FAMILY LAW, FAMILY COURTS AND FEDERALISM AN OPPORTUNITY FOR REFORM

By H. A. FINLAY*

[*In this article Professor Finlay examines the ideological underpinning of the Commonwealth Family Law Bill. He then describes the role which the State Courts will play in the new system and suggests the establishment of Family Courts which will take over the administration of ancillary relief in the Matrimonial Jurisdiction and other areas of Family Law, e.g. Adoption, which are purely part of State Jurisdiction.*]

I INTRODUCTION

At the time of writing, the 'Murphy Bill, Mark II'[1] has not yet been put to the vote, and upon the dissolution of the Parliament it will therefore lapse. Its ultimate fate is a matter of speculation and will depend upon the outcome of the General Election. But assuming the Bill is re-introduced, voting will not be on party lines and it is quite possible that there may be amendments of one kind or another before it becomes law.

Whatever the outcome of this particular move for reform, the fact that it has been made at all is indicative, not merely of a strong desire on the part of the Australian Labor Party to imprint upon contemporary Australian society the stamp of a new political and social outlook after 23 years in the wilderness (as witness the spate of legislation that has been promoted since that party returned to office at the end of 1972), but of a wide range of criticisms that have recently been levelled at the Australian law of marriage and divorce. These criticisms have come a mere 14 years after the enactment of Sir Garfield Barwick's Matrimonial Causes Act 1959 (Cth).[2] At that time it was widely regarded as having reached 'a peak of legislative excellence'.[3]

The chief merit of the 1959 Act lay in substituting a unified, uniform code of matrimonial causes and ancillary matters, through the assertion of federal legislative power, for the divergent provisions previously prevailing in the eight jurisdictions of mainland Australia.[4]

* B.A. (London); LL.B. (Tas.); Associate Professor of Law, Monash University, Visiting Fellow, Wolfson College, Oxford 1974.

1 Family Law Bill 1974 (Cth), introduced into the Senate on 4 April 1974.

2 Effective from 1 February 1961, *Commonwealth Gazette* 1960, 4245.—The Act will hereinafter be referred to as the 1959 Act.

3 Toose, Watson and Benjafield, *Australian Divorce Law and Practice* (1968), Preface vii.

4 This expression is intended to encompass all the political entities of the Common-

The 1959 Act did, it is true, go beyond the mere unification of matrimonial causes laws envisaged by the Joske Bill of 1957 which, being a private member's bill was severely restricted in scope. The Government of the day, upon taking it over, introduced certain additional features. One of these was the attempt to develop marriage guidance facilities and reconciliation procedures.[5] These, unfortunately, did not, as it turned out, go much beyond pious hopes.[6] That is not to deny the very valuable work of the various marriage guidance organisations and the very real support given to them by the Australian Government under the 1959 Act. Marriage guidance, however, has not become an integrated factor in Australian family law. Another departure from the Joske Bill was in the decision not to establish a separate federal court, but to entrust the new federal jurisdiction to the Supreme Courts of the States pursuant to section 77 (iii) of the Constitution.

While the 1959 Act did not, therefore, result in the creation of a new or radically different divorce law, its great merit may ultimately be seen to have lain in preparing the ground for the setting up of such a new law. The unification of the law and the standardisation of its provisions, including the adoption of the five year separation ground has provided a common basis upon which considerable and revolutionary innovations could be introduced. Such an attempt has now been placed before the public in the Murphy Bill.

Some comments will be made here upon some of the features of the Bill, particularly where it departs from previous law. A detailed evaluation must be deferred until its final form becomes apparent. But what is of special interest is the omission of certain things which could have been included. This is most apparent in the failure to reorganise the structure of the courts by which family law is administered in Australia, upon a functional basis. Instead of seizing the opportunity of developing a system of family courts which could have covered all matters of family law, the present attempt is disappointing in its conservatism on this aspect. This will be discussed in the second part of this article.

II FAMILY LAW

(A) THE BILL, PRINCIPAL RELIEF AND THE ABOLITION OF FAULT.

The Bill, which in structure resembles the 1959 Act, is a revolutionary

wealth of Australia including, with due deference to that island's strong feeling of separate identity, the State of Tasmania, but excluding the external territories.—For a handy bird's eye view of the different grounds of divorce prevailing before the 1959 Act, see the table in Finlay and Bissett-Johnson, *Family Law in Australia* (1972), 14-5, which is adapted from the table in *Commonwealth Parliamentary Debates* (*Hansard*), 23 House of Representatives (1959) 2233.

[5] 1959 Act, ss. 9-17.

[6] See *e.g.* Finlay, 'The Broken Marriage and the Courts' (1971) *University of Queensland Law Journal* 23.

piece of legislation in common law jurisdictions. At one stroke it abolishes fault as an element both in principal and ancillary relief. It does this by replacing the fourteen grounds of divorce in the 1959 Act by one single ground. It is cast in terms which have become familiar: 'that the marriage has broken down irretrievably'.[7] The terminology is reminiscent of, and undoubtedly borrowed from the English legislation.[8] But unlike the English Act which in the next breath goes on to preserve fault in three of the five 'facts' by which irretrievable breakdown is to be proved, there is only one single criterion from which it may be inferred, namely separation for twelve months. Once such separation is established it raises irretrievable breakdown as a necessary presumption.[9] This presumption is much stronger, and will require a greater degree of cogency in rebuttal than was the separation ground in the 1959 Act, where the relevant qualification read: 'and there is no reasonable likelihood of cohabitation being resumed'.[10] This distinction between the provisions is possibly academic, since the courts have usually been ready to infer an absence of likelihood of reconciliation from the mere fact that proceedings are taken, and it may be compared to the equivalent provision in the English Act that the court, if satisfied by the evidence of one of the five 'facts', shall grant a decree 'unless it is satisfied on all the evidence that the marriage has not broken down irretrievably'.[11]

But unlike in the English Act, irretrievable breakdown under the Bill is based solely upon twelve months' separation and is available upon unilateral application. Unlike separation in the 1959 Act, it is subject to no bars or provisoes based on hardship or the public interest.[12] Still less are any of the other bars, like the petitioner's adultery retained,[13] or the old three year embargo on divorce.[14] It follows that that old bogey of the divorce reformer, the discretion statement, will likewise be buried for good, not only because the Bill makes no provision for it, but because by reason of the abolition of the bar it would serve no useful purpose. Its passing will be regretted by none.[15]

