

**“Access to Justice on the One  
Hand, Quality of Justice on  
the Other – Can this Balance  
Achieved by A Federal  
Magistracy”**

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Magistrates’ Court of Victoria**

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## ACCESS TO JUSTICE ON THE ONE HAND, QUALITY OF JUSTICE ON THE OTHER - CAN THIS BALANCE BE ACHIEVED BY A FEDERAL MAGISTRACY

### BACKGROUND

The complexity of the jurisdiction which the Courts exercise in Australia in relation to Family Law and to the protection and the care of children has always raised significant practical and constitutional difficulties. The establishment in 1975 of the Family Court of Australia as a single Federal Court went only part of the way towards simplifying a jurisdiction which had previously not been uniform throughout Australia, and which had been dealt with in the State and Territory Courts.

The enactment of the *Family Law Act*, 1975 and the establishment of the Family Court was dramatic and controversial as it changed the attitude of the Courts to divorce, for the first time introducing uniform, no fault divorce legislation with a sole ground of divorce, being separation for a period of twelve months based on an irretrievable breakdown of the marriage. Segments of the community were outraged that adultery, cruelty and desertion were no longer to be considered relevant factors in determining whether or not a dissolution of the marriage should be granted.

For a variety of reasons there were many aspects of the jurisdiction which could not be included in the *Family Law Act*, and thus did not come within the jurisdiction of the Family Court. Some of these reasons related to the constitutional limits as to what jurisdiction could be assumed by the new Federal Family Court. As a consequence the Family Court at this time could only hear proceedings which arose out of the breakdown of a marriage. A marriage certificate was required to be filed before any proceedings could be commenced. This meant that all proceedings which arose out of a de facto relationship, or a homosexual or lesbian relationship were excluded from the jurisdiction, and the State Courts retained jurisdiction.

The somewhat anomalous situation arose that in a custody or access dispute, as it was then known, if the children were born in a marriage the matter would be heard

in the Family Court, and proceedings relating to siblings of these children if born within a de facto relationship, could only be heard in the State Courts.

By way of a referral of powers by the States to the Commonwealth in the *Family Law Amendment Act 1987*, most family law matters relating to children, whether born in or out of marriage, could now be heard in the Family Court. This, however, only partially resolved what still remains as a problem.

The State Supreme Courts while anxious to transfer power to a specialist Family Court in these matters, were still left with jurisdiction in De Facto Property matters. This is an issue which still exists. There is also still jurisdiction in State and Territory Magistrates' Courts in De Facto Property matters although it is limited to a fixed amount.

Adoption of children was another jurisdiction which remained with the State Courts. In Victoria, an application for an adoption must be issued in either the County Court or the Supreme Court.

In 1975 when the *Family Law Act* was enacted, the State and Territory Magistrates' Courts were conferred with federal, summary jurisdiction under the *Family Law Act*. At this time, prior to the establishment of the Child Support Agency and the enactment of the Child Support legislation, a large number of maintenance applications were being issued in the Magistrates' Court. There were also proof of paternity applications, known as affiliation proceedings. Together with some interim custody and access applications, this formed a substantial part of the family law work in the Magistrates' Court. Historically, it was not particularly popular with magistrates, it was not particularly complex and it was generally not given any priority over what were considered to be the more serious criminal and civil proceedings before the court. It was not unusual for a family law application to be dealt with quite late in the day if indeed it was heard at all. Many of the cases listed would be adjourned if they did not resolve.

The Children's Court also falls within the structure and jurisdiction of the Magistrates' Court. In Victoria it presently obtains its jurisdiction under the *Children and Young Persons Act 1989* in its Family Division as part of its State

welfare jurisdiction. The Children's Court also has a Criminal Division which is theoretically unrelated in the sense that the legislation requires that the separate divisions of the Court operate quite independently. However, the difficulty which the court faces is that often the clientele in each division of the court is the same.

