# ESTABLISHMENT OF THE Family Court

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Twenty-five years is not in itself a significant time in terms of the history of courts: the High Court of Australia moves towards its centenary (1903); the Supreme Court of New South Wales moves towards its bicentenary (1814 if one measures it from the Second Charter of Justice). But the 25th anniversary is an event of great significance to the Family Court of Australia – a Court which was conceived almost as an afterthought, had a difficult gestation and birth, and survived a troubled infancy.

I have been surprised over the years by the apparent lack of knowledge of the history of the Family Court by those who express views about it, and in particular about its origins and early years. For those associated with the Court in those early years vivid memories remain, but in those turbulent times there was little opportunity to chronicle them.

"History is bunk" American automotive pioneer Henry Ford said in the course of giving evidence during a libel trial in 1919, adding that "the only history that is worth a tinker's damn is the history we make today". In the same vein, 19th century English novelist George Elliot said that "the happiest women, like the happiest nations, have no history".

However, I prefer the views of 16th century British philosopher Francis Bacon who said that "histories makes men wise" (and no doubt women too), for unless we learn the lessons of history we are destined to repeat them at great cost to ourselves and society.

> *"The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternatively consult history and existing theories of legislation. But the most difficult labour will be to understand the combination of the two into new products at every stage. The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past."*
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> *– Oliver Wendell Holmes Jr (1881)*

History engenders a sense of continuity, of collegiality, of one's place, however temporary. This is especially important in an institution such as a court which ultimately depends for its acceptance in society upon a tradition built up over time rather than upon individuals or isolated events. In addition, a history of the Family Court validates the remarkable efforts of its pioneers, who found themselves caught up in difficulties over which they had little control. And so while it has been said that history is but the record of the victor, the matters recounted here are really the record of a *survivor.*

### *Before 1900*

Any understanding of the lively events in Australia in the first half of the 1970s involves a brief excursion into the political, social and legal history of the preceding century.

Over the centuries leading up to 1857 the ecclesiastical courts in England had acquired complete jurisdiction over matrimonial causes, but for relevant purposes its jurisdiction was confined to decrees of nullity (although the grounds were expansive) and what we would now call a decree of judicial separation. There was no provision in canon law for divorce because that was regarded as contrary to Christian doctrine. Divorce could only be obtained by a private Act of parliament – an exclusive and very expensive process. In his great work on marriage and divorce in Australia, Percy Joske (1969) said that "obtaining a divorce by parliamentary process was a luxury which only the extremely rich

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## AND ITS EARLY YEARS

could afford and even the moderately opulent had to forego".

In the two centuries to 1857 there were only 250 such Acts in England of which nine were granted on the petition of the wife. In the Australian Colonies ecclesiastical courts did not exist. Only one petition to parliament for divorce was ever lodged – on behalf of the wife. The Act of divorce was passed on this petition by the New South Wales Parliament but was not given royal assent.

In England, the Matrimonial Causes Act of 1857 provided grounds upon which a decree of dissolution of marriage could be obtained by court process. The Act created a court for divorce and matrimonial causes to which was also transferred the matrimonial jurisdiction of the ecclesiastical courts. The grounds for divorce were restricted, entirely fault based, and gender discriminatory. The procedures remained expensive and largely the domain of the wealthy. The legislation also gave to the court powers in relation to property, but the real significance of that had to await the married women's property reforms of 1888.

The various Colonies of Australia rapidly followed these leads on divorce so that well before the end of the century each Colony had fault based divorce legislation and settlement of property powers, together with the existing jurisdiction in relation to children, whether of a marriage or not. In each of the Colonies this jurisdiction was conferred upon the respective Supreme Courts.

Both before and subsequent to 1857, the Colonies had also enacted maintenance legislation. This dealt with the maintenance of a deserted wife or children in a non-divorce setting. That jurisdiction was exercised by courts of petty sessions or summary jurisdiction. By the end of the 19th century each Colony had also enacted child protection legislation, a jurisdiction exercised by courts of petty sessions or children's courts.

Thus by the time the Australian constitutional conventions began, in the last decade of the 19th century, directed towards the establishment of the nation of Australia by an act of federation and the creation of a federal government, both the legislation and the tribunals which dealt with divorce, settlement of property, maintenance of spouses, and the custody, protection, and maintenance of children, were firmly settled. The legislation was that of the respective Colonies, and the adjudication was that of the various Colonial courts. Ultimately, the difficult process of federation led to English legislation and the enactment of the Commonwealth of Australia Constitution.

### *Developments during the 1900s*

Put simply, the Australian Constitution empowered the Federal Parliament to make laws in relation to a number of subject matters delineated in section 51. The various States retained the powers which fell outside that scope, and even within that area generally continued to have their existing powers until the Commonwealth intruded.