The philosophy on which the Bill is based is the conclusion that an

[7] Cl. 26(1).
[8] *Cf.* Divorce Reform Act 1969 (U.K.), s. 2(1), now the Matrimonial Causes Act 1973, s. 1(1), and also the Californian ground of 'irreconcilable differences which have caused the irremediable breakdown of the marriage'—C.C. 4506.
[9] 'the ground shall be held to have been established'—cl. 26(3).
[10] S. 28(m).
[11] Divorce Reform Act 1969 (U.K.), s. 2(3); Matrimonial Causes Act 1973, s. 1(4).
[12] 1959 Act, s. 37.
[13] *Ibid.*, s. 37(3).
[14] *Ibid.*, s. 43.
[15] See Finlay, 'Discretion Statements: an Oldfashioned Melodrama' (1969) 1 *Australian Current Law Review* 35; *Pertoldi v. Pertoldi (No. 2)*, (note) (1970) 44 *Australian Law Journal* 33.

inquiry into the causes of breakdown of marriage is not proper.[16] Indeed Senator Murphy pursues this attitude with logical consistency in proposing that legal procedures be simplified in accordance with his attack upon a law which has proved to be bedevilled by 'high costs, delays and indignities to the parties'.[17] Thus the number of matrimonial causes available that can be classified as 'principal relief',—a concept which is now carried into the terminology of the law[18] as distinct from the Rules,[19] —has been reduced by the omission of such delaying devices or redundancies as judicial separation, jactitation and restitution of conjugal rights.[20] The real essence of matrimonial causes in the sense of 'suits for the redress of injuries respecting the rights of marriage',[21] meaning thereby the substance of the marriage relationship itself, as distinct from rights merely incidental to marriage[22] has thus been distilled into the single ground of separation for twelve months.

While matrimonial causes by way of principal relief have been reduced to dissolution of marriage and nullity, the remaining example in this class, declarations, has been expanded to include declarations as to the validity of a marriage in addition to declarations as to the validity of a decree of dissolution or of annulment, thereby making good one of the more notable omissions of the 1959 Act.[23] There has, on the other hand, been a rearrangement and extension of the scope of ancillary relief. The remedy of damages for adultery which, even in the restricted form in which it continued its uneasy existence under the 1959 Act,[24] had become almost as much of an anachronism as the odious action for criminal conversation from which it was descended, is now to be abolished. On the other hand, injunctions, 'in circumstances arising out of the marriage relationship',[25] so worded, no doubt, from abundance of caution with due regard to the limits of constitutional power under section 51(xxi) of the Constitution, are now explicitly included. Under the 1959 Act injunctions

[16] Second Reading Speech, Family Law Bill 1974 (Cth).
[17] Second Reading Speech, Family Law Bill 1973 (Cth).
[18] Cl. 4(1).
[19] Matrimonial Causes Rules (Cth), r. 195.
[20] *Cf.* Finlay, 'Jactitation and Restitution of Conjugal Rights: An Epitaph' (1974) 11 *Western Australian Law Review* 264.
[21] Jowitt, *Dictionary of English Law* II, 1155, though that definition, it is suggested, will itself have to be rewritten in consequence of the purging of fault from the law of divorce.
[22] For a brief discussion of the meaning of 'matrimonial cause' and the influence of statutory definition of that term upon its meaning see Finlay, 'Commonwealth Family Courts: Some Legal and Constitutional Implications' (1971) 4 *Federal Law Review* 287, 289-90.
[23] It was arguable that it always remained within the competence of state jurisdiction pursuant to common law, as was assumed to be the case in *Mandel v. Mandel* [1955] V.L.R. 51, following the Court of Appeal in *Har-Shefi v. Har-Shefi* [1953] P. 161. A different view was taken by Cowen and Da Costa, *Matrimonial Causes Jurisdiction* (1961) 70, but since the question does not seem to have been dealt with in any reported decision it probably need not now be answered.
[24] S. 44.
[25] Cl. 4(1).

were included in Part XIV[26] headed 'Miscellaneous', and they came to be used mainly in aid of the court's jurisdiction in ancillary matters, for instance in relation to the property of the parties. They were thus an extension of powers already conferred under the Act and could not be used otherwise.[27] The extension of the injunctive power is spelled out in the Bill as 'including an injunction for the personal protection of a party to the marriage or of a child of the marriage', as well as relating to the property of a party to the marriage.[28]

This extension is designed to take care of the case of the battered spouse and has been introduced deliberately in preference to a ground of 'instant relief' such as cruelty or intolerable conduct. It is therefore consistent with Senator Murphy's declared intention to take any inquiries relating to the conduct of the parties out of the arena of principal, and indeed of ancillary relief except, no doubt, to the limited extent to which it is relevant to the purpose of the injunction.

It is evident that the scheme of the Bill in its application to principal relief has resulted in a simplification of the law which will, it is hoped, reduce very considerably the possibility of legal argument of the kind of intricacy that had been developed in relation to desertion,[29] or to such grounds as 'habitual' cruelty[30] or drunkenness,[31] or to 'frequent' convictions.[32] Unfortunately there are still some provisions in the Bill which may create an opportunity for the deployment of 'legalism'[33] in the divorce court. This is so particularly in relation to the terminology in which the twelve months separation ground is framed. The statement of the ground follows closely enough the formulation of the five year separation ground in the 1959 Act. But there is a further statement that 'the parties to a marriage may be held to have separated and to have lived separately and apart notwithstanding that they have continued to reside in the same residence'.[34] Perhaps this will do no more than lend statutory force to the kind of reasoning that evolved the 'two households' test,[35] which has found substantial acceptance in Australian courts in relation to desertion and separation under the 1959 Act and its predecessors.[36] It is thus a device for inferring marriage breakdown by way of a statutory presumption,

[26] S. 124.
[27] *Sanders v. Sanders* (1967) 116 C.L.R. 366, 372, *per* Barwick C.J.; *Horne v. Horne* [1963] S.R. (N.S.W.) 121, 135.
[28] Cl. 90(1).
[29] 1959 Act, s. 28(b).
[30] *Ibid.*, s. 28(g).
[31] *Ibid.*, s. 28(f).
[32] *Ibid.*, s. 28(g).
[33] See generally on 'legalism': Finlay, 'Justiciable Issues and Legalism in the Law of Divorce' (1972) 46 *Australian Law Journal* 543.
[34] Cl. 27(2).
[35] *Hopes v. Hopes* [1949] P. 227.
[36] *Crabtree v. Crabtree* (1963) 5 F.L.R. 307, *Johnson v. Johnson* [1964] V.R. 604, *Potter v. Potter* (1954) 90 C.L.R. 391.

expressed in a shorthand way. In the absence of such a provision it could no doubt be proved specifically, but that would involve the undesirable expedient of an inquisition into conduct.