Once a child is apprehended under State welfare legislation regardless of whether or not there are currently proceedings between the parents in the Family Court, for both historical and constitutional reasons, the welfare jurisdiction between the State and the child or its parents prevails, and the State Children's Court must complete its hearing and make a determination before any further proceedings can be heard in the Family Court.

The Children's Court is a tragic and very busy court often with grossly inadequate facilities. There are usually welfare workers, court staff, legal representatives, Salvation Army workers, psychiatrists and psychologists from the Children's Court Clinic, and of course magistrates all doing their utmost to find solutions to what are unresolvable problems in a society such as we all live today. The removal of a child from the care of its parents into the care of the State welfare authorities is a decision which carries a heavy burden on any judicial decision maker. Some of these children are returned to a parent or another family member and some are not. Some are barely days old, and some are well into their teens. Some are at serious risk of violence and the Courts have experienced some serious consequences of such situations in recent times resulting in the death of such children.

## JURISDICTION OF STATE AND TERRITORY MAGISTRATES

Many of my comments will refer to the situation in Victoria, and although there are similarities with other States, there are naturally certain differences between the States.

The Magistrates' Court is a Court with a wide and extensive jurisdiction. It is now a different Court from the one which was conferred with summary family law jurisdiction in 1975. It is a Court which is composed of professional lawyers, many of whom have been competent and experienced barristers and solicitors over a

period of years. Many of these former practitioners have developed expertise in a specialist area, including family law. Some of the magistrates have been members of another court or tribunal before their appointment to the Magistrates' Court.

The Magistrates' Court deals with approximately 90% of all criminal proceedings in Victoria, including both summary and indictable matters. The majority of indictable matters are listed in the Magistrates' Court as a committal hearing. At committal the magistrate will determine whether or not there is sufficient evidence to commit the accused to stand trial. It also has a wide ranging civil jurisdiction which has recently been increased. This includes commercial litigation, workcover, applications by victims of crime, inquests by a Coroner, and of course family law, family violence and the criminal and child welfare jurisdiction in the Children's Court.

There is a modern central court complex at Melbourne which has 30 Courts, most of which sit each day. It has a sophisticated security system, there are cells, and custody courts where a prisoner can be retained in the dock in custody. There are remote witness facilities in some of the Courts, facilities for giving video evidence and a number of private interview rooms. There are facilities for conducting a transcript of the evidence, and all of the Courts are computerised. There are Magistrates' Courts throughout the State, some of which have equivalent facilities, most of which do not.

At the Melbourne Magistrates' Court there is a highly competent, experienced Family Law Registrar and there is an allocated Court to family law and family violence with a magistrate listed each day. The magistrate may, or may not have any particular interest or expertise in family law.

## CURRENT SITUATION

Magistrates in Victoria do not specialise despite the increased breadth and depth of the jurisdiction. Each magistrate must be equipped to enter any Court throughout the State at any time and be prepared to make an informed and carefully reasoned

decision about any case which is presented. It may be under State legislation or it may be under Commonwealth legislation. It may be a civil matter or it may be a criminal matter. It may be a family law or a family violence matter.

Although persons charged with serious criminal offences are usually represented, the majority of family law litigants appear in the Court unrepresented. If there is no practitioner it will often be for the magistrate to determine the relevant legislation and authorities upon which a decision should be based. There may be a copy of the *Family Law Act* and the *Crimes (Family Violence) Act* on the bench. It would be most unlikely that there would be a duty lawyer available to assist in family law matters. There may be an interpreter who has been provided by the Court if it is required. If one or both of the parties require some emotional support there will possibly be a Court Network officer available to assist. These people are unqualified support persons who are volunteers and who are rostered to the Court each day to provide assistance to the parties.

The magistrate will usually sit in the Court with a Court clerk who will assist in calling and swearing in witnesses and preparing documentation. They will also assist in determining the priority in which cases should be called in terms of length of hearing and complexity. They do not usually have particular expertise in the jurisdiction.