Originally the proposed Commonwealth powers were expressed as "parental rights and the custody and guardianship of infants", but there was a strong view that the powers in relation to children, other than in the divorce setting, should remain with the States. The belief was that this would be achieved by separating the powers into "marriage" and "divorce" and attaching the power relating to children only to the second of those.

However, the dichotomy proved not only unsatisfactory but ineffective. The division between the Commonwealth and the States of disputes in relation to children depending upon whether or not there were divorce proceedings grew increasingly impractical. In addition, later High Court decisions established that the marriage power was not confined to the celebration of marriage, but included the rights, duties, and obligations arising out of or in consequence of marriage. That is, it included custody and maintenance of children of the marriage whether or not ancillary to divorce. The constitution also empowered the Commonwealth to establish the High Court and other federal courts.

It took the Federal Parliament a long time before it exercised any of these powers other than in relation to the High Court in 1903. This was essentially because of the relatively weak nature of the Federal Government in the earlier years up to at least the Depression and World War II. In any event, for many years the government saw no reason either to intrude into areas of marriage or divorce, or to set up a federal structure of courts. It was content in the former areas to allow the State legislation to continue to operate (despite the

continued and widening differences between the laws and practices of the States, and despite the emphasis at the convention upon uniformity). In relation to the latter, it was content to invest the established State courts with federal jurisdiction rather than attempt to create a federal judicial system. Its only forays into this area were the early establishment of the bankruptcy court and various, but unsuccessful, attempts over the years to invest industrial courts with judicial power.

The first intervention by the Commonwealth into divorce occurred in 1945, but for a specific and limited purpose. This was a provision in relation to wartime marriages contracted by Australian women with American servicemen stationed in Australia, referred to by Australian soldiers as "over here, over paid, and over sexed". In many cases the husband returned to America after the war, and made no attempt to contact his Australian bride or arrange for her to travel to America. If the wife sought to free herself from this marriage by divorce she faced extreme difficulties. The law at that time was that on marriage the wife took the domicile of the husband, and it was only divorces granted by the court of domicile which would obtain national or international recognition. That meant the Australian woman could only obtain a divorce by applying in the relevant State in the United States. There were many obvious practical difficulties to that, especially if the whereabouts of the husband was unknown.

In 1945 legislation was introduced by the Attorney General, Dr Evatt, directed to overcoming this situation by allowing the divorce proceedings to be instituted in Australia. It also dealt with an ancillary issue of a party resident in one State of Australia and domiciled in another State.

### *Separation as a ground of divorce*

In this immediate postwar period there was increasing dissatisfaction with the State based grounds of divorce. They varied from State to State and, with one notable exception, were entirely fault based. The Freudian emphasis upon sexual misconduct as the main grounds of divorce spilled over into claims for children and property. The outcome in those matters was heavily influenced by issues of fault.

The notable exception was that in 1939 the Western Australian Parliament provided for the first time in Australia a non fault based ground – namely, separation for five years. Although the ground was heavily hedged about with qualifications so as to be of the very limited value in practice, it represented a significant change in fundamental principle and set a precedent which was heavily relied upon by those who sought to provide a non-fault ground Australia wide.

During the early 1950s there was a significant movement to unify and simplify the grounds by a federal Act and, significantly, to introduce separation as a ground Australia wide. This movement had as its most significant leader Percy Joske, who was then a practising silk in family law in Victoria and a member of the Federal Parliament. In 1957, Mr Joske introduced a private members bill to achieve these reforms but it seemed that it would suffer the delays and uncertainty often associated with private bills, more especially because of its controversial nature. In 1958, the then Attorney General, Garfield Barwick, took over the running of the bill (and, some would say, the kudos subsequently associated with it).

Despite strong opposition both within and outside parliament, the Matrimonial Causes Act 1959 was passed on a free or conscience vote of the parliament in May 1959, and came into operation in February 1961.

The Act simplified and reduced in number the fault grounds of divorce and, more importantly for the future, provided divorce on five years separation. It also made detailed provision relating to property, custody and maintenance, but as ancillary to divorce. Proceedings relating to those matters, but in a non-divorce setting, continued under State law.

There was nothing in that legislation, or the considerable debate that surrounded it, to suggest that a federal Family Court should be established to administer these federal laws. The State Supreme Courts were to continue to exercise that jurisdiction.

### *Towards a family court: 1970–1976*

The initiative for a Family Court was to wait another decade and even then it was a last minute one. In December 1971 the Senate referred to its Standing Committee on Constitutional and Legal Affairs the question of "the law and administration of divorce, custody and family matters with particular regard to oppressive costs, delays, indignities and other injustices". That committee made an interim report just prior to the 1972 federal election. Thereafter, with the change of government, the running was taken over by Senator Murphy who had become the Attorney General.