Unfortunately the provision is couched in vague and general terms. It is at least open to argument that it could have been better and more directly expressed if it had had the destruction of the *consortium vitae* as the touchstone for its establishment. This would have imported a well-known and certain criterion. Another form of the test has been whether there has been a 'sufficiently substantial degree of repudiation of the matrimonial obligations of married persons to amount to forsaking and abandonment'.[37] If the objection to using one of these known formulations is thought to be that they would of necessity let in an inquiry into matrimonial fault which it was desired to avoid, then it must be said that it is difficult to conceive how the phrase in the Bill would obviate an inquiry of the very same kind. There is little doubt that the courts will interpret it in much the same way and by resorting to the same kinds of consideration to which the expressions in *Hopes v. Hopes*[37a] or *Powell v. Powell*[37b] had given rise, and it would have saved unnecessary argument and uncertainty if the meaning and extent of 'separation' under the Bill had been expressly delimited and defined.

(B) MATRIMONIAL BREAKDOWN, AND HOW TO PROVE IT.

The equation of breakdown with twelve months separation is a pragmatic expedient, and Senator Murphy is to be commended for his courage in adopting it. There is, of course, nothing essentially new in having twelve months separation as a ground for divorce, being a mere adaptation of the familiar five year separation ground. What the Bill does, however, is to adopt irretrievable breakdown in explicit terms as the sole criterion for the dissolution of marriage and then create a conclusive, if rebuttable presumption that irretrievable breakdown is equated with twelve months' separation. This is a revolutionary device because all the consequences flowing from divorce are based, not merely upon the severance of the marriage tie upon the fulfilment of a statutory requirement, but upon the philosophy that the marriage had ceased to be viable. That fact was never previously recognised in so many words. It was generally an unspoken assumption on the part of judges in their exercise of the jurisdiction, but not as a necessary part of the philosophy underlying matrimonial causes. Thus a marriage was dissolved because the respondent had committed adultery, or desertion, or cruelty or whatever else. Probably in such circumstances, and particularly in view of the fact that the petitioner had

[37] *Powell v. Powell* (1948) 77 C.L.R. 521, 524 *per* Latham C.J.
[37a] [1949] P. 227.
[37b] (1948) 77 C.L.R. 521.

gone to the length of petitioning for divorce, the marriage had ceased to be viable. Probably, but not necessarily. The only concession that the law made to the possibility that it had not broken down was the requirement that the courts 'give consideration from time to time to the possibility of a reconciliation',[38] the requirement—amounting to a legislative platitude—of 'being satisfied of the existence of any ground . . .',[39] and in relation to five years' separation, that there was 'no reasonable likelihood of cohabitation being resumed'.[40]

That there need be no necessary correlation between the commission of a matrimonial offence and irretrievable breakdown was recognised in the English Divorce Reform Act 1969 in relation to the ground of adultery which gives rise to relief only where, in addition, 'the petitioner finds it intolerable to live with the respondent'.[41] That these two elements are not necessarily present in every case has long been recognized,[42] and constitutes an advance on adultery *simpliciter* as a peremptory ground of divorce.

The expression 'irretrievable breakdown' has been so bandied about in recent years that it may be helpful to clarify what we mean by it. There are, in the light of recent debate, three possible methods for dissolving marriage. One is by means of the traditional fault grounds. At the other extreme is divorce upon application by both, or even by one of the parties. Thirdly, there is 'irretrievable breakdown' occupying an intermediate position.

The notion of fault was originally relied upon to break indissoluble 'Christian' marriage.[43] It responded to the stress created by the retention of a rigidity of status on moral grounds at a time when society had shown itself prepared to resile from similarly rigid attitudes in related departments of life. Thus while socially still frowned upon, fornication was no longer subject to the same stringent sanctions to which it had been subject. Fault as the basis for dissolving marriage was at first seen as the breach of a fundamental term of the marriage contract, that of a lifelong union 'to the exclusion of all others'[44] which was sufficiently momentous to justify its rescission. The introduction of desertion and cruelty as grounds was an extension of that principle because these two offences could not be regarded as a similarly fundamental repudiation of marriage. They introduced circumstances into the relationship of husband and wife making

[38] 1959 Act, s. 14(1).
[39] *Ibid.*, s. 69.
[40] *Ibid.*, s. 28(m).
[41] Divorce Reform Act 1969 (U.K.), s. 2(1)(a).
[42] See *e.g.* Westermarck, *Future of Marriage in Western Society* (1936), 58-79 and the authorities there cited.
[43] *Cf. Hyde v. Hyde*, (1866) L.R. 1 P. & D. 130.
[44] *Ibid.*

continued cohabitation difficult or impossible, but they did not, of themselves, negate the essential nature of marriage as expounded in *Hyde v. Hyde*.[44a] It was but a short, though fundamental step to add insanity to these grounds. It shared with the others the attribute that it made cohabitation impossible, but it marked a breakthrough in making divorce possible without any suggestion of fault.

Divorce on the basis of mutual consent, or upon unilateral application on the other hand has long been anathema to our society. It was feared that the knowledge that the relationship of husband and wife could be set aside as easily as marriage could be entered into, or indeed more easily in the case of unilateral application, would destroy the stability of an institution which was regarded as the very mortar of society.

If the device of fault is used then clearly dissolution of marriage is a matter for the courts. The judicial process involved here is similar to that in the criminal law or in fault-based negligence. On the other hand, where divorce is based upon the simple wishes of the parties and nothing more, there is no reason why it should not be administered by an official like a registrar of births, deaths and marriages, although if other rights of the parties, or of other parties are also involved, as they usually are in ancillary matters, some elements of a judicial procedure remain desirable.

With the recognition that more harm than good would be done to the institution of marriage if society refused to give recognition in law to a destruction of the relationship in fact, the principle of 'marriage breakdown' as the basis for dissolution has come to be regarded as the desirable criterion since it was more logically related to the marriage relationship. At the same time it appears to offer a way of avoiding the undesirable features of an inquiry into fault on the one hand, and the apprehended writing down of the marriage relationship that is thought, rightly or wrongly, to be inherent in the notion of divorce upon 'mere' consensual, let alone unilateral application on the other. So the breakdown concept has gained in support since the early days of this century, culminating in the highest judicial approval of the House of Lords in *Blunt v. Blunt*,[45] which declared it to be 'contrary to public policy to insist on the maintenance of a union which has utterly broken down'.[46] It has recently been re-stated in an equally well-known phrase by the Law Commission as one of the objects of a good divorce law, *viz,* 'when regrettably,—a marriage has irretrievably broken down, to enable the legal shell to be destroyed with the maximum of fairness, and the minimum bitterness,

[44a] *Ibid.*
[45] [1943] A.C. 517.
[46] *Ibid.*, 525.

distress and humiliation'.[47] Thus has emerged the middle way to divorce by means of 'irretrievable breakdown'.

But not all who espouse irretrievable breakdown mean the same thing by this expression. The area in which differences emerge is indeed the most difficult aspect of this ground, namely how it is to be established. There are basically two ways of doing so, and they are very different from one another. One is by inquest, the other by construction or presumption of law.