This system of course equips magistrates to be efficient decision makers and resilient in their approach to any problem. Sometimes mediation on the bench seems to be the only sensible alternative.

## DEFICIENCIES WITH THE PRESENT SYSTEM

1. As has already been indicated, magistrates in Victoria do not specialise, although there are some magistrates who have extensive expertise in family law. It does not necessarily mean that that is the work that they will perform.

2. Practitioners are aware that if they issue family law proceedings in the Magistrates' Court a general magistrate will hear the case who may or may not be familiar with family law.
3. Magistrates do not receive any particular training in family law or family violence, or matters relating to family relationships, although seminars are conducted from time to time in a variety of areas.
4. As there are no specialist family law magistrates there is no opportunity for liaison between magistrates and the Family Court. There are no joint education sessions conducted and magistrates are generally unaware of what is occurring in the Family Court. The converse is also true, that the Family Court is unaware of what is occurring in the Magistrates' Court.
5. There is no counselling or mediation available in the Magistrates' Court and it is extremely difficult for any arrangements to be made for any form of urgent counselling or mediation. This becomes a serious problem, particularly with the increase in family violence complaints coming before the Court.
6. There is no protocol for a magistrate encountering a difficult family law situation where an urgent resolution may be required. This can occur in any Court, but can be particularly difficult for a magistrate sitting in a remote region.
7. There is no handbook specifically designed for the use of State and Territory Magistrates in family law.
8. With the reduction of legal aid, the majority of family law cases are conducted by litigants in person.
9. In a significant number of cases interpreters are required. On occasions there is only one interpreter for both parties. On other occasions a child or other family member will be brought along to the Court to interpret. This

creates an almost impossible task in making a decision which will most likely have far-reaching consequences.

10. Whilst some of the facilities in Magistrates' Court are of a high standard, many of the courts lack appropriate facilities to ensure privacy and security. This is of particular concern in view of the large numbers of cases coming before Magistrates' Courts involving allegations of domestic violence and child abuse.

## STATISTICS

In Victoria statistics of all hearings under the *Family Law Act*, the *Crimes (Family Violence) Act* and in the Children's Court are collected on an annual basis and are monitored by the Casflow Analysis Section Courts, Tribunals and Registries Department of Justice. They are then produced in a bound volume annually and are widely distributed. They provide a valuable insight into the development of the activities of the court.

The Magistrates' Court in Victoria in the exercise of its summary jurisdiction in family law demonstrates a gradual but significant reduction in the total number of dispositions under the *Family Law Act*.

Magistrates' Court, Victoria - Total dispositions under the *Family Law Act* between 1992-1997

Year	Total dispositions for all hearing
1992/93	5,753
1993/94	5,301
1994/95	4,470
1995/96	3,975
1996/97	3,598



This may be contrasted with the significant increase in complaints made under the *Crimes (Family Violence) Act 1987* which is a State Act and under which the Magistrates' Court has exclusive jurisdiction. A comparison between 1991 and 1997 demonstrates this development.

Magistrates' Court, Victoria  
Crimes Family Violence Application and Orders  
made between 1991/1997

Year	Completed Applications	Orders made
1991/92	7,626	4,512
1992/93	9,090	5,335
1993/94	10,534	6,188
1994/95	14,205	8,652
1995/96	17,055	10,891
1996/97	18,662	11,402

The orders which are made under this legislation are known in Victoria as Intervention orders, although in other States they are known as Apprehended Violence orders or Protection orders. Although the purpose of the legislation in each State may be the same, the legislation is not uniform.

The legislation in Victoria has expanded with amendments to the Act in 1994 which extended the definition of "family member" and added the offence of stalking.

A noticeable increase in interim intervention orders and warrants to arrest has occurred in the After Hours Service which is provided by the Court. This service provides a Magistrate for urgent matters between 5:00 p.m. and 9:00 a.m. on weekdays and at all times during weekends.

