The year 1999 saw a great deal of legislative activity in the family law area, with a number of proposals either before parliament or anticipated for introduction.

This trend looks set to continue in 2000 with the establishment of the Federal Magistracy, and developments regarding the Family Law Amendment Bill and matrimonial property.

New legislative developments

Belinda Fehlberg

Since the last *Family Matters* 'family law update' by Margaret Harrison (no. 53, pp. 53-54), the most significant legislative change has been the enactment of the Federal Magistrates Act 1999, along with the Federal Magistrates (Consequential Amendments) Act 1999. Their combined effect is to introduce the Federal Magistrates Service, also known as the Federal Magistrates Court, designed to deal with 'less complex' family law (and other federal law) disputes. Other important developments have occurred in relation to the Family Law Amendment Bill 1999, and the Federal Government's matrimonial property law reform agenda.

Federal Magistracy

The Federal Magistrates Service is a new federal court created by the federal parliament under Chapter III of the Commonwealth Constitution. Other federal courts currently in existence are the Family Court and the Federal Court.

The Service has been established to deal with a range of less complex issues currently heard by the Family Court and the Federal Court. Its establishment is part of the Government's wider aim of encouraging separating couples away from the formal legal process to the greatest extent possible, while still taking into account the complexity of their particular dispute. The intention is to provide a faster and less expensive option for litigants in less complex matters and to reduce the workload of the Family and Federal Courts.

It is expected that the Service will commence operations in some locations from mid-2000. In order to minimise expense, the Federal Magistrates Service will, to the extent practical, use the infrastructure of the existing federal courts – for example, accommodation, courtrooms, some staff, and library facilities. As noted previously by Margaret Harrison in *Family Matters* (no. 52, p. 64), the Federal Government has committed about $27 million over the next four years to establishing the Service.

Sixteen magistrates will be appointed to staff the Federal Magistrates Service. Federal Magistrates will be based in Melbourne (five, including the Chief Federal Magistrate), Sydney (two), Parramatta (two), Canberra (one), Newcastle (one), Brisbane (two), Townsville (one), Launceston (one,) and Adelaide (one). The Federal Attorney-General announced on 31 January 2000 that Diana Bryant QC would be recommended to the Attorney-General as the first Chief Federal Magistrate. Ms Bryant is a highly experienced Melbourne barrister specialising in federal law with a family law emphasis. The fifteen additional magistrates are yet to be appointed.

The Federal Magistrates Service does not have any jurisdiction of its own – it shares its jurisdiction with the Family Court and the Federal Court. In the family law area, the main issues which the Federal Magistrates Service can decide are:

- applications for divorce;
- property disputes between married couples where the property is worth less than $300,000 (or where the property is worth more than this, with the parties' consent), including disputes regarding financial agreements (considered below in the context of the Family Law Amendment Bill);
- parenting orders – that is, contact orders, specific issues orders, and child maintenance for children over 18 (see the article by Bruce Smyth elsewhere in this edition of *Family Matters*) – but not residence orders, unless the parties consent;

- enforcement of Family Court orders (considered below in the context of the Family Law Amendment Bill);
- matters involving the location and recovery of children; and
- disputes involving the determination of parentage.

The decision that residence (previously known as 'custody') disputes can only be heard by the Federal Magistrates Service if the parties both consent reflects the view that applications for residence tend to raise more complex issues than contact disputes and other children's issues. However, applications for contact in the Family Court often raise matters of significant complexity and difficulty, so it will be interesting to see whether this distinction is workable in practice. A further concern is that under the current legislation the Service cannot hear applications for interim residence orders. This will significantly undermine the usefulness of the Service to separating parents seeking to formalise arrangements regarding their children for the period between separation and a full court hearing.

Further, in a more general sense, listing the matters the Service can determine is probably of limited use as the crucial factors for determining in which court a dispute should be heard are, first, the complexity of the matter, and second, at a more practical level, the extent to which the parties are able and willing to pay the more expensive legal cost applicable in the Family Court.

The legislation provides for matters to be transferred between the courts, with the courts being required to consider, among other things, whether the Federal Magistrates Service has sufficient resources to hear and determine the matter and the interests of the administration of justice. In practical terms, however, transfer to the Family Court may be less likely when the parties are unable or unwilling to pay the higher legal costs associated with Family Court proceedings and are prepared to consent to the matter being heard by the Federal Magistrates Service. This has given rise to the concern that two separate classes of justice will result (expressed, for example, in submissions to the Senate Legal and Constitutional Legislation Committee, October 1999, p. 7, para 2.9).