The former method was favoured by the Archbishop of Canterbury's group which reported in 1966 in *Putting Asunder*.[48] The Group correctly perceived that an inquiry into the marriage would make the condition and viability of that relationship the focal point for the tribunal charged with the inquiry, and that that inquiry would be more like a coronial inquest than an adversary proceeding.[49] The report, moreover, advocated this as the only method for dissolving marriages, firstly because in logic all other grounds would become redundant once breakdown was adopted, and secondly, because of the mutual incompatibility of the two principles of breakdown and matrimonial offence.[50]

The second method formulates certain circumstances upon proof of which irretrievable breakdown is deemed to exist. This is what has been done in the English Divorce Reform Act 1969. But the fact that the formulation of these circumstances can include matters of fault shows this device, when so used, to be no different from the traditional fault grounds. That, in fact, is how facts (a),[51] (b)[52] and (c)[53] of the English Act have been framed. They have been aptly characterised as fault grounds by several commentators.[54] In their case, therefore, the phrase 'irretrievable breakdown' adds nothing whatever in law to the grounds, except perhaps an expression of a pious hope.

But equally the device of a constructive breakdown by presumption of law upon proof of a statutorily defined set of facts may be based upon such circumstances as separation without explicitly saying that this constitutes breakdown. This is what was done in the five year separation

[47] Law Commission: *Reform of the Grounds of Divorce, The Field of Choice* (1970) Cmnd 3123, par. 15(ii).
[48] Publ. S.P.C.K., London 1966.
[49] *Putting Asunder*, par. 84.
[50] *Ibid.*, par. 69.
[51] '[T]hat the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent.'
[52] '[T]hat the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent.'
[53] '[T]hat the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition.'
[54] Jackson, 'The New Legislation in Practice' (1971) *Law Society Gazette* 341, Passingham, *The Divorce Reform Act* (1969) 2, Finlay, 'Justiciable Issues and Legalism in the Law of Divorce' (*supra*, n. 33).

ground of the 1959 Act[55] and its predecessors. Or it may be stated that such breakdown is to be deemed to arise upon separation with consent[56] or without consent,[57] which has been done in the English Act, or separation *simpliciter* in the Murphy Bill,[58] but without otherwise probing the question whether breakdown has in fact occurred. This is what sets this method apart from the philosophy underlying *Putting Asunder* which regarded breakdown as requiring an objective ascertainment based upon a detailed investigation of the facts.

No such inquisition into breakdown has commended itself to lawyers. The Law Commission did not favour it, mainly for two reasons. One was the many practical difficulties involved.[59] These included the likelihood that court hearings would take far longer than before,[60] that very large numbers of trained experts would be needed,[61] that the detailed inquest by public hearing would be even more distasteful than the traditional procedure[62] and that the judicial system would be unable to cope with the greatly increased number of divorces that was to be anticipated.[63] The other, more fundamental objection was simply that breakdown of marriage was not considered to be a triable issue, or that if it was, a court of law was not the appropriate tribunal for its ascertainment.[64]

The view that marriage breakdown is not a triable or suitable issue for a court of law to investigate is inherent in the nature of the subject matter and the procedure appropriate to it. Courts typically deal with contests between opposing parties seeking to assert legal rights against one another. The marriage relationship, on the other hand is not based on legal rights, though such rights are annexed to it by law. But parties who desire a dissolution are not primarily concerned with the assertion of legal rights against one another. Yet they were forced by a law which allowed dissolution only upon proof of the infringement of a legal right of one of the parties by the other to use the procedures appropriate to such a proceeding. However, unlike the parties to a breach of contract or negligence action, the parties to a marriage which has ceased to be viable are usually more *ad idem* than they are apart: they have a common interest in an identical solution to their 'dispute', namely the termination in law of their

[55] S. 28(m).
[56] Divorce Reform Act 1969 (U.K.), s. 2(1)(d).
[57] *Ibid.*, s. 2(1)(e).
[58] Cl. 26(1) and (2).
[59] *Field of Choice*, pars. 70, 71.
[60] *Ibid.*, par. 58(k).
[61] *Ibid.*, par. 58(l).
[62] *Ibid.*, par. 58(m).
[63] *Ibid.*, par. 58(p).
[64] *Ibid.*, par. 58(i).—*Cf. Pheasant v. Pheasant* [1972] 1 All E.R. 587, Finlay, 'Justiciable Issues and Legalism in the Law of Divorce' (*supra*, n. 33) and also Finlay, 'Reluctant but Inevitable: The Retreat of Matrimonial Fault', not yet published.

moribund relationship which keeps them linked together like reluctant Siamese twins. As long as society continued to pretend that marriages could end only when the rights of one of the parties had been violated by the other, the parties were forced either to act out this supposed transgression in fact or to pretend that it had occurred. Divorce became a fictitious charade so that when a party sought a divorce, that party's legal adviser was expected to 'choose' a suitable ground. The process had become the very opposite of what it notionally was, where the law should indicate divorce only as a last resort for the vindication of a legal right of the complainant's. Thus was the parties' desire for the dissolution of their bond perforce fitted into the procrustean bed of a procedure devised for them by a century of adversary divorce law. The philosophy underlying that procedure today is a mere anachronism, nourished by a system of legal fictions. The continued survival of that system has done little to enhance the prestige of the law and of its institutions, or to endear its practitioners to the public.

But if the expedient of an inquest into marriage were to be adopted it would have to be taken out of the legal arena for the reasons advanced by the Law Commission.[65] Some other machinery would be required, either for dealing with marriage breakdown in substitution for courts of law, or as auxiliary institutions to which the courts could delegate the necessary inquisitorial functions. One proposal that might have achieved such a result that has been suggested[66] does not seem to have had much appeal. On reflection, who is to say that the Murphy solution would not achieve the desired effect more reliably? It would certainly avoid the costs and complications involved in finding and training the army of expert investigators required if every allegedly broken marriage were to be examined. Moreover, any such examination, even though no longer in open court, would still involve an inquiry into conduct. It could also be regarded as carrying with it an unpalatable degree of paternalism on the part of 'Big Brother', affecting the innermost private lives of citizens who, rightly or wrongly, would no doubt regard themselves as perfectly capable of deciding for themselves whether their marriages have broken down. The Bill does strengthen and support the marriage counselling provisions of the 1959 Act, while modifying the less satisfactory features of its reconciliation provisions.[67] Offering advice and counselling where sought or likely to be accepted is probably as much as a government ought to do. Beyond satisfying itself that all the interests involved, including those of the children, had been adequately safeguarded it could hardly go without incurring the resentment of the citizen, or tempting him into continuing

[65] *Supra*, n. 64.
[66] Finlay and Phillips, 'A Sane Divorce Law for a Sane Society' (1970) 42 *Australian Quarterly* 75; *Cf.* Finlay, 'Justiciable Issues and Legalism' (*supra*, n. 33) 555-7.
[67] *Cf.* Finlay, 'The Broken Marriage and the Courts' (*supra*, n. 6).

to engage in subterfuge of one kind or another. There is much to be said for the view that the interest of society in the stability of marriage is not impaired if those involved are permitted to make adult decisions for themselves.

