

FOREWORD

THE HONOURABLE JUSTICE ELIZABETH EVATT *

Ten years into the life of the Family Law Act and of the Family Court we find, on the evidence of these articles, a healthy and dynamic institution, ready for further growth, despite the setbacks of the past few years. What have been the achievements of these years?

Pressure for the reintroduction of fault, and for changing the grounds of divorce, have become lost causes, as they deserve. Attention can now focus more clearly on the significant areas of family law. These concern the well-being of children, and issues relating to property, maintenance and personal protection.

Looking first at children, the greatest achievement of the Family Law Act and the Court has been to establish innovative and effective programmes of counselling and conciliation. The benefits have been felt by many children and their families in ways which do not necessarily show in statistics. A genuine alternative to litigation has been opened up for many people. Not only are they helped to reach agreement in some or all aspects of the matters in dispute, they are also encouraged to develop skills which will enhance their ability to solve future family problems. This is the most solid success of the system, and it continues to grow (see the paper by Fogarty J., "Family Court – Possible Future Directions"). The establishment of the Family Conciliation Centre in Noble Park, Victoria, bears witness to the overwhelming acceptance of and need for this kind of approach to family breakdown and its consequences.

The focus of the family law system on the needs of children has led to an increasing interest by professionals from various behavioural areas in

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family law (see, for example, Professor Brent Waters' paper on "Psychiatric Considerations in Preserving the Best Interests of the Child"). There has also been much research by the Court and by the Institute of Family Studies into the impact of the system on children.

Regrettably, progress in dealing with the needs of children has been held back by failure to achieve constitutional reform or a referral of powers. Far too many children remain outside the jurisdiction of the Court which was established with the appropriate resources to deal with them – children whose parents are not married to each other (see the paper by Owen Jessep and Richard Chisholm, "Children, the Constitution and the Family Court").

In regard to property and maintenance, these are now founded on a sound and coherent system, based on equality, fairness and need, even though, as Nygh J. points out in his article, "Sexual Discrimination and the Family Court", the family law system is unable on its own to compensate adequately for the underlying social and economic inequalities between men and women in society. In this area, too, the development process is incomplete. The Family Court's own efforts to give shape to the broad discretion conferred upon it by the Family Law Act have been cut down by the High Court, apparently unconcerned that justice and equity, the principle which governs property orders, also includes the elements of predictability, and of treating like cases alike.

It is now imperative that the Australian Law Reform Commission complete the task of reform, and create a law with just the right balance between certainty and fairness which the Australian people are entitled to expect. The paper by Deena Shiff and Peter Waters, which touches upon just one aspect of this reform shows what a formidable task lies before Professor Hambly and his team. A coherent system of family property must draw clear lines between the rights of married people and the rights of third party creditors.

The constitutional problems which continue to beset the Family Law jurisdiction sometimes seem like a macabre game of snakes and ladders. The small upward steps climbed through the ingenuity of the Court in attempting to arrive at a fair result in so far as the law appeared to permit, and through legislative reforms, have so often been followed by a sudden slither down the snakes, represented by such cases as *Mallet* and *Cormick*.

Too often, it seems, the Family Court has been returned to the familiar pastures of square one, incredulous at the apparent lack of understanding by the High Court of the objectives of the legislation and at its insensitivity to the requirements of an effective family law (see the papers by Dorothy Kovacs, and Rebecca Bailey-Harris). To this incredulity has now been added the further sting of gratuitous insults.

The Australian family law system has waited a long time to enter the promised land of constitutional reform or referral of powers, which would enable the Family Law Act and the Family Court to be in actuality what

they appear to be in name. But the promises, made regularly over the last ten years, begin to sound more and more hollow.

In another area, that of domestic violence, the need for co-operation between federal and State authorities is clearly shown in Robyn Lansdowne's paper on "Domestic Violence Legislation in New South Wales". Too often it is lacking in practice. There is a bewildering choice of legal options open to victims of violence, though it is hard to say whether any of them are really effective. However, violence is one field where parties to de facto relationships are given legal recognition in at least some States. Perhaps there is something peculiarly Australian in this. New South Wales is also to be congratulated for being the only State so far to tackle the issues involved in giving at least some form of recognition to de facto relationships (see the paper by Rebecca Bailey-Harris).

There has also been much concern over the years about enforcing Family Court orders. The absence of adequate machinery to enforce maintenance in all States other than South Australia and Western Australia has been a cause of frustration and anger. The solutions require improved administrative procedures which have already been recommended but not yet implemented. The more difficult area of enforcement is that related to custody and access which touch upon people's lives very closely. There are many problems confronting the Family Court in finding the right balance between conciliatory and supportive approaches on the one hand, and ensuring respect for and compliance with its orders on the other. These are admirably dealt with in the paper by Michael Chesterman and Peter Waters, "Contempt and the Disobeying Spouse".

Here we have a significant collection of papers touching upon many of the important current issues of family law, and pointing to its future development. The overall tone is positive, except for the negative approach to an important issue taken by John Wade in his paper, "The Status of Family Law Practice in Australia". The over-concern for status and its apparent connection with rewards should have no place in a system designed and operated to meet people's needs at a time of crisis and disruption in their lives. Family law is and will remain one of the most important areas of law affecting the people of this country in their family relationships.

This collection is, of course, directed at the legal and other professions involved in the administration of family law. All would do well to study the paper by Fogarty J. which is typical of the enthusiasm which still prevails in the Court to continue in its pioneering spirit, to confront and overcome the many problems with which it is beset, and to continue to expand its ability to serve the people.