Also, the test to be applied to determine whether a matter is 'complex' or not is unclear at this stage. There is a resulting risk that litigants may exploit this to 'forum shop' between the two courts. An additional factor is that the complexity of a case may not be initially apparent, so there is a possibility of matters being transferred after they have progressed some way down a particular court system. This raises risks of additional delay, duplication of proceedings, and cost for the parties concerned.

Appeals from family law decisions of the Federal Magistrates Service will be to the Family Court. While appeals will normally be to the full court of the Family Court (comprising three justices), the Chief Federal Magistrate will have the discretion to allow an appeal to be decided by a single judge of the Family Court. This reflects legislative intention to provide the Service with maximum flexibility to deal with cases efficiently, while also taking into account their complexity.

Another important aspect of this legislative intention is the simplified court practice and procedure to operate in the Federal Magistrates Service. The Service has yet to make its own court rules, but the emphasis in the legislation is on minimising the duration, formality, and cost of court process in a number of ways. For example, Federal Magistrates will be able to make a decision without an oral hearing with the consent of the parties.

In fact, many of the 'new' procedures being announced in relation to the Federal Magistrates Service are not entirely new to family lawyers. For example, video link-ups have been used in the Family Court for some time, and primary dispute resolution alternatives – for example, counselling – have always been a strong feature of Family Court process.

The introduction of the Federal Magistrates Service received the scrutiny of the Senate Legal and Constitutional Legislation Committee in 1999. The Committee reported in October 1999 and that report conveys in detail the range of arguments put forward both 'for' and 'against' the Service, some of which have been touched on above (see further: Senate Legal and Constitutional Legislation Committee October 1999).

It is certainly fair to say that despite its potential advantages, many unknowns still surround the operation of the Service. These include the impact that its implementation will have on the Family Court, both in terms of reduced workload (which could well be slight) and transfer of funds away from the Family Court (extent as yet unknown).

Family Law Amendment Bill

As outlined by Margaret Harrison in an earlier edition of *Family Matters* (no. 53, pp. 53-54), the provisions of the Family Law Amendment Bill 1999 will amend the Family Law Act 1975 in a range of areas. These include the introduction of a new three-tiered system for the enforcement of parenting orders, and the introduction of legally binding pre-marital financial agreements, both of which are discussed below. A number of other issues are also covered in the Bill, including the development of existing Family Law Act provisions to encourage private arbitration of property disputes on marriage breakdown. The use of private arbitrators to reach enforceable property and financial agreements is part of the Government's intention to offer speedier and lower cost options in the family law area, as discussed above.

The Bill was introduced into the House of Representatives on 22 September 1999, and was read a second time before the Senate referred an inquiry to the Senate Legal and Constitutional Legislation Committee (the 'Senate Committee'). The Committee reported on 6 December 1999, concluding that the Bill 'is basically wise legislation' but that the Government 'should give further consideration to several aspects of the legislation before proceeding with it' (Senate Legal and Constitutional Legislation Committee December 1999, p. (i) and conclusions para 6.1).

Although it is currently uncertain which of the Senate Committee's recommendations the Government will act upon, the Committee's major recommendations are likely to be accepted and this would not result in any major changes to the existing Bill. The report of the Committee also provides a good sense of the more significant aspects of the current Bill and is worthy of note on that basis.

Enforcement of parenting orders

As Margaret Harrison has previously outlined in *Family Matters* (no. 53, pp. 53-54), contact orders present particular problems regarding enforcement. There is the opportunity for breach of orders to occur on each occasion of contact, and contact hand-over often occurs in the atmosphere of emotional distress which frequently accompanies relationship breakdown.

The current proposals are based on an initial proposal made by the Family Law Council in June 1998 for a three-tiered system (Family Law Council 1998). The proposal set out in the current Bill for the enforcement of parenting orders is, however, much more detailed and in essence comprises three stages.

First, at the *educative stage* court orders and the consequences of breach must be explained to the parties, along with the availability of education programs.

The second stage is the *remedial stage.* If contravention of an existing court order occurs without reasonable excuse, the court would have the power to order the recalcitrant parent to attend a post-separation parenting program selected from a list compiled by the Attorney-General, or the court may make an order for compensatory ('make up') contact in favour of the other parent.