In the case of either of the alternatives outlined above one thing becomes clear, and that is the diminishing role of the law and its traditional institutions in dealing with marriage breakdown. But for the time being the law remains closely involved, particularly in the area of ancillary relief. This aspect will be referred to again below under the heading 'Family Courts'.

(C) ANCILLARY RELIEF UNDER THE BILL.

It is not proposed here to discuss in detail the proposals dealing with ancillary relief but to comment chiefly upon the philosophy underlying them. Ancillary relief includes as its three most important aspects the maintenance of the parties, their property and the 'custody, guardianship or maintenance of, or access to' children of the marriage.[68] On the procedural side it may be noted in passing that jurisdiction in all matrimonial causes, except principal relief, is conferred upon state courts of summary jurisdiction[69] and this, it is assumed, will effectively extend federal jurisdiction in these matters including 'pre-divorce maintenance' which has hitherto been dealt with under the maintenance legislation of the States.

The principles upon which jurisdiction in ancillary matters is to be exercised henceforth will no longer include the 'conduct of the parties.' This portentous phrase had previously allowed, indeed required questions of fault to dominate proceedings relating to ancillary relief, and thereby to continue, whether by design or merely by historical accident, to punish marital 'misconduct'. It was therefore generally assumed that even where fault was no longer required as a necessary ingredient in principal relief[70] it still had to be demonstrated against a respondent where possible, in order to secure a better tactical position for the petitioner. This philosophy found expression in the statement by Lord Denning:

> the fact that the husband has obtained this decree does not give a true picture of the conduct of the parties. I agree that the marriage has irretrievably broken down and that it is better dissolved. So let it be dissolved. But when it comes to maintenance or any of the other ancillary questions which follow on divorce, *then let the truth be seen.*[72]

[68] Cl. 4, definition of 'matrimonial cause' (c)(i), (ii) and (iii).
[69] Cl. 18(6).
[70] *E.g.* cruelty under the principles in *Gollins v. Gollins* [1964] A.C. 644, *Williams v. Williams* [1964] A.C. 698, constructive desertion under s. 29 of the 1959 Act or separation under s. 28(m).
[71] *Trestain v. Trestain* [1950] P. 198.
[72] *Ibid* 202—Emphasis supplied.

That view, however in the space of twenty years fell into increasing disfavour[73] and has been squarely rejected in the Murphy Bill. The Bill spells out a mutual duty to maintain which subsists between spouses 'so far as the first-mentioned party is reasonably able to do so and to the extent that the other party is unable to support himself or herself adequately'.[74] But that duty is expressly made subject to another provision which is significant for it removes the entitlement once the marriage has been dissolved or annulled, *'or where the parties have separated and are living separately and apart'*,[75] except where the party claiming maintenance is looking after a minor child of the marriage or where that party 'is unable to support himself or herself adequately' because of age or infirmity 'or for any other reason'.[76]

This is an important departure and may well excite some controversy when the Bill comes to be debated. Presumably the right to maintenance is intended to cease even in cases where the parties continue to live under the same roof, if while doing so they are held to come within the provision under which they are deemed to be living apart.[77] And it comes as no surprise that among the matters which, and only which are to be taken into account by a court considering the maintenance of a spouse[78] or of the children of a marriage,[79] or their custody[80] or the property of the parties,[81] the conduct of the parties is nowhere mentioned explicitly, nor can it be inferred by necessary implication from any of the Bill's provisions as having any relevance. This departure, it is submitted, represents a notable advance on the English Divorce Reform Act where, in spite of the rhetorical expression of views in *Wachtel v. Wachtel*[82] the Master of the Rolls has clearly shown in *Chapman v. Chapman*[83] that he regards fault,

[73] *Cf.* the view of Salmon L.J. in *Tumath v. Tumath* [1970] P. 78, 86, that hotly contested issues of right and wrong in cases of irretrievable marriage breakdown in order to secure 'a supposed benefit for one or other of the parties in future maintenance or custody proceedings' could not 'serve any useful purpose and may indeed properly be regarded as contrary to modern concepts of public policy'.

[74] Cl. 51(1).

[75] Cl. 53—emphasis supplied.

[76] Cl. 53(a) and (b).

[77] N. 34.

[78] Cl. 54(2).

[79] Cl. 55(1).

[80] Cl. 43.

[81] Cl. 58, particularly (4).

[82] [1973] 1 All E.R. 829, 835: 'When Parliament in 1857 introduced divorce by the courts of law, it based it on the doctrine of the matrimonial offence. This affected all that followed. If a person was the guilty party in a divorce suit, it went hard with him or her. It affected so many things. The custody of the children depended on it. So did the award of maintenance. To say nothing of the standing in society. So serious were the consequences that divorce suits were contested at great length and at much cost. All that is altered. Parliament has decreed: "If the marriage has broken down irretrievably, let there be a divorce". It carries no stigma, but only sympathy. It is a misfortune which befalls both. No longer is one guilty and the other innocent.'

[83] [1972] 3 All E.R. 1089, 1090: 'Whilst I see no harm in saying, as a matter of history, how the parties came to live apart, I think it altogether wrong for a

in relation to ancillary matters arising under any of the three 'fault' grounds, facts (a), (b) and (c) in that Act as still being a factor that could play a part. *Wachtel v. Wachtel* itself leaves open the possibility of a residual effect of the conduct of the parties upon ancillary relief where that conduct is 'both obvious and gross'. Even such a diminished degree of relevance is ruled out as a factor under the Bill. No doubt this aspect of the philosophy of the Bill must be read in conjunction with the Government's attitude to social welfare provisions and its plans for their vigorous extension. In this the Attorney-General displays a pragmatic attitude and awareness of the fact that the ordinary family man is quite unable to support two families, which is what in the past he has often been expected to do, even on pain of imprisonment.[84]

The Bill thus constitutes an important and forward looking proposal that breaks new ground in its consistent and singleminded abolition of fault in matrimonial causes.

III TO BE OR NOT TO BE: FAMILY COURTS

Revolutionary as the Bill is in its impact upon the law, it is disappointingly unimaginative in its approach to the tribunals by which that law is to be administered. Although in the matter of jurisdiction the Commonwealth would move boldly into, and occupy the fields of 'marriage'[85] and 'divorce and matrimonial causes, and in relation thereto, parental rights and the custody and guardianship of infants'[86] to the fullest possible extent,[87] gathering up the important matters of State maintenance legislation and of the Married Women's Property laws, the opportunity has not similarly been taken to create integrated Family Courts to deal with all matters arising under the Bill.

