

## The English Divorce Law Reforms

After an extremely laborious passage through Parliament, the English Family Law Bill was finally passed at its third reading in mid-June (see *Family Matters*, no.42, pp. 34–35). Called the Tory government's 'one guttering light of decency and civility' by the *Times* (15 June 1996), the Bill had nonetheless faced stern opposition from Government and Labour members alike – to say nothing of having the moral wrath of the *Daily Mail* poured upon it at every opportunity. However, its principles were generally supported by both the Catholic and Anglican churches, their leaders apparently realising what many did not; that divorce would actually become a lengthier and perhaps more complicated procedure for most spouses than it has been under the incongruous fault/no fault provisions of the current legislation.

Despite its eventual passage, the Bill was significantly amended by both the House of Commons and the House of Lords. The principle of no fault divorce based on a period of separation survived, and the legal process begins to run once a statement of marital breakdown is signed. During this period information meetings are to be individually provided by an approved person who has no financial interest in subsequent proceedings. These meetings will also give advice about services available to assist where there is domestic violence. The statement of marital breakdown cannot be signed until three months have elapsed from the time the information meeting is held. There may also be meetings during this period with a marriage counsellor, followed later by consultations with mediators. Mediation will be provided if the parties and the nature of their dispute are considered suitable.

Parliament insisted on there being differential separation periods for childless and other couples. Parents of children under 16 will have to have separated for 18 months, six months longer than will be necessary for those without children. (Separation periods include the compulsory three months waiting time prior to the signing of the statement of marital breakdown.) The time may be reduced to 12 months if there is an injunction

## News from the Family Court

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*This occasional series on family law issues covers a variety of different subjects and points of view. Articles in various recent issues of Family Matters have canvassed topics such as indigenous people and the legal system, reforms to the English divorce legislation, the international movement of children, and the sterilisation of young people. Updates on these are provided below.*

for domestic violence or the separation is considered to be significantly detrimental to the children.

Labour demanded the inclusion of a requirement that superannuation entitlements be split between spouses at the end of the marriage, but this is not expected to become law until it has been thoroughly examined by the superannuation industry. (Ironically, this is one important area where Australia finds itself unable to come to any solution, although superannuation is frequently the second most valuable asset acquired during a marriage. An Interdepartmental Working Group on the Treatment of Separation as Matrimonial Property produced an options paper in late 1995, which went to the previous Attorney-General for consideration. Following the election and a possible re-assessment of the general principles of superannuation, this paper appears to have disappeared, but presumably will have to be examined by the new Attorney-General.)

Finally, the two-step process by which a

decree nisi is granted followed six weeks later by the grant of the decree absolute has been abolished in the English amendments. In its place parties will apply for a divorce order at the end of period of reflection, and this will be granted one month later.

The Family Law Act is expected to be implemented in mid-1998.

## Aboriginal and Torres Strait Islander Initiatives in the Family Court

In his article *Indigenous Customary Law and Australian Family Law* (*Family Matters*, no.42, 1995, pp.24–29) Chief Justice Nicholson discussed many of the issues facing Aboriginal and Torres Strait Islander people who come into contact – directly or indirectly – with the mainstream family law system. His article canvassed a number of Family Court initiatives designed to make its services more relevant and useful to these potential clients. He also anticipated the development of several more programs and policies in the months to come.

Much has happened in the intervening period, largely as a result of the energy generated by the Court's Aboriginal and Torres Strait Islander Awareness Committee.

The Committee was set up to: investigate the extent to which Aboriginal and Torres Strait Islander people use the services of the Family Court; increase awareness at all levels within the Court of the problems confronting Aboriginal and Torres Strait Islander people in using those services, and identify any special needs they may have; and formulate the means, if applicable, by which the Court's services can be made more relevant to and useful for Aboriginal and Torres Strait Islander people.

The Committee has operated since its establishment in early 1993 on the assumption that everyone has a right to expect to be met with cultural understanding should they come into contact with any of the Court's services, whether voluntarily or otherwise. There is also a commitment to consult at a local level with both Aboriginal and Islander people to ascertain what, if anything, is needed

from the Court by way of services. The strategy has been to be informed by the people as to what they want and then to devise, with the communities themselves, the ways in which the Court's services might be adjusted to accommodate the needs. It has always been stressed that the Family Court has no interest in imposing a system of resolution of family disputes on Aboriginal and Torres Strait Islander people, and that their traditional community and family based methods of resolving such disputes were respected.