Third, at the *punitive stage* sanctions available to the court are imposed, including community service orders, bonds of up to two years, fines of up to $6600, and imprisonment for up to 12 months. These sanctions already exist under the Family Law Act but the court currently has a discretion about whether to impose a sanction when a breach occurs. In contrast, the proposed change is that sanctions *must* be imposed for any subsequent breach after the remedial stage if there is no reasonable excuse for the breach. Significantly, the same sanctions may also be imposed for a first breach in exceptional circumstances. There are three categories of exceptional circumstances: first, where a remedial program is not available within reasonable distance of the person's place of work or residence; second, where a post-separation parenting program appears inappropriate due to the person's behaviour (an example would be violence toward the other parent); and third, where the court considers that compensatory contact would not be appropriate.

The Senate Committee was unconvinced by evidence that the proposed three-tier approach would not address the problems associated with contact, including evidence that contact enforcement is sometimes used by a contact parent (usually a father) to harass a residence parent (Senate Committee Report December 1999, p. 9). The Committee was, however, supportive of the possibility that *both* parties to a contact order should have to participate in a post-separation parenting program. The injustice of casting the person technically in breach as the sole 'wrongdoer' when the other party may also have played a part in the resulting breach was at least acknowledged to this extent.

The Senate Committee's greatest concern was that the legislation should clearly allow the court more discretion regarding whether to punish a person for a first breach of a parenting order. In other words, it should be clearer that sanctions are not mandatory when a person falls within one of the exceptional circumstances set out above. The reasoning behind this recommendation was not set out in the Committee's report. It probably reflects the concern (arising from lack of clarity in the drafting) that because sanctions are mandatory for subsequent breaches, they may also be seen as mandatory in cases of first breach where exceptional circumstances exist, resulting in harsh outcomes.

Financial agreements

Another main aspect of the Family Law Amendment Bill is the introduction of legally binding pre-marital financial agreements. This proposal has been the focus of a previous *Family Matters* article (Fehlberg and Smyth 1999).

In essence, the enactment of the Bill would allow couples to enter into legally binding agreements about property division and spousal support arrangements before and during marriage, as well as after relationship breakdown as is now the case. Under the current Bill, no court approval will be required for agreements to be legally binding. An agreement will be legally binding if it is in writing, signed by both parties, each party has received independent legal *or* financial advice (that is, legal advice is not a requirement), and the parties have not agreed to end their agreement. To end an agreement, parties must follow the same process as for entry into the agreement – that is, independent legal *or* financial advice.

The Bill allows the court to set aside financial agreements on limited grounds, namely: fraud; general law grounds for refusing to perform a contract; circumstances arising after an agreement has been entered that make it impracticable for the agreement to be carried out; and exceptional circumstances arising post-agreement relating to the care of a child of the marriage.

In relation to these provisions, the Senate Committee recommended that the grounds for setting aside agreements by the court should be expanded, particularly regarding non-disclosure (which may not amount to fraud – a ground for avoiding agreements), and the requirement that changed circumstances in relation to a child be 'exceptional'. The Committee also recommended that legal *and* financial advice should be required for entry into binding financial agreements (rather than legal *or* financial advice), and that agreements should have to be registered in (although not examined by) the court.

The changes recommended by the Senate Committee would certainly provide additional protection to vulnerable parties entering financial agreements, but in practical terms their impact is likely to be negligible in the vast run of cases that are resolved privately. However, the requirement that agreements be court-registered would at least allow some monitoring of the kinds of agreements that are being entered, and the extent to which such agreements are being used.

It is likely that by the time this issue of Family Matters is published, an amended Bill will be introduced into Parliament. Any changes to the position as reported above in this section will be discussed in this column in the next edition of Family Matters.

Property reform

In a speech to the National Press Club on 27 October 1999, the Federal Attorney-General, Mr Daryl Williams, reported the outcome of consultations on the Government's 1999 discussion paper, *Property and Family Law: Options for Change* (outlined by Margaret Harrison in *Family Matters* no. 52, pp. 63-64).

In essence, two options for reform were presented in that paper (although the reform possibilities were expressly not limited to these). The first option was a starting point of equal sharing for property division on marriage breakdown, with the underlying premise being that parties have made equal contributions to that property. The court would retain discretion to depart from this conclusion. The second option was a more far-reaching proposal under which assets acquired during the marriage by the parties would be treated as communal property on marriage breakdown, to be divided equally between them unless special circumstances existed.