In 1993/94 the total number of interim intervention orders issued by the After Hours service was 762, whereas in the 1996/97 period the figure was 1,468. This represents an increase of 93%. Of the 1,468 orders made, 1399 were urgent intervention orders and 69 warrants to arrest were issued.

It is evident that issues of domestic violence have become highly relevant in the Magistrates' Court and that the number of complaints being made is increasing at a significant pace.

Some of these complaints are issued in the Magistrates' Court alongside family law proceedings in the Family Court which may be dealt with at the same time. This is reflected in the amendments under the *Family Law Reform Act 1996* in Division II relating to family violence, whereby a Magistrate when making a family violence order, may vary, discharge or suspend orders made for contact in the Family Court.

The majority of the complaints made under the *Crimes (Family Violence) Act* are urgent and a speedy resolution is required. The Magistrates' Court is accessible, it will provide an urgent resolution and it will most often be comparatively efficient.

Security can usually be provided and interpreters are available when required. There is, however, no facility for urgent counselling and there is usually no legal representation for the parties. The result is that this vast number of potentially violent, urgent cases is now being heard in the Magistrates' Court with little support. Many of the complaints are heard by the Court on an interim basis *ex parte*, and after the defendant has been served with a copy of the order the matter will return to the Court. Sometimes the complainant seeks to have the defendant removed from the joint residence on an *ex parte* application, but based on serious allegations of violence. Sometimes police will attend with the applicant which can be of great assistance to the Court.

If the matter is contested and the parties are not represented the Magistrate is confronted with a difficult task. If only one of the parties is represented it can on occasions be even more difficult.

#### ESTABLISHMENT OF A FEDERAL MAGISTRACY

1. The Family Law Council prepared a detailed evaluation in a Report on magistrates in Family Law, in the exercise of summary jurisdiction to improve access to family law in July, 1995. In its Report it referred to a

number of deficiencies in the current system of shared jurisdiction between the Family Court and the State Courts. It stated as a principle that:

*"The question raised by this inquiry is how to achieve a balance between quick and inexpensive access to justice on the one hand and quality of justice on the other. There is no point in having a superb system of justice which is fair in every way if it is inaccessible to all but the very rich. Equally there is no point in a readily accessible system of justice which provides justice that is so rough as to constitute no justice at all."*

The Report makes a number of recommendations. It states that its recommendations are "centred on the need to improve the quality of service provided within the family law jurisdiction while ensuring that people in all areas of Australia continue to have ready access to those services".

It proposes that a Family Court magistracy be established initially in major metropolitan areas and that as a longer term objective the Family Court should assume exclusive family law jurisdiction in all but the most remote areas.

As an interim measure the facilities provided in State and Territory Magistrates' Courts should be enhanced and the Council recommends that State magistrates interested in specialising in family law matters should be provided with specialist training and support and have specified responsibilities for hearing family law matters in particular regions.

The Family Law Council made some twenty-three recommendation in its Report.

2. The Joint Select Committee on certain family law issues in its Report on Funding and Administration of the Family Court of Australia in November, 1995 also considered the role of Courts of summary jurisdiction. It adopted the view that more use of the Courts of summary jurisdiction could ease the burden on the Family Court, and saw the proper relationship between the Courts as being complementary. It considers that there is a need for the 'sharing' of jurisdiction, particularly in outer metropolitan areas. It

recommends that there be a comprehensive training program for a limited number of appropriate State magistrates who would specialise in family law, particularly in outer suburban, provincial and rural areas.

It also recommends direct access to the Family Court of Australia for State magistrates for advice and research assistance, and that there be access to the Court Counselling service, preferably in the local area.