The Bill vests jurisdiction in matrimonial causes in the Superior Court which it is proposed to set up under separate legislative proposals,[88] and in State and Territory Supreme Courts. In matters not coming within the definition of 'principal relief'[89] State and Territory courts of summary

petitioner (who seeks a divorce on the ground of five years living apart) to charge the respondent with a matrimonial offence. If the petitioner seeks to make such a charge, she should proceed on one of the other grounds, such as adultery, intolerable behaviour or desertion. She should only proceed on the five year ground alone when that is the only fact on which she is entitled to rely.'

84 Cl. 84, putting an end to imprisonment for failure to comply with a maintenance order.

85 Constitution, s. 51(xxi).

86 *Ibid.*, s. 51(xxii).

87 In accordance with the views so ably argued by Sackville and Howard, 'The Constitutional Power of the Commonwealth to Regulate Family Relationships' (1970) 4 *Federal Law Review* 30.

88 See the Superior Court of Australia Bill. The outcome of these proposals also depends on the result of the federal election pending at the time of writing.

89 N. 18, *supra.*

jurisdiction are also invested with federal jurisdiction concurrently. A notable innovation is the extension of summary court jurisdiction to include matters relating to property, in addition to maintenance and custody, except where such proceedings are already pending in the Superior or a Supreme Court, or where an order of such a court has already been made.[90] This extension recognizes the important role which courts of summary jurisdiction play in matrimonial proceedings.

Eventually the Superior Court is evidently to take over the most important aspects of the matrimonial causes jurisdiction from the Supreme Courts of the States, and to supervise the state summary courts in their exercise of the jurisdiction. Provision for this is made, both in the Family Law Bill[91] and in the Superior Court of Australia Bill.[92] The jurisdiction will be phased in by proclamation[93] and this may be done in different States and Territories at different times[94] and may be made exclusive.[95] All matters of family law within federal jurisdiction will thus come to be dealt with by state courts of summary jurisdiction subject to appeals to the Superior Court,[96] and by that court itself to the eventual exclusion of State Supreme Courts. The Attorney-General has decided against setting up separate federal family courts.[97] Instead, there will be a Family Law Division of the Superior Court.

The proposed specialisation on the part of the Superior Court is to be welcomed. One of the major disadvantages of the family law jurisdiction that has hitherto prevailed in Australia to the detriment of that jurisdiction has been the failure to recognize that this jurisdiction requires special skill and expertise, and to appoint to it judges and magistrates with interest and aptitude in this field.[98] Nor as a rule have state courts the necessary personnel available to carry out the supportive tasks arising in this jurisdiction. In addition to marriage counsellors, as they are now to be called,[99] and medical experts, there is a real need for welfare officers, social workers and psychologists, to name the more obvious. The 1959 Act enabled courts to call for reports from welfare officers in matters affecting the welfare of children.[1] It is doubtful whether courts have made use of this power

[90] Cl. 20.
[91] Cl. 19.
[92] Cl. 20.
[93] Cl. 19(2).
[94] Superior Court of Australia Bill (Cth), cl. 20(2).
[95] Cl. 19(3), Superior Court of Australia Bill (Cth), cl. 20(5).
[96] Cl. 73, Superior Court of Australia Bill (Cth), cl. 21(1)(c).
[97] Second Reading Speech, Family Law Bill 1973 (Cth).
[98] A beginning has recently been made in New South Wales by the reorganization of the Supreme Court to include a Family Law Division. Elsewhere, some degree of specialization is sometimes achieved by a more informal distribution of work among judges, but even this seems to be more the exception than the rule.
[99] Cl. 4(1); *cf.* Part II.
[1] S. 85(2).

sufficiently frequently,[2] or whether their reluctance on occasion to do so has been due to the unavailability of suitable officers rather than to judicial conservatism, or to not being used to exercising the kind of 'robust initiative'[3] which this power requires of them. It is outside the scope of this discussion to attempt an evaluation of the relative merits and demerits of an inquisitorial as against the customary adversary procedure in family law, but it is submitted that in its present form the adversary procedure is most unsuitable.

There has been some discussion of the problems involved.[4] One of the main difficulties is due to the conflicting *desiderata* that courts should be able to obtain reliable and unbiased confidential information about the parties where this is relevant to orders concerning the welfare of children, balanced against the traditional rights of the parties to have full knowledge of all the facts available to the court, and to test the opinions of experts who have given evidence concerning them. Courts have often been suspicious of the possibility of 'letting advocacy creep in to expert evidence,'[5] —understandably so in the context of the prevailing adversary method of litigation. As long as these proceedings are conceived as being concerned with the determination and assertion of legal rights it is difficult to see how this objection can fairly be overcome. It may be, however, that the way to cut the Gordian knot is to take family relationships out of the traditional court setting altogether as being sufficiently disparate in character to require a form of proceedings *sui generis*. Hence in speaking about Family Courts this fundamental characteristic of family matters rather than the traditional rules of litigation is the one that must be borne in mind.

On the positive side of the Bill is the proposal announced by the Attorney-General to attach to the Family Law Division of the Superior Court 'appropriate supportive staff, such as marriage counsellors and welfare officers.'[6] This will meet one of the needs of a Family Court, but it seems to be overstating the position considerably when the Attorney-General goes on to claim that the Family Law Division 'will in fact be a family court as generally understood'.[7]

If indeed it should turn out to be the intention under the present proposals that the eventual day to day division of work—as distinct from the

2 One such case, *Sing v. Muir*, (1970) 16 F.L.R. 211, was commented on in Finlay, 'Natural Justice in Custody Proceedings' (1970) 2 *Australian Current Law Review* 94.

3 *Sing v. Muir, supra*, n. 2, 214 *per* Burbury C.J.

4 See *Reeves v. Reeves (No. 2)* (1961) 2 F.L.R. 280, *Votskos v. Votskos* (1967) 10 F.L.R. 219, Toose, Watson and Benjafield, *op. cit.* (*supra* n. 3) par. 742, Finlay and Bissett-Johnson, *op. cit.* (*supra* n. 4) 550-4.

5 *Per* Harman L.J. in *Re C (MA) (an Infant)* [1966] 1 All E.R. 838, 860.