In December 1973 he introduced the Family Law Bill 1973 into the Senate and it was widely circulated among interested people and bodies for consideration and comment. Progress was delayed by the premature election of 1974, and the Bill was twice reintroduced, finally to become the Family Law Bill 1974.

We should be clear about what was contained in this Family Law Bill as late as the second half of 1974. It proposed twelve months separation as the only ground of divorce. In addition, it contained detailed provisions relating to property settlement, custody and maintenance. It was intended to cover the whole field of property and maintenance of spouses and the custody and maintenance of children of a marriage whether or not ancillary to divorce proceedings. This represented a major expansion of jurisdiction from the Matrimonial Causes Act whose provisions confined those aspects to divorce.

What is important to note for present purposes is that the 1974 Bill made no mention of the Family Court of

Australia. It provided that jurisdiction in relation to summary matters would continue in the State magistrates courts and that divorce and other substantial proceedings, whether ancillary to divorce or not, would continue to be heard in the Supreme Courts of the States or in the proposed Superior Court of Australia.

That last matter deserves attention. In December 1973 Senator Murphy introduced into the Senate the Superior Court of Australia Bill. This proposed the establishment of a broadly based federal court. The proposal was defeated by the Senate in April 1974 by 27 votes to 25. The 1974 election followed shortly after that and upon its return the Labor Government reintroduced that legislation. However, in February 1975 the Bill was defeated in the Senate on a tied vote. Had it passed in the Senate it would have had a safe passage in the lower House. In 1976 the new government introduced the Federal Court of Australia Bill which had a much narrower focus. It was passed, establishing the Federal Court of Australia.

It is interesting to consider what may have been the position if the original proposals of 1974 had not been defeated. There would have been a broadly based Superior Court of Australia, one of the divisions of which would have dealt with family law. My own view is that it was unfortunate that that opportunity was lost, and so narrowly as it turned out.

In the meantime, in August 1974, the Senate Committee was invited to consider the proposed Family Law Bill. Its report was delivered in October 1974, and for the first time it proposed the establishment of the Family Court of Australia (no doubt against the background of the likely defeat of the other legislation).

It is of great interest to revisit that Senate Committee report. The relevant portion so far as the Family Court is concerned is presented in the accompanying box (pp. 56-57).

In late 1974 the Family Law Bill was reintroduced into the Senate virtually in its final form. It made provision for the establishment of the Family Court of Australia, with the option of State Family Courts in States that chose that course. The Bill passed through the Senate on 27 November 1974, by the substantial majority of forty-nine to seven. Voting was a free or conscience vote.

The passage of the legislation through the House of Representatives was more difficult. The Prime Minister Mr Whitlam moved the second reading of the Bill on 28 November 1974, but various delays and the strong opposition to the proposed single ground of divorce meant that the legislation was not passed in the House of Representatives until 21 May 1975, and only after a long debate over a number of days. Again, the voting was a conscience vote.

Most of the debate turned on the question of twelve months separation. Mr Ellicott, then shadow Attorney General, moved an amendment which provided two years separation as the ground of divorce, or one year where the application was supported by both parties or "having regard to the behaviour of the parties the marriage has in fact broken down irretrievably". Mr Ellicott's amendment was defeated, by one vote (60 to 59), and legislation on this issue passed.

The other provisions of the Bill, and in particular the provisions relating to the establishment of the Family Court of Australia, were passed with substantial majorities. On 12 June 1975 the Bill received royal assent, and on 28 August 1975 the Act was proclaimed to come into operation on 5 January 1976.

### *The Family Court of Australia*

But where was the Family Court of Australia? In particular, where was the money and the administrative expertise to set up such a substantial organisation in such a short time and by a government and a department which had had no serious experience in court administration? If these difficulties were not enough, the gathering political storm clouds were placing the Labor Government under great pressure.

The legislation provided the option for States to establish State family courts to be funded by the Federal Government. In August 1975, Western Australia took up that invitation, the only State to do so.

In the same month, judge "designates" were appointed – Elizabeth Evatt, Chief Judge designate, and Austin Asche (Melbourne), John Marshall (Adelaide), Ken Pawley (Sydney), and John Ellis (Canberra). In a paper published in the *Family Lawyer* in 1986, Austin Asche (then a Justice of the Supreme Court of the Northern Territory and later the Chief Justice and then Administrator of the Territory) recorded those events, and some personal aspects of it, as follows:

> It was the fate of the Family Court to come into existence in a time of political turmoil. Almost to the day it opened there was much doubt that it would do so.
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> I was appointed a judge designate in August 1975. A judge designate is a strange beast and there have been, fortunately, very few of the species. He has none of the privileges, rank, title and appurtenances of a judge but he must cease to practice his trade as a barrister. So he gives up the substance for the shadow. The government of the day did what it could. After a month or so I and my two brethren (Pawley and Ellis) in a like predicament were "seconded" to some vague post in the Commonwealth Civil Service.
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> Our duties were rather obscure but centred around the preparation for the new court. So for about five months, in an office which they found for me in Queen Street, I sat and dictated memoranda (some of which seem to

have been read by authorities) and took part in the interviewing of various members of staff, and generally considered the hazards of a leap in the dark.

