



FEDERAL MAGISTRATES COURT OF AUSTRALIA

Tuesday 8 November 2011

Chief Federal Magistrate Pascoe AO CVO

Legalwise Family Law Conference Vietnam – Opening Address

1. Introduction

Thankyou Maryanne [Ofner], and good afternoon to special guests and delegates.

It is very exciting to be again in Vietnam. I first came here ten years ago, and then in 2009, and change continues at a rapid pace.

It is hard to believe that in the late 1960s, I was studying Asian languages and culture along with Law at the ANU, and in my spare time enjoying the excitement of “demos” against Australia’s involvement in the Vietnam War.

It was considered unusual for an undergraduate to enrol in what was then called ‘Oriental Studies’, and I was constantly reminded by my law lecturers that the ‘exotic’ topics I was studying in another faculty would never be of practical use. They were wrong.

My studies gave me a lifelong love of Asia and I have spent a considerable amount of time in the region in a number of capacities, particularly in the field of human rights and human trafficking. My particular interest is in the movement of pregnant women across national boundaries, in order to traffick the newly-born child.

Not just in the 1960s, but also in the mid-1970s, a conference of this nature in Hanoi would have been deemed impossible.

To illustrate how different Australia was, let me take you on a brief journey back in time to 1974.

In 1974, Australians were, for the most part, familiar with Vietnam only through news footage of the Vietnam War, and through stories relayed by some of the 60,000 Australian personnel who took part in the war¹. Vietnam was not a place to which Australians came for holidays or to attend conferences.

In 1974, there were less than 2,000 Vietnamese migrants living in Australia; and Vietnam's influence had yet to register on the cultural or culinary radar of most Australians.

1974 was also an important turning point in another regard. Most of you here will recognise that it was the year preceding passage of the Australian *Family Law Act*, under which most of us toil.

Before the *Family Law Act*, a divorce would only be granted on one of 14 mainly fault-based grounds and a number of indiscretions – such as adultery, enticement and criminal conversation – could still, in theory, attract damages.

2. 1975 to today: Demographic change.

All of this changed the following year.

After the fall of Saigon in April 1975, the number of Vietnamese-Australians increased dramatically. Starting in 1975 and up to the late 1980s, Australia resettled over 90,000 Vietnamese refugees under the international *Convention Relating to the Status of Refugees*.

From 1990 to the present, Vietnamese people have continued to resettle in Australia, but now – happily – they come here as migrants, not refugees.

¹ *The Vietnam War: Overview*, Australian Government Department of Veterans' Affairs, <<http://vietnam-war.commemoration.gov.au/vietnam-war/index.php>> at 1 September 2011

As of the 2006 census there were over 170,000 Australians with Vietnamese ancestry; and Vietnamese is now the sixth most widely spoken language in the country.²

But a better sign of the positive effect that migration from Vietnam has had on Australia are the countless Vietnamese-Australians who have made an impact across a range of fields: from Luke Nyugen (chef and owner of red lantern) to Khoa Do (Young Australian of the year, 2005) to Nam Le (Author and former lawyer).

The cultural exchange has not just been one way. More Australians than ever are travelling to Vietnam to holiday and volunteer, and many Australians now live and work in Vietnam.³ Melbourne's RMIT University has a campus in Ho Chi Minh City, which caters to Vietnamese students.

As a result, the ties between our two countries are growing stronger, making events like this conference both possible and desirable.

3. 1975 to today: the Family Law System

I have mentioned another event from 1975 which has relevance to this conference: the passage of the *Family Law Act*.

Before this Act, there was no overarching system in Australia to manage family disputes and protect the best interests of children. Litigation with regard to parenting after separation and property division was resolved in State Supreme Courts, under a combination of state laws and the Commonwealth *Matrimonial Causes Act 1959*. Confusion reigned, and there is evidence that many people, particularly women, stayed in unhappy and unsafe marriages due to the “intrusiveness, cost and embarrassment” associated with fault-based divorce proceedings.⁴

² *Australians overall claim more than 250 ancestries, speak 400 languages at home: Census*, Australian Bureau of Statistics, Media Fact Sheet, June 27 2007.

³ *Overseas Arrivals and Departures, Australia, Jul 2011*, Australian Bureau of Statistics, (2011), Released 02 September 2011.

⁴ The Hon. A. Nicholson AO RFD and Margaret Harrison, ‘Family Law and the Family Court of

The background to the 1975 *Family Law Act*, – including the protracted debate and scrutiny to which the bill was subject – is something I’m sure many of you are familiar with, although some of you look too young to remember. In any event, I won’t go over that ground again here.

I will say, however, that despite the claims of some detractors, the Family Law System in Australia has many benefits, which are worth emphasising.

Firstly, there are distinct advantages to delivering services through a unified national system, rather than through a plethora of state-based agencies. In this regard, I note the success of the Federal Magistrate Court’s Dandenong Pilot Project, which uses a ‘triage’ approach to link litigants with community organisations and service providers, starting at the first Court event. This approach helps separating families to obtain the legal and non-legal advice and support they need at a particularly challenging time in their lives.

Secondly, an important way in which the Family Law Courts deals with the unique workload is through a holistic approach to dispute resolution. Parties are referred to court-based conciliation and mediation, as well as external bodies where that is deemed appropriate.