To some extent (as Chief Justice Nicholson's article referred), the past horrific experiences of indigenous people with the white legal system, particularly in the forced removal of children from their families, has led to an understandable and persistent suspicion of its operations. Nonetheless, increasing numbers of marriages involve people of different racial or tribal backgrounds, and increasing numbers of children are born to couples from mixed backgrounds. This has meant that family disputes cannot always be handled within the communities themselves, as they frequently were in the past.

The success of the Court's initiatives require clear and open communication, the development of a proper consultative process and of trust and respect among the participants, and the implementation of an agreed structural framework.

Much help has already been provided by the four Aboriginal family consultants employed by the Court in Alice Springs and Darwin. Their role is a multi-faceted one. It includes the provision of information on how the Court works and how its services may be provided and used in a way that respects cultural needs and is of relevance and benefit to Aboriginal families. The consultants also work with the Court counsellors to ensure that counselling is explained clearly, and they help parents make the best use of the counselling provided so they can make the best informed decisions about their children. If necessary the consultants also make links with other agencies such as Aboriginal Legal Aid, and child care and family violence support groups. In both Alice Springs and Darwin reference groups have been set up to support the family consultants in carrying out their roles. Membership of these groups comes from agencies and community groups that were visited during the consultative process.

Lack of understanding of others' cultures is a frequent barrier to successful participation in the legal, or general societal systems. Anecdotes abound of Aboriginal women (who may show respect for a person in authority by avoiding eye contact and speaking quietly) being told by judges to speak up and look directly at them, or of people being obviously intimidated by the traditional courtroom layout, or being confronted by disbelief when describing their obligations to a family member. Other problems have arisen as a result of assumptions being made that an Aboriginal party or witness is able to understand English, when in fact an interpreter is required.

In March 1996, about 28 judges and staff of the Family Court participated in a three-day cross-cultural awareness course at Batchelor College, south of Darwin. This was followed by a one-day course in Alice Springs run by the Institute for Aboriginal Development. These were both informative and enjoyable, and included a number of presentations by Aboriginal participants on issues of cultural and social change. Also included were: discussions of family relationships, rules and responsibilities; social and other problems arising from the removal of children from their families; court scenarios with interpreters, and discussions about language, and both verbal and non-verbal communication.

The courses also clearly pointed out the differences between the experiences and cultural characteristics of northern and central tribes, and the dangers involved in stereotyping experiences and assuming homogeneity.

One of the Committee's current goals is to have cultural awareness programs delivered on a local or regional basis in future to all Court personnel. Another area where cross-cultural understanding is important is in the training of separate representatives in Family Court disputes. As is mentioned later in this column, such representatives play a pivotal role in matters where the best interests of the child are central. Where the child is of Aboriginal or Torres Strait Islander origin, knowledge of indigenous culture, custom, history and ways of communicating is vital. A national training program for the training of separate representatives has been devised and will have cross-cultural component to specifically address these matters.

In child-related disputes where one parent is Aboriginal and the other is not, it is frequently argued that the child is most appropriately raised in an environment which is respectful of her or his Aboriginal cultural heritage. Such an argument is more powerful since the passage of the Family Law Reform Act in June 1996, section 68F(f) of which requires the Court to consider in determining the child's best interests 'the child's maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders)'.

Other developments have involved the work of the Alice Springs counselling service, which opened in mid-January with one Court counsellor and two Aboriginal family consultants. Previously, Alice Springs had been served by staff working out of Darwin who visited the area every six weeks. Information on the new service has been made available in English, Central/Eastern Arrente, Western Arrente, Pitjantjatjara and Warlpiri. Community liaison has been a major focus of attention and several visits to remote communities have been made. About 20 per cent of the counselling interventions have involved cases where one or both parents were of Aboriginal descent.

The consultative aspects of the Court's programs have included an information workshop held in Dubbo in June. This was attended by staff from legal aid commissions and community legal centres as well as a number of Aboriginal people living in the area. The workshops explained the Court's powers and services and also the limitations on its powers, most particularly its lack of jurisdiction in child protection and juvenile justice matters, which are the subject of State legislation. A video was made of the workshop which will enable Court staff in different areas to provide similar material at later opportunities. Special training kits and packages are also being prepared for distribution to Aboriginal and Islander workers in organisations.

Another aspect of the Court's policy is to encourage the recruitment and career development of indigenous staff. The Court has engaged an Aboriginal firm of consultants to prepare a recruitment and career development strategy.

## Child Abduction Matters

In *Family Matters*, no.42, 1995, pp.42-44, this column examined some recent decisions where parents sought to leave Australia with their children. In circumstances where the departing parent does not obtain permission from the other parent or the Court, the Hague Convention on Civil Aspects of International Child Abduction ('The Convention') may be used to bring about the child's return. After some brief background about the Convention, this segment considers a recent case where children brought to Australia said they wanted to stay.