The Whitlam Government was tottering and a hostile Senate was waiting eagerly for the most politically opportune time to administer the coup de grace. It was not the time to expect Cabinet to direct its full attention and energy to the implementation of the Family Law Act 1975. Much trouble flowed from that.

So the fate of the court and the Act hung in the balance. I was deeply mistrustful, and retained my own Owen Dixon Chambers on the basis that there was a very real chance that I would be back at the Bar at any moment. My friend Pawley was more sanguine, or more courageous. He gave up his chambers in August 1975; and thereby saved himself the five months rent which my pessimism cost me. (Asche 1986: 1)

Shortly after the appointment of the judges designate, Labor lost control of the Senate, partly as a consequence the death of a Queensland senator and his unusual replacement. The consequence was that in October 1975 the Senate deferred consideration of the Appropriation Bill. That meant that the government was denied funds to carry on the business of government. Prior to that, a major recruitment campaign had begun to fill staff positions in the Court throughout Australia; about 300 vacancies were advertised between June and September and nearly 8000 applications were received. That ground to a halt.

On 11 November 1975 the Labor Government was dismissed by the Governor General, Sir John Kerr. The caretaker government of Mr Fraser undertook to make no appointments and to initiate no new policies before the election.

## SENATE COMMITTEE'S RESPON

The Committee is firmly of the opinion that this Part requires substantial redrafting to incorporate the creation under the Bill of the Family Court of Australia, a federal court of record, being invested with the full jurisdiction of the Commonwealth under Section 51 of the Constitution (viz. marriage, divorce and matrimonial causes) and dealing exclusively with family law matters. It is proposed that the new court exercise not only the remedies in relation to matrimonial causes now exercised in State Supreme Courts and Territory Courts but maintenance, custody and family property jurisdictions presently exercised in a variety of State courts. It is recognised that for some period the present magistrate's jurisdiction will need to continue in some districts, but it should be phased out over a period.

The concept of a "family court" is well established in the United States of America, Canada and Japan though there are variations in the proceedings and powers. It generally involves the creation of a special court (or division of a larger court), the assimilation of all family matters into one court, with active pre-divorce counselling. It is the concept of the "helping court". . .

### *Judiciary*

It is proposed that the Family Court of Australia consist of a two tier body of judges, the first tier having the equivalent status of Supreme Court or Federal Judges and the second tier having the status equivalent to the Country Court or District Court Judges. It would sit in all States and Territories and appeals from single Judges would be heard by a Full Court of three judges. It is not contemplated that the jurisdiction of each tier be rigidly defined in the Bill but certain matters (particularly complex custody and property issues) would no doubt be reserved for the first tier judges. Judges would need to travel on circuit to provide a wide availability of the facilities of the Court. It is of the essence of our recommendation that the Judges appointed to this court (men and women) should be chosen for their experience and understanding of family problems and should be drawn from existing Judges, members of the bar and solicitors, according to their particular suitability. They would need to recognise their responsibility in developing a new type of court, acting with a minimum of formality, coordinating the work of ancillary specialists attached to the court, encouraging conciliation. and applying, only as a last resort, the judicial powers of the court.

### *Creation of the court*

The committee is concerned with the effect on the creation of the Family Court and appointment of judges of Section 72 of the Commonwealth Constitution, which in general requires judges of the Family Court created by Parliament to be appointed for life. The Committee does not believe that it is desirable that judges of this Court should adjudicate when of advanced years. It accepts that judges of the "first tier", dealing with matters of legal substance and difficulty, should be federally appointed judges, but efforts should be explored to see whether they may be induced not to sit in this jurisdiction after a certain age. With respect to the judges of the second tier (who will handle the substance of maintenance proceedings and will travel more extensively), the Committee believes the

After that election, and contrary to expectations, Prime Minister Fraser appointed Senator Greenwood, a vigorous opponent of the Family Law Act, as Attorney General. The incoming government had made it clear that it would implement the legislation. But – with what enthusiasm? Before any further steps were taken, Senator Greenwood initiated another round of consultation with the States in the hope that some may be induced to take up the offer of separate state courts. Wisely, each State refused.