Thirdly, the discretion accorded to Judges under the Act allows for issues of religious and cultural diversity to be more deftly negotiated. There is also specific recognition in the Act of the need for a child’s cultural heritage to be taken into account in the determining the child’s “best interests”. This is particularly important given Australia’s position as one of the most multicultural countries in the world. In recognition of this, the Federal Magistrates Court and the Family Court have each endeavoured to make their Court systems accessible to people from diverse cultural, religious and linguistic communities – however there is, of course, always more work to be done.

Another striking aspect of the family law system in Australia is how it has been adapted and changed over time. Since it was introduced, the *Family Law Act* has been amended several times, in line with social science research and changing social norms, and also for constitutional reasons.

A number of these amendments to the *Family Law Act* reflect shifts that have occurred in Australian society, including changing attitudes to ‘custody’ and ‘guardianship’⁵, the adoption of compulsory superannuation, and the trend towards de facto partnerships. There have also been amendments encouraging parties to attend mediation and resolve matters out-of-court, in order to minimise the stressful effect of court proceedings on parties and their children.

More recently, concern about family violence has led to the *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011*. The Family Court and Federal Magistrates Court have also reacted to these concerns through the publication of a joint ‘Family Violence Best Practice Principles’ document.

This remains an area of significant focus and concern, especially in light of the clear evidence of the adverse effects of family violence on children.

4. *Vietnam’s Family Law System – receptiveness to change*

If I might, as an aside, draw on an example from our host country, I think it is worth noting that the family law system in Vietnam, while different to the Australian system in many respects, has shown a similar capacity to change and adapt.

The very first piece of Vietnamese Family Law was the *Marriage and Family Law* of 1959. Steven K. Wisensale, an expert on Family Law in Vietnam, has written that one of the most striking aspects of this law was the “emphasis... placed on gender equity”. The law affirmed the basic rights of women and children, required equality

⁵ Explanatory Memorandum, Family Law Amendment Bill 1983 (Cth)

between sexes at home and in society, and abolished polygamy and arranged marriages.

In 1986, the National Assembly in Vietnam passed an updated *Marriage and Family Law*. This law clarified the obligations and responsibilities of married partners, identified specific responsibilities of parenthood and reformed existing divorce laws, without abolishing the ‘fault’ rule.⁶

It has been said that the 1986 law was “a direct response to... the major economic reforms [known as *doi moi*] that were converting the nation from state-sponsored socialism to free-market capitalism” at the time.⁷

Since then, a number of family law acts and decrees have been passed in Vietnam:

- In 1994, a *Special Decree on Marriage and the Family and concern over outside influences* was issued by the Vietnamese Ministry of Justice in response to concern about the growing number of marriages between Vietnamese nationals and foreigners.⁸
- In 2000, the revised *Marriage and Family Law* addressed the category of couples we would call “*de facto*”, and also emphasised the equal treatment of children born in and out of wedlock.
- Further laws, adopted in 2004⁹, 2006¹⁰ and 2007¹¹ have dealt with issues of children’s rights, gender equality and prevention of domestic violence respectively.

All of these changes to Vietnam’s family law system have been guided by Article 64 of the Constitution of the Republic of Vietnam, written in 1946, which states that “the family is the cell of society.”

⁶ *Marriage and Family Law 1986* (Vietnam)

⁷ Wisensale, S, ‘Marriage and Family Law in a Changing Vietnam (1999) 20, *Journal of Family Issues*, 610

⁸ *Special Decree on Marriage and the Family and concern over outside influences.1994* (Vietnam)

⁹ *Law on Child Protection, Care and Education 2004* (Vietnam) Law No. 25/2004/QH11

¹⁰ *The Law on Gender Equity 2006* (Vietnam) Law No. 73/2006/QH11

¹¹ *Law on Domestic Violence Prevention and Control 2007* (Vietnam) Law No. 02/2007/QH12

It is interesting to note the similarities between this definition of the family and the wording of s.43(1)(b) of the Australian *Family Law Act*, which describes family as “*the natural and fundamental group unit of society*”.

5. *Concluding remarks.*

History tells us that societies do not remain static. Change is inevitable, and there is no going back to the past – no matter how attractive that might appear. In Physics, they talk about “the arrow of time” which always moves forward.

I can think of no other area of law where changing societies and changes in social values, demographics and structures are more important than family law. Flexibility, discretion, openness to diversity and change is critical. Family law is, more than any other area of law, about people and especially about children. All of you can and do make a positive difference.

I congratulate the organisers of this conference for compiling such a diverse and interesting program. The focus on cultural diversity within Family Law is particularly important – not just because of the location we currently find ourselves in, but because of the constantly changing profile both of society and of Family Law litigants.

Before I finish, I should say that the Federal Magistrates Court, which I have the great honour of leading, is at the forefront of many of the areas of law I have touched on today. The Court deals with most refugee and migration cases, and some 85% of all family law matters, many of which involve litigants from diverse cultural backgrounds. Issues of language, heritage and values are daily fare in the Court. In short, our work represents the dynamic and multi-cultural society which is Australia today.

I wish all of you a successful and stimulating conference, and I look forward to participating in many of the discussions and presentations over the next three days.