The Convention to date has been ratified by 44 countries, and came into force in Australia on 1 January 1987. Between July 1995 and March 1996 it was successfully used to have 33 children brought back to Australia and 37 children returned to their 'home' countries from Australia.

The main objective of the Convention is to secure the prompt return of children wrongfully removed to or retained in any 'Contracting State' (or jurisdiction which is bound by the Convention, as Australia is). In the majority of matters, the other countries involved are New Zealand, the United Kingdom or the United States of America.

Countries bound by it are required to establish 'Central Authorities'. These have a number of functions, but primarily their task is to locate the children, institute proceedings for their removal or return, and ensure their safe return. In doing so they must act promptly.

Where an application is brought under the Convention for the return of a child, an order must be made *unless*: there was consent or acquiescence to the child's removal or retention; there is a grave risk that the return of the child would expose him or her to physical or psychological harm, or would otherwise place the child in an intolerable situation; the child objects to being returned and has reached an age and degree of maturity at which it is appropriate to take account of her or his views.

If at least a year has elapsed since the child was wrongfully removed or retained and the making of an application, there is an additional discretion to refuse to make an order

on the basis that the child has settled into the new environment.

The underlying purpose of the Convention is to restrict considerably the discretion of the Court of the country to which the child has been taken. Therefore in the case of a child abducted from, say, New Zealand to Australia, it would not be necessary for the Australian Family Court to consider issues of what is in her or his best interests, as it would be required to do in the case of domestic disputes where a residence or contact order was sought.

The scope of the Court's enquiry is also much narrower than it is in the case of children removed from a non-Convention country such as Malaysia or Indonesia. In such cases there may be arguments about which country's courts should determine the matter, as well as questions about what will best ensure the child's welfare. In effect, in Convention cases, unless one of the grounds is made out, the Convention presumes that an order for return of the child is in the child's best interests.

So far, the Convention has not been the subject of proceedings before the High Court, which has on several occasions refused leave to have such matters heard before it. At the moment, an application for special leave to the High Court is pending in a case described here as *De L*.

In *De L* the Australian-born wife was married to an American citizen and lived in America with him. After separation, and without the husband's consent, she removed the two daughters aged approximately ten and twelve years of age and brought them to Australia.

The Central Authority applied unsuccessfully to have the children returned to America. In dismissing the application, the trial judge placed considerable weight on a report prepared at her request by the Court's counselling service which (incorrectly as it was later found) addressed the question of with which parent the children wished to live. Both, and particularly the elder daughter, were seen to be attached to the mother.

Although finding that the children had been wrongfully removed within the meaning of the Convention, the trial judge nevertheless found that they objected to being returned to the United States, and therefore there was a valid exception to the obligation that they return. The Central Authority appealed suc-

cessfully to the Full Court (Nicholson CJ, Kay and Mushin JJ, unreported), and the wife is now seeking leave to appeal to the High Court to have that decision overturned. The case raises a number of interesting points, not all of which can be covered here.

All Full Court judges considered that the Counsellor's evidence of the children's wishes did not provide evidence that could satisfy a finding that the children 'objected' to being returned. A majority (Kay and Mushin JJ) considered that, given the strict policy underlying the Convention, 'objection' should be interpreted to mean more than the ascertainment of a child's wishes in a custody dispute.

The Chief Justice disagreed, however, saying that it is wrong to adopt a strained construction of the concept of 'objection' because: children should not be expected to express their views within adult formulations; even if children are mature enough to have their views taken into account, they should not be expected to feel comfortable expressing them forcefully in interview situations; the policy of the Convention is not compromised by hearing what children have to say – the Court must still make critical assessments about the child's age and maturity and determine whether in the circumstances the discretion to refuse return should be exercised.

Nicholson CJ also differed from the majority as to whether the case should be reheard by the trial judge after a Counsellor's report which addressed the correct issue had been obtained. Kay J considered that no further hearing was warranted, as he found that the children had no wish to remain in this country beyond their wish to remain living with their mother.

An argument was also raised as to whether, were the children returned to the United States, the US immigration authorities would grant the mother entry. Mushin J, who otherwise agreed with Kay J, was less sure of the future processes of the immigration authorities on the material before him. He said that a further hearing would only be warranted if the mother was unable to return.

Mushin J accepted that if the mother was prevented from entering the country the concept would be different, as the two factors of (1) the children's return to their place of habitual residence and (2) their wish to live with a particular parent, would be inextricably linked.