On 5 January 1976, Elizabeth Evatt, Austin Asche, Ken Pawley and John Ellis were sworn in as Judges of the Family Court of Australia in a ceremony in Sydney presided over by Justice Lionel Murphy. John Marshall was unable to attend but was sworn in on that day in Adelaide.

Shortly after that another dramatic event occurred, recorded by Austin Asche in his article (1986: 2-3): "Upon the sudden and tragic death of Ivor Greenwood, Mr Ellicott QC became Attorney General. His work for the Family Court has not received the credit it deserves. He was no passionate devotee of the Act. If he could have seen it vanish in a puff of smoke he would have been less than disconsolate. But he had been handed the job of making the Act work and he tackled it manfully."

To put it at its mildest, when the Court opened its doors in some (but not all) of the capital cities of Australia it was completely unprepared for the task. But there was a strong feeling that the considerable public expectations should not be disappointed.

The rhetoric of those who had strongly supported the legislation led to high social expectations. They had to confront strong moral and social objections from those sections of the community which saw twelve months non fault based divorce as contrary to prevailing social and moral standards. Consequently, great emphasis was placed by its supporters on what was seen as the positive features of the legislation, particularly the removal of fault.

## SE TO FAMILY LAW BILL 1974

problem is more acute. The Committee has not conceived its duty to be to solve this problem which is however a matter of essential importance to the Australian Government. However one possible solution to this problem is along the following lines, namely that the Australian Government immediately approach the various State Governments to seek their agreement as follows:

a) That the respective State governments will appoint (as State judges subject to retirement) such Judges of the second tier as will operate mostly in that particular State and will make such appointments in agreement with or on the recommendation of the Australian Government.

b) That the respective State Governments create and maintain the facilities for such parts of the Family Court operating in that particular State, from moneys provided by the Australian Government and subject to such reasonable conditions as may be prescribed for attaining a minimum standard of facilities for the Family Court in all States.

c) Consideration could also be given to incorporating into the Family Court of Australia, the existing Family Court of South Australia.

d) Until co-operation is achieved with a particular State Government, the magistrates' jurisdiction would need to continue in that State in a substantial way. Where a State Government refuses to co-operate in the implementation of the Bill, it may be necessary for all judges to be appointed by the Australian Government, despite the difficulties outlined above.

e) The Bill would require amendment to empower agreements and administrative arrangements to be made in accordance with these suggestions if adopted.

### *Court structure*

There is a need for a new start in matrimonial law and administration in creating a new entity not interchangeable with existing courts. The Court will require new standards and methods, both in its physical environment, its procedural methods and in its approach to marital problems. Court premises should be separated from existing courts, and business be conducted in modern surroundings with small well-provided court rooms, enabling easy dialogue between the court and the parties. Conference rooms and other facilities and ready access to advice, including legal aid, are essential. The careful choice of staff and the provision of written and oral advice and assistance must receive close attention.

It is essential that the activity of the court be seen as a "team" operation, not in the traditional atmosphere of the judicial separation and inflexible divisions of functions. The Family Court of South Australia, although in its infancy, is a worthwhile example of such a team activity. The judge should nonetheless retain his clearly discernible role as a judge, not as a counsellor. He should control proceedings, advance optional solutions and create the "climate" for settlement. But if there is no settlement, the necessary decrees must be judicial and must be seen to be judicial.

*– Standing Committee on Constitutional and Legal Affairs, October 1974.*

There had been no doubt that the fault based grounds of the past were artificial and hypocritical and led to much unnecessary pain, anguish and cost, especially tied up as they were with issues of property and children. But the crossover to twelve months separation was a dramatic turnabout. In addition, the unanswered question was – removal of fault from what? – in particular, in relation to children and property. These were not seriously addressed at the time or in the legislation, and it has taken the Family Court the next 25 years to work through these issues.

### *Coping with the backlog*

There was a backlog of potential divorce applications. Many preferred to wait until the Family Law Act came into operation and then apply under the twelve months separation ground rather than to institute proceedings in the previous year or two on fault based grounds. Consequently, there was an enormous upsurge in the number of divorces filed in 1976, as is demonstrated by the following figures:

**Divorce applications**

| *Year* | *Filed* |
|---|---|
| 1973 | 21,308 |
| 1974 | 26,855 |
| 1975 | 28,383 |
| 1976 | 66,098 |
| 1977 | 41,303 |
| 1978 | 40,625 |
| 1979 | 36,754 |

In most of the registries the Family Court had the near fatal problem of the almost en masse transfer of proceedings still pending in the State Supreme Courts. The State Courts had slowed down their adjudication of in particular the more difficult cases in anticipation, and were only too happy to transfer them to this brand new Court. Unfortunately, the Family Court had little option but to acquiesce in this policy and there were no administrative arrangements to deal with this, with the result that in some registries files came from the Supreme Court to the Family Court literally by the truckload. Thus, overnight the Family Court developed a backlog from which it has never recovered.