The Attorney-General said that neither option had received significant support. Instead, 'the submissions overwhelmingly supported the retention of the status quo, with some minor modifications' (Attorney General 1999; on the current status quo, see Grania Sheehan's article in this edition of *Family Matters*). The Attorney-General also said that one of the difficulties in this area was the lack of comprehensive statistics about the outcome of property settlements. To this end, he would be talking to the Australian Institute of Family Studies and the Australian Law Reform Commission about 'further research into this important area of law'.

The Attorney-General also announced that he intended to amend the Family Law Act to give couples greater certainty in property settlements, by:

- clarifying the factors that courts can take into account in spousal maintenance and property settlements – that is, separating out the s 75(2) spousal maintenance factors and devising a discrete set of factors for the operation of s 79(4), relevant to property division (see Sheehan in this edition of *Family Matters)*;
- resolving the conflict between family law and bankruptcy – there is currently a lack of clarity regarding priority of the non-bankrupt spouse versus unsecured creditors where there are concurrent family law and bankruptcy proceedings;
- giving the courts power to bind third parties in order to give effect to a property settlement – also an area of some complexity; third parties are generally outside of the court's jurisdiction yet they will often comprise a company or a trust effectively controlled by one of the parties.

In addition to these proposed changes to the property provisions of the Family Law Act, the Attorney-General announced that draft legislation is being prepared to permit the division of superannuation following marital breakdown. The treatment of superannuation in family law has become increasingly unsatisfactory since the introduction of compulsory superannuation in Australia. In essence, the problem is that non-vested superannuation is not usually viewed as being the 'property' of the superannuated spouse, and is therefore not divisible under the Family Law Act as property of the parties on marriage breakdown. This often results in superannuated spouses being advantaged when property is divided, especially where there are no other assets to off-set against a valuable future superannuation entitlement (see further Dewar, Sheehan and Hughes 1999).

The Attorney-General proposes to amend the Family Law Act and the Superannuation Industry (Supervision) Act 1993 to enable the division of superannuation in its accumulation phase. The courts will have a broad discretion to do justice and equity between the parties, and will not be restricted by a formula when dividing a superannuation account (Bourke 1999: 193). The amendments are expected to appear later this year.

The Attorney-General also announced that he is keen to pursue a reference of power from the states to the Commonwealth in relation to de facto couple property disputes. De facto property disputes fall outside the ambit of federal legislative power under the Commonwealth Constitution, so a referral of powers by the states to the Commonwealth would be required before the federal parliament could legislate. This has become more of an issue since the case of *Re Wakim*, in which the High Court declared the state/Commonwealth cross-vesting scheme invalid. Before it was struck down, this scheme allowed senior state courts to hear federal law cases, and vice versa. This was convenient for the parties as it saved them having to go through two court proceedings when their dispute raised both state and federal law matters. For example, it allowed the Family Court to hear a de facto property dispute – normally a state court matter – at the same time as parenting orders – a Family Court matter – were made (see Alistair Nicholson's article in this issue of *Family Matters).*

A referral of powers has occurred previously in the family law area. In the 1980s the states referred important powers regarding children to the Commonwealth, including parental disputes over children and child support. As a result, all such disputes are now determined under the Family Law Act and the Commonwealth child support legislation, whether or not the parents are married. Before the referral, the Commonwealth could not make laws applying to children born outside of marriage.

The advantage of this approach in the area of de facto property is that it would achieve consistent rules applicable throughout Australia to de facto couples on relationship breakdown. The legal treatment of married couples and de facto couples may also become increasingly similar – a controversial issue (for example, see Glezer 1997).

These are early days regarding any referral of power on de facto property issues. There is no indication as yet regarding how many states would refer powers on de facto property. The Attorney-General has expressed his willingness to consider legislating, even if not all states were prepared to participate. However, any aim of achieving consistency of the applicable law throughout Australia would be substantially undermined if some states referred their powers and others did not.

There is also currently no indication whether the Attorney-General would see it as being within his brief to include same-sex de facto couples in any legislation that is drafted. The inconsistency of legislative protection for same sex couples throughout Australia is an important issue, and is discussed in Jenni Millbank's article in this issue of *Family Matters*.

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