3. The Attorney-General's Department - Discussion Paper in January, 1997 also addressed the questions raised for a Federal Magistracy and considered whether it was time for a Federal Magistracy. It considered the expansion of jurisdiction in federal civil and family law and assessed the need for an additional structure to support both the Federal Court and to the Family Court. It considers a number of options for the establishment of a Federal Magistracy, and stated that "the proposal for a federal magistracy ties in with the Government's ongoing commitment to the improvement of all aspects of the family law system".
4. The Family Law Council submitted a response to the Attorney-General's Department Discussion paper in February, 1997.

In its response it referred to the earlier report *Magistrates in Family Law* in which, as has already been stated, it recommended the creation of a system of federal magistrates in family law. It noted that it was particularly attracted to the Western Australian model of the Family Court. The council states that it has reconsidered its views in light of the Attorney-General's Department Discussion Paper and that it sees no reason to change the conclusion previously reached that there is a need for a system of federal magistrates in family law. In considering the options for a Federal Magistracy it makes a number of general observations:

1. Any system for a Federal Magistracy should fully acknowledge that there is a need for the retention of the services of the State and Territory Magistrates' Courts, particularly in rural and remote areas

where it will generally not be cost effective for the Federal Magistracy to replace the State and Territory Courts.

2. The Family Court has, for some time provided its judges with high quality seminars in such matters as cultural and gender awareness. It would be essential to provide Federal Magistrates in the family law area with similar 'training'.
3. The Family Court has introduced simplified procedures in recent years. These procedures, if adopted in a Federal Magistracy, would need to be explained to those using the system.
4. It may be possible to achieve an atmosphere in which the participants may be a little more relaxed than they might be in a superior court and self-representation may be more feasible in a Federal Magistrates' Court.
5. In determining the structure of the Federal Magistracy a high degree of flexibility is desirable.
6. The Family Law Council considers that specialist Family Law Magistrates may be better than multi-skilled Magistrates, and that any new service should have full access to counselling, advisory and Primary Dispute Resolution Services comparable to those available in the Family Court.
7. The deficiencies in the present system relating to the lack of statistics could best be overcome if an integrated Federal Magistracy Service could be devised, with the State merely supplementing that service in rural and remote areas.

The Family Law Council supports a position where family law magistrates become part of the Family Court and thereby have access to the full facilities of the Court. Workload and priorities would then

be determined by the Court and the magistrates would share the court's vision and objectives.

## 5. CHILD CONTACT ORDERS

### Enforcement and Penalties

A Report dealing with complaints about problems with the enforcement of contact was prepared by the Family Law Council and presented to the Attorney-General in June, 1998. After substantial consultation with relevant organisations and examination of the position in overseas countries, particularly the U.K. and New Zealand it made a number of recommendations.

In its Report the Council stated that:

*"Complaints about problems with contact enforcement have been consistently voiced over a lengthy period. Members of Parliament are regularly receiving complaints about these matters and there have been a number of public inquiries in which problems were clearly made known. In Council's view the problem is real, it is persistent and it need to be addressed."*

It recommended that a number of changes be made to the system for determining contact enforcement applications and that in the long term jurisdiction to hear such applications be transferred to Federal and State Magistrates with a right of appeal to the Family Court only on a question of law. Assistance would be made available to Federal and State Magistrates by way of specialised training and resources.

## CONCLUSION

On any view of the present situation it is apparent that the community is entitled to some changes to the current system.

The nature of families and their breakdown has altered considerably in the last twenty years. Family violence and child abuse are now frequent issues before the Courts, both the Family Court and the Magistrates' Court.

The recommendations made by the Family Law Council to establish a Federal Magistrates' Court and with access to all of the training and support services available are worthy of consideration. Naturally the process would be a gradual one, and the further recommendation that State and Territory Magistrates retain the jurisdiction in rural and remote areas is realistic and practical, provided that proper support services and training are available.

If changes are to be implemented in the family law jurisdiction, reflecting an increased emphasis on Primary Dispute Resolution, this may well be an opportune time to begin the process of establishing a Federal Magistracy.

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