No serious consideration was given to how this Court would deal with the whole of its jurisdiction Australia wide, particularly as it took over not only the divorce and matrimonial cause jurisdiction of the State Supreme Courts but also maintenance and custody powers for children of a marriage.

The State magistrates courts were empowered to hear limited classes of matter but that could never have been seen to be a satisfactory solution to the overall issue. Tragically, the received view at the time and for many years subsequent was that it was contrary to the requirements of Chapter Ill of the Constitution for the Court to delegate any of its judicial powers to its registrars (as was common in the State courts). In addition, there was also a generally held view that there would be constitutional difficulties about appointing federal magistrates. Neither of these difficulties were to bedevil the Family Court of Western Australia (see below). But they represented disabling impediments to the work ability of the Family Court of Australia from its inception.

As it now turns out these fears were apparently misplaced. The decision of the majority of the High Court in *Harris v Calladine* in 1984 supported controlled delegation. The establishment in 1999 of the Federal Magistrates Service presupposes a confidence that earlier concerns about the constitutionality of federal magistrates consistently with Chapter III are misplaced. It may yet remain an issue.

What an enormous difference it would have made to the Family Court if, from its beginnings, these apparent obstacles had not existed. And what a pity it is that the solution of magistrates has been introduced in recent times through a separate organisation rather than as an integral part of an overall family court.

#### *Without undue formality*

Section 97(3) of the Family Law Act required the Court to proceed "without undue formality". This provision, and the thinking behind it, were significant components of the debates leading up to 1975. There was a perception that the Supreme Courts were unduly formal and censorious, and demonstrated a lack of enthusiasm for family law work. A contrast is the requirement of appointment to the Family Court (Section 22) that such a person "by reason of training, experience and personality . . . is a suitable person to deal with matters of family law".

Thus there was an expectation that there would be significant and positive changes in the atmosphere and ways in which family law matters would be dealt with, although exactly what that was to be remained uncertain. A difficulty is that too much informality proves to be counter productive and it is not easy to control the length of trials (and their costs) consistently with procedural fairness.

The report of Family Law Council in the early 1980s made clear that there were certain public expectations in relation to the trappings and style of courts that litigants saw to be important. Undue informality was not to the liking of the public, the legal profession and the other courts.

Then there was the matter of premises. Officers of the Attorney General's Department and the newly appointed officers of the Family Court scurried around desperately in the latter part of 1975 and early 1976 seeking almost any premises that would suffice. Names

such as Scandia House and subsequently Temple Court in Sydney, Dalgety House and then Marland House in Melbourne, and Adelaide Street in Brisbane, and others, are still recalled with dismay.

To go on circuit meant either begging the use of State courts when they were not being used, or moving to other premises. Early records of the Court refer to proposed premises at Rockhampton as follows: "The Lady Mayoress's ante room is completely unsuitable".

The size of the courtrooms was part accident, part design. There was an influential view that courtrooms should be small and informal and that the parties should be "up close" in the process. But in reality this translated into crowded cubby holes with a complete lack of dignity in cases involving high emotion.

Intentionally, the Court facilities were not custom built but were located in commercial premises. Among the obvious difficulties about this was that the lifts were available for litigants, lawyers, staff and judges, and the general public without distinction, and judges and staff had to walk through the daily assembled crowds outside their courtrooms, wait for the door to be opened (because it had to be kept locked) and then repeat that process during the course of the day at its various adjournments. When one now visits the Court premises at Melbourne, Sydney, Brisbane, Hobart and Parramatta it is impossible not to recall those previous premises without considerable anguish. (The question whether premises are now too formal and too like courts pre-1975 is beyond the scope of this paper.)

The provision in the original legislation which prohibited wigs and gowns was a conscious policy decision made at that time, and initially it had the support of members of the Court. Whether wigs and/or gowns are important, what are the reasons for them in a court such as this, and what the future will bring remain matters of debate. But the reality is that by the mid-1980s the majority of the judges in the Court wished to take up wigs and gowns, and ultimately the legislation was amended to achieve that.

Two other policy decisions built into the legislation by the parliament were also to cause the Court great anxiety in the early years. The first was the exclusion of the public from the courts, and the second was the prohibition of the publication of identifying material. Both represented policy reactions to the previously unsatisfactory position when divorce courts became something of a spectator's sport and where newspapers regularly outdid each other in salacious and identifying reportage of divorce proceedings.