6 Second Reading Speech, Family Law Bill 1973 (Cth).

7 *Ibid.*

legal delimitation of jurisdictional competence—is to let the Superior Court deal with principal relief and to leave most of the ancillary matters to be determined by courts of summary jurisdiction, we shall find that we are very far from the realization of a 'family court'. Principal relief is nowadays a matter on which there is no serious contest, and its determination typically takes only a few minutes. The role of the courts in this matter has become something of a rubber stamp. Under the Bill, *a fortiori,* this would become almost the invariable rule. An adjudication on the rights of the parties to principal relief will therefore resolve itself into the very simple question of whether they have lived separately and apart for the requisite period.[9] Once this fact has been established the relevant rights of the parties reduce themselves to a right in the applicant[10] to a decree *nisi.* The simplicity of legal proceedings is recognized and will no doubt be further increased by the abolition of robing in all proceedings under the Bill[11] and the provision that in all but defended proceedings for principal relief the regulations may provide for evidence to be given by affidavit.[12]

Yet ancillary proceedings, which is where the contests arise, will not necessarily be dealt with by the same court that made the decree *nisi.* They may now be instituted up to twelve months after the decree[13] and are no longer required to be brought concurrently.

The tentative picture of the new 'Family Court' which emerges, however, is somewhat confused. Apparently the Superior Court whose work at first instance is to be the routine task of granting decrees of dissolution in undefended divorce proceedings will have attached to it the sophisticated apparatus that a family court should have. On the other hand the courts dealing with the really contentious aspects of family conflict seem likely to remain the state courts of summary jurisdiction. These courts, while they continue to operate in often overcrowded conditions, in antiquated buildings and in an environment not always conducive to the careful con-

[8] It is conceded that proceedings for annulment may involve substantial questions of law, but numerically they are likely to be even fewer under the Bill than they have been hitherto, and the present aspect of the argument does not really apply to them. The overwhelming majority of matrimonial causes are of course undefended divorces.

[9] The question would be made even simpler if the *indicia* upon which the cessation of the consortium may be assumed were spelled out explicitly, as has been suggested above.

[10] The petition is to be abolished as an anachronism, see Second Reading Speech, Family Law Bill 1973 (Cth).

[11] Cl. 74(4).

[12] Cl. 75.

[13] Cl. 22(3). This is a change from the 1973 Bill which would have permitted such later institution of proceedings under the regulations or with the leave of the court. The philosophy underlying the 1974 Bill is for finality. This is most strongly apparent from cl. 60 which enjoins courts to 'make such orders as will finally determine the financial relationships between the parties to the marriage and avoid further proceedings between them'.

sideration of important decisions affecting the intimate lives of citizens must remain as the Commonwealth finds them.[14] The Bill does nothing to ameliorate their conditions. It is not suggested that it could. The Commonwealth has no constitutional power to appoint officers to State courts.[15] But it could appoint officers of its own who could be available to these courts.[16] This has not been done. Neither can the Commonwealth restructure state courts and of course the Bill does not attempt to do so. But the Commonwealth could make financial grants to the States, and it could make them subject to conditions. In this way the Commonwealth could encourage the setting up of family courts on a coordinated basis at state level. It is pleasing to note that an opening exists in the Bill which could lead to such a development. This is to be found in the reference to the possibility that states might set up family courts at petty sessional level which would then be enabled to exercise the appropriate jurisdiction under the Bill.[17]

Anyone looking for a 'Family Court' will therefore be disappointed. Not only will the probable division of labour between the Superior Court and courts of summary jurisdiction be in inverse relationship to the intricacy of the respective subject matters with which they will be dealing, but important areas of family law will for constitutional reasons remain outside the scheme. Thus adoption remains a matter for state laws and State Supreme Courts, while affiliation orders and maintenance of illegitimate children, as well as their custody and the payment of incidental expenses to their mothers[18] continue to be matters for state summary courts, with appeals to state Supreme Courts.

Another matter that has not really been explored because it is not generally regarded as coming within family law in the narrow sense is Testators' Family Maintenance. While this may be said to be concerned primarily with arrangements as to property, it is at least arguable that the duty to maintain a surviving spouse or child who is otherwise unable to maintain himself is a matter incidental to marriage.[19] Whether such an argument is tenable is not really to the point in the present discussion, which is concerned simply with pointing out an area of relevance to family

[14] *Federated Sawmill, Timberyard and General Woodworker's Employes' Association v. Alexander* (1912) 15 C.L.R. 308, 313.

[15] *Le Mesurier v. Connor* (1929) 42 C.L.R. 481.

[16] *Bond v. George A. Bond and Co., Ltd* (1930) 44 C.L.R. 11.

[17] Cl. 4(1), definition of 'court of summary jurisdiction'. In at least one state, South Australia, a family court of this kind has been set up by 'administrative arrangement', and at least one other State (Tasmania) is believed to be giving serious consideration to the establishment of a Family Court.

[18] In Tasmania also maintenance in certain cases, see Maintenance Act 1967 (Tas.) s. 16.

[19] Some of the questions arising from this argument were discussed in *Attorney General (Vic.) v. Commonwealth*, (1962) 107 C.L.R. 529, see *e.g.* the judgment of Dixon C.J. The case is an obvious starting point in any discussion that seeks to probe the extent of Commonwealth power in family law.

relationships that remains within the jurisdiction of the states, thereby contributing to the continued fragmentation of family law in the widest sense.

There is yet another area of relevance which cannot be omitted here, and that is the juvenile court jurisdiction. Many of those who have considered the establishment of family courts[20] consider that a family court jurisdiction ought to include that of the juvenile courts which is normally exercised by magistrates. This view has been held particularly in the United States and Canada.[21] It is also relevant that the philosophy which would include the juvenile jurisdiction underlies the South Australian experiment that has been referred to, and may well become the basis upon which other States set up family courts of their own which would be recognized under the Bill.

A detailed discussion of the pros and cons of integrating the juvenile jurisdiction with matters of family law would be out of place here, but two reasons may be mentioned which tell against such an arrangement. One is that unlike other matters of family law which are primarily concerned, in so far as they are concerned with questions of law at all, with the legal rights, duties and relationships generally of members of a family *inter se,* and also, as members of a family, with person outside that relationship, the juvenile jurisdiction is or has been essentially a species of criminal jurisdiction. Admittedly the emphasis in recent years has been increasingly to regard its rehabilitative aspect as the most important part of its functions, and the care and protection aspect as more important than the correction of juvenile offenders, but there have been similar tendencies in the criminal courts also. But although the causes of delinquency may arise from, or be associated with other problems of maladjustment within the family they require different treatment. The knowledge gained in the treatment of one family problem may be useful, indeed essential in the treatment of another and where it is, it should be made available to the juvenile court and *vice versa,* but this does not of itself make the juvenile court into a family court, if by that we mean a court having as its primary concern the solution of problems arising between members of a family. The juvenile court is the expression of society's interest in the relationship between that society itself and its members,

[20] And of whom the present writer is not one.