Nicholson CJ approached the matter on the basis that the children had attachments to Australia as well as to their mother. He considered that the incorrect direction given to the Court Counsellor, to ascertain the children's wishes rather than whether they objected to being returned, did not fulfil the Court's obligation to properly hear and assess the children's views. As he saw that there was a clear issue about the children's objections, he would have ordered a further report and hearing.

If the High Court hears the mother's appeal, it may be asked to consider the relevance of Article 12 of the United Nations Convention on the Rights of the Child (UNCROC), which provides that children have the right to be heard and present views to administrative and judicial decision-making bodies. The Chief Justice in his judgement in *De L* referred to Article 12 of UNCROC as a source of the Court's responsibility to hear the child's views.

Accordingly, the case may therefore become the first High Court decision since the highly publicised *Teob's case* (1994-95) 183 CLR 273 (see *Family Matters*, no. 40, 1995, pp.33-34) to consider the impact of that Convention on domestic decision-making.

## Sterilisation of Children with an Intellectual Disability

Statistics from the Health Insurance Commission reported in *The Sydney Morning Herald* (8 July 1996, p.1) show that 464 girls under the age of 18 years were sterilised in 1994-1995. In the same article, Susan Brady, who provides medico-legal advice in the Queensland Department of Families Youth and Community Care, suggested that it is 'highly unlikely that a large number of the sterilisations were carried out for medical reasons' given the rarity of diseases of the reproductive tract for this age group. Her conclusion was therefore that hundreds of illegal sterilisations are occurring every year. These observations are in keeping with other research discussed in Nicholson, Harrison and Sandor (1996).

The legal significance of these sterilisation figures stems from the highly publicised

*Marion's case* (1992) 175 CLR 218. A majority of the High Court there established that it is beyond the scope of parents' ordinary responsibilities to give consent to such a procedure when the purpose is not to remedy a medical need (such as cancer). Unauthorised procedures amount to an assault on or trespass to the person for which there may be both criminal and civil consequences.

The necessary authorisation can be given by the Family Court pursuant to its welfare jurisdiction. Where there is specific State legislation on the subject, the High Court has held that a legal body such as a Guardianship Board, or a court such as the Supreme Court, can give the authorisation providing there has not been a ruling under the Family Law Act granting or prohibiting the procedure. In such circumstances, the State body or Court has no power to make an order (*P v P* (1994) 181 CLR 583).

New South Wales has applicable legislation – the Children (Care and Protection) Act 1987 (NSW) – and applicants living in that State therefore have a choice of where to seek authorisation.

In June 1996, on the application of the mother of an intellectually disabled child, the Supreme Court of New South Wales granted its first sterilisation order since the High Court's decisions referred to above (*JLS v JLW*, not yet reported, Bryson J, 21 June 1996). A concerning feature of the process was that only the mother had legal representation, whereas the involvement of a legal representative for the child is an expected part of proceedings in the Family Court (*Re K* (1994) FLC 92-461). The child's representative in the Family Court plays a critical role in making sure that the procedure is a step of last resort. To this end, the Full Court of the Family Court in (*P and P* (1995) FLC 92-615 at 82,157) has said that the child's representative should perform functions such as the following:

- Inform the Court by proper means of the children's wishes in relation to any matter in the proceedings. In this regard the separate representative is not bound to make submissions on the instructions of a child or otherwise, but is bound to bring the child's expressed wishes to the attention of the Court.
- Arrange for the collation of expert evidence and otherwise ensure that all evidence relevant to the welfare of the child is before the Court.

- Test by cross examination where appropriate the evidence of the parties and their witnesses.
- Ensure that the views and attitudes brought to bear on the issues before the Court are drawn from the evidence and not from a personal view or opinion of the case.

Whatever the merits of the decision itself, *JLS v JLW* illustrates that independent advocacy for the child appears to depend on the law under which proceedings are brought. It should not be possible to 'forum shop' when the decision is as irreversible as sterilisation. This was a concern of the 1994 report of the Family Law Council which recommended a single decision-making forum – the Family Court under the Family Law Act.

To date there has been no legislative action but, in keeping with the Council's report, the Family Court has been developing protocols with legal aid bodies and State departments, such as the Queensland Department of Families Youth and Community Care, so that sterilisation applications can be appropriately diverted to interventions which are an alternative to invasive procedures.

The Court is also working cooperatively to educate professionals so that they are not ignorant of the High Court's decision which makes unauthorised interventions unlawful. In the next edition of *Family Matters*, note the announcement of a 1997 seminar in Queensland for professionals of all disciplines on the medical powers jurisdiction.

### References

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- Nicholson, A. Harrison, M. and Sandor, D. (1996), 'The role of the Family Court in medical procedure cases', *Australian Journal of Human Rights*, vol.2, no.2, pp. 242-261.

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