The exclusion of the public was not only inconvenient in practice but also entirely unsatisfactory in principle. As disenchantment with the Family Court began to develop for other reasons, this was used to describe the Court as a "star chamber" or "secret" court, and led to one-sided reportage. Fortunately that provision has been abandoned.

The restrictions on identifying publications remain important, although attempts to establish a satisfactory formula may not yet have been successful. It was really only the media which complained about this. They knew from the beginning that they were welcome to describe the workings of the Court, including cases, in non-identifying terms. But they also knew that the attraction of such reportage depended not only upon salacious material but also the capacity to identify real and hopefully well known people.

### *Meeting high expectations*

Gradually during 1976 and 1977 the number of judges appointed to the Court increased, but never in a way which met the overpowering demand. It should be recorded that the judges appointed during those years confronted an extraordinarily daunting task with the minimum of government support and an increasingly skeptical public. They worked in primitive conditions and were at the same time attempting to push out the parameters of family law and meet at least some of the high expectations which had been generated.

The court was a victim of the publicity of its supporters. Nothing was envisaged as being beyond it – including changing human nature! It was also the victim of changing times. It was conceived in one era and born in another. The early 1970s were years of great social change and expectation. The years that followed were much more conservative. The court was deliberately positioned outside the court mainstream. Within limits, there was nothing wrong with that. But if things went wrong, it did not have that direct institutional support to fall back on and the differences were seen as the cause of these difficulties.

Two other difficulties initially faced the Court and continued to do so for some time after 1976. The first was the attitude of some members of other courts and of the legal profession who saw family law and this new Court as inferior and second rate. They saw this view confirmed in the chaotic conditions in which the Court operated in its early years.

The second difficulty related to the question of the tradition of an institution such as a court. Ordinarily courts develop over time from small and controlled beginnings. A tradition both internal and external takes time to develop. It cannot be obtained or developed overnight. Externally, the Family Court was a court without a background or history, and it operated in a difficult and emotive area. Internally, there was an absence of peer example and previous excellence to fall back on. With one or two exceptions, none of the judges appointed in 1976 and 1977 had any judicial experience. Some found the transition difficult. All found that learning on the job in that environment and without peers to fall back upon for advice and support made the task immensely more difficult.

The circumstance that this was the first national court and was operating in an area where practice and personalities were State based meant that in the early

years many of the judges did not know the judges from other States, and for a long time preferred to adhere to the practice and ethos of their own State. This made the establishment of uniform, federal practices and attitudes difficult. In the early years it was essential to have a local judge as a member of any Full Court. The major duty of that judge was to explain to the other two, increasingly incredulous, members the local practice and law.

### Counsellors

One of the most fundamental changes brought about by the Family Law Act was the availability of counsellors within the Court both in pre- and post-litigation, and in confidential and non-confidential circumstances. This was a matter much emphasised by the proponents of the Bill who were able to contrast the almost entire absence of any such facilities in the State courts.

The counselling service was really the most important and most effective reform which the Act introduced. When the Act came into operation at the beginning of 1976 there was a total of six counsellors. This rapidly increased over the next twelve months to approximately fifty, but the recruitment of so many in such a short space of time and into a specialised area was difficult. In addition, there were feelings of opposition and suspicion by the some in the legal profession to an entirely differently based discipline.

It was interesting to watch this battle between lawyers and counsellors. Lawyers, with their customary confidence and assertiveness, and because they knew (or thought they knew) the rules and the counsellors did not, gave the counsellors a hard time in the early stages, routinely cross examining them about their age, experience and note-keeping procedures. Some counsellors found this very difficult, but others quickly learned the rules and recognised that they must inevitably gain the upper hand, as they did. It was also inevitable that the Court had to support, and did, the place in the Court and the integrity of family reports and their methodology, and a number of early cases emphasised this.

In addition, it should be said in a more positive way that lawyers began to appreciate that the social scientists had a great deal to contribute. This would not have worked if the counselling service had been positioned outside the Court. (The recent decision to "outsource" pre-court counselling is a retrograde step, representing economic rationalism without any soul.)

### Registrars and staff

When the Family Law Act came into operation a principal registrar was appointed together with registrars and/or deputy registrars in the other, at least major, registries. However, their duties then were entirely different from the ones now performed by registrars. They were intended to be appointed as administrators – that is, people who knew about the law in their administration. In addition, although staff numbers were always meager, there were more indians than chiefs. These are both concepts which I think still have validity.

There was no thought in the early years that registrars could or should perform judicial functions. Only gradually did that change, and registrars gradually became involved in financial inquiries, certificates of means and pre-trial conferences. The decision to delegate to them judicial work was a bold move that was upheld in *Harris v Calladine* in 1984. The present situation where registrars are concerned only with judicial matters and not involved at all with administration is quite foreign to the anticipation in 1976 and for some years after that.