[21] *Cf.* among most recent writings the report of the Law Reform Commission of Canada *The Family Court* (1974), and the impressive research paper entitled 'A Conceptual Analysis of Unified Family Courts' backing it which is the work of Professor Julien Payne. See also Judge H. A. Allard, 'Family Courts in Canada, in Mendes da Costa: *Studies in Canadian Family Law* (1972) I, 1. Reference should also be made to a paper entitled 'Family Causes and Family Courts' delivered by Mr Justice Toose at a Symposium of the Sydney Law Graduates Association in 1969. That paper also included Testators' Family Maintenance as within the scope of a family court.

while the preoccupation of the family court remains in the realm of private law and the relationships between private persons *inter se*.

The other argument against a mingling of the two jurisdictions is the 'image' that would be projected by such a family court. So much in matrimonial causes should properly be a matter of persuasion and counselling rather than paternalism and coercion, as the Attorney-General has wisely recognized in his decision against any compulsory marriage counselling.[22] It is equally well recognized that the greatest difficulty in the way of any legal intervention in marriage breakdown at a stage when something constructive can still be done to prevent that breakdown from becoming 'irretrievable' is the fact that the parties do not usually approach the law and its institutions until the point of no return has been reached. It is pleasing to note at this point, that the ineffectual rule 15 is to be done away with, under which a solicitor was required to certify that he had told his client who wanted a divorce of the marriage guidance facilities that were available. Instead, the Attorney-General proposes to 'provide for the furnishing to persons proposing to institute proceedings under this Act, and to their spouses, of documents (a) setting out the consequences of dissolution of marriage (including the consequences for the children of the marriage); and (b) specifying approved marriage counselling organizations available to assist the parties to a marriage in considering a reconciliation'.[23] This proposal, it is believed, was first put forward by the National Council of Marriage Guidance Organizations.

It becomes important then to 'sell' the idea of conciliation in the context of a family court, and to do so without any overtones of authoritarianism or brainwashing on the part of a 'Big Brother' seeking to dictate to its citizens how they should regulate their family relationships. Any suggestion or flavour of a family court as a court dealing with crime, juvenile delinquency and matters suggestive of squalor and the seamy side of life must be avoided like the plague.

What then should an Australian family court look like? Ideally it should be a single court in which all matters of family law properly speaking would be dealt with. In view of the increasing tendency away from contested proceedings and the simplification of the law in those that are contested, it seems unnecessary and indeed undesirable that the forum chosen for this jurisdiction should be a court at the level of a Supreme or Superior Court. On the other hand, the importance of decisions in family matters requires a court of higher standing than a court of summary jurisdiction. To say this is in no way to denigrate the very important and valuable contribution that has been made by these courts and the work of

[22] Second Reading Speech, Family Law Bill 1973 (Cth).
[23] Cl. 15.

magistrates staffing them. Often, they have displayed an ability to deal with problems that is in no way inferior to that of Supreme Courts. But the fact that they are usually concerned with work in other jurisdictions, of which petty offences form a significant and typical part, alone makes these courts an undesirable venue for family matters. The appropriate solution may lie in the creation of a specialized court at intermediate county or district court level.[24] Such courts could be established as state family courts and invested with all matters of family law within both federal and state power.

The Superior Court of Australia could be entrusted with appellate jurisdiction in family matters within federal power, leaving only appeals in state family matters to be dealt with by State Supreme Courts. This would ensure a uniformity of approach in so far as it is possible to achieve this. The Commonwealth, at the same time, could establish social welfare services to be available to state family courts in the exercise both of their federal and state jurisdictions. Alternatively they could be set up by the States under federal grants with conditions attached that would ensure their efficiency.[24a] These services could be co-ordinated by a special Family Welfare Division within the appropriate Commonwealth Department which, by acting throughout Australia would ensure a uniformity of standards and quality of these services. On the legal level, uniformity of approach could also be promoted by the setting up of conferences and further training of the family court judges of the several States.

The establishment of a system of state family courts administering predominantly federal law would have a two fold effect. It would firstly be a practical way of achieving a unified structure within the federal system, bringing the jurisdictions together by a community of interest inherent in a common subject matter. It would also be a way in which the States could be given a feeling of playing a meaningful part in the federal system, acting together under a Commonwealth law in a spirit of 'co-operative federalism'.

One other proposal should be noted. A beginning is made in the Bill with the process of consultation by a provision enabling the Attorney-General to set up a Family Law Advisory Committee. This Committee, which would consist of judges, magistrates, members of both federal and

[24] In England undefended divorces are handled by County Courts, while ancillary matters are dealt with by court registrars who are usually appointed from the solicitors' profession.

[24a] No attempt is made here to sort out the constitutional problems inherent in the former alternative, since I am concerned in this article to sketch the kind of services that should be provided, rather than explore in detail how they would operate. The nature of these problems is similar to those discussed by Sackville in: 'Social Welfare in Australia: The Constitutional Framework' (1973) 5 *Federal Law Review* 248 particularly at 263. Certainly this would be one of the matters to be gone into when the design of family courts in Australia comes to be considered.

state public services, marriage counselling organizations and other persons would be charged with advising the Attorney-General 'on the working of the Act and on other matters relating to family law'.[25] The Committee would be able to monitor the application of the Act by the courts and to study and report on developments in family law.

Ideally, the Government will not stop there. One of the most urgent needs is knowledge based on empirical research as to how family law is working out in fact. Whenever family courts are under discussion, a variety of views is put forward that may be variously based on guesswork or speculation, on *a priori* judgments or attitudes which are the outcome of traditional sectional or sectarian views, as well as being derived from sound experience. What is needed is an Institute of Family Studies, backed by the Australian Government, whose task it would be to embark on a programme of empirical research, to test the assumptions underlying the law and the proposals for its amendment and to disseminate the results of its findings. A great deal of research is being carried out overseas,[26] but so far comparatively little investigatory work of this kind has been done in Australia. The question of how the law is working out in fact has been of increasing interest in recent years, even to lawyers themselves, although it was not traditionally one of the matters with which they were trained to have much concern. One of the first questions to be investigated could be the one that has been raised, though not conclusively answered here, whether family courts should include a juvenile court jurisdiction. Research teams, drawn from several related disciplines should be set up. The Australian Government has shown commendable initiative and imagination in setting up an Institute of Criminology. The equally important subject of family law deserves no less.

The subject of federalism that was raised in the title of this article has not been discussed at length, but it underlies the notion of state family courts administering a federal family law. It can be seen as an essential part of such a system, and should not be left out of any future discussion, or of any projected redraft of the Bill.

[25] Cl. 91.

[26] *Cf.* the work of the Centre for Socio-Legal Studies at Wolfson College, Oxford under Professor O. R. McGregor, whose *Separated Spouses* (with L. Blom-Cooper and C. Gibson) shows the nature and methods of the kind of project that could be initiated here, and other projects supported by the Social Sciences Research Council.