It also needs to be remembered that the information revolution was unheard of in 1976. There was no email, nor were there fax and copying machines or word processors. The typewriter and Australia Post constituted the transmission of information. At least this meant few memos and shorter judgments. Libraries (except the personal libraries of individual judges) were non-existent for many years.

On the positive side, federal funded legal aid was generally available and consequently there were few litigants in person. This meant that many potentially difficult cases could be controlled in a more satisfactory way and at an earlier point.

Staff worked with great enthusiasm and initiative. Only about 100 of the 300 staff required as a bare minimum were on duty when the Court opened. Their only formal training was a one-day induction (for some).

### Family Court of Western Australia

In August 1975 the Western Australian government accepted the invitation to establish a State court to be funded by the Federal government and to be known as the Family Court of Western Australia. No other State followed that path and last minute attempts in January 1976 to get them to do so fell on deaf ears.

The Family Court of Western Australia did not open its doors until 1 June 1976, five months after the Family Court of Australia had commenced. That was because of the view that the four or five months from August 1975 to January 1976 was inadequate to attend to the administrative and other organisational steps which had to be taken if it was to achieve a reasonable state of readiness. In the intervening period from January to June 1976 the Supreme Court of Western Australia heard old cases and cases under the new Act. But there was a backload which was then transferred to the Family Court.

By the time of its opening the Family Court of Western Australia had three judges. In 1979 magistrates were appointed and they performed a wide range of judicial functions from that time, greatly relieving the workload of judges. As indicated earlier, this step was unfortunately not taken in the federal

sphere until 1999, and then through a separate court structure.

### Two success stories

Although the provisions relating to the establishment of the Family Law Council and the Australian Institute of Family Studies feature prominently in the Family Law Act, there was little parliamentary or public discussion prior to 1976 about the purposes which they would serve.

*The Council* was probably regarded as no more than one of those numerous government appointed advisory bodies which would only exist so long as its recommendations accorded with the policies of the government of the time. There was little by way of precedent for the Institute overseas and certainly none in Australia, and so there was little understanding of what purpose it may serve.

However, in reality both organisations have proved to be outstanding successes.

The Council commenced in November 1976 with Elizabeth Evatt as the chairperson. From the beginning it proved to be a knowledgeable and independent body irrespective of its changing membership over the years. It was author of many major reforms in family law, and its views on other reforms were always of the utmost importance. In particular, the child support reforms of the 1980s originated in the Council, and the Council was responsible for the first public presentation of the child support scheme.

*The Institute* commenced in February 1980 under the directorship of Dr Don Edgar. The delay in its establishment was advantageous in that it enabled the Institute to form some concept of its work. This was important because outside the Institute there was little vision about the tasks which it would perform. Was it to be the research arm of the Family Court, or the research arm of aspects of government policy? Very quickly the Institute asserted its position as an independent research body in relation to families in the broadest sense, and it has consistently maintained that position.

The Institute quickly proved to be, and remains, highly influential. Its research work has spanned the whole range of family relationships, including its cost of children study and its later assessment of the child support scheme, its study of the economic consequences of marital breakdown and post-divorce, and its assessment of the reforms relating to children which were introduced in 1995.

### A further twenty-five years

It is impossible to predict the shape of the Family Court in 25 years when it celebrates its 50th year. Technology will dominate all aspects of courts and old fashioned conferences such as the Court is presently holding will be a thing of the past, as will the traditional oral court hearing. However, some things will remain the same – simplified procedures Mark XX will be put forward as the answer to all the Court's problems!

Human nature will not have changed, but social, economic, educational and environmental changes will inevitably have an impact upon people in Australia and the nature of their family problems. Matters influencing the shape of families will then include work equality, advanced genetics, an ageing population, serial monogamy and serial relationships, the necessity for pre relationship agreements, and the low birth rate.

There will be one federal court covering all federal areas as part of a large trial court structure. All non-commercial relationship disputes relating to children or property will be covered by the same legislation and adjudicated by the same court. The debilitating discussions of the present time about sexuality and relationships will be seen as an oddity of the past.

This court structure will give opportunity for wider judicial experience. Exclusivity in family law (at least in the current narrow sense) will not be seen to be in the interests of the Court or litigants. A wider range of jurisdiction is not inconsistent with specialised knowledge in particular areas.

After many more inquiries and draft Bills, a strict family law and other relationship property regime – with emphasis upon mediation and arbitration as the almost exclusive model – will finally come about, society no longer being of the view that it should continue to afford the luxury of tailor-made individual hearings.

Finally, again in the words of Oliver Wendell Holmes (1881): "The truth is, that the law is always approaching, and never reaching consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow."

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