

orders under the Family Law Act. New federal legislation (Family Law Amendment Act 1991) will ensure that step-parent adoption which extinguishes custody, guardianship or access orders will not take place without the leave of the court. Future further amendments may be introduced by the federal Government to make proceedings for this leave the exclusive jurisdiction of the Family Court.

### **Transferring guardianship or custody to non-parents**

Earlier amendments to the Family Law Act allowed the registration of 'child agreements' which had the force of a court order, and meant that custody or guardianship of a child could be transferred without any court scrutiny. Consent orders could also have this result. The new legislation is designed to plug this

gap and will ensure that such transfers of responsibility will not be able to take place unless a court has determined that it is in the interests of the child.

### **Inter-country adoption**

The federal Attorney General's Department is co-ordinating Australian input to a draft UN convention on the Adoption of Children Coming from Abroad. The Hague Conference on Private International Law in October 1988 undertook to become involved in this because there are a number of problems which are not sufficiently dealt with by existing international instruments including

- the need to establish legally binding standard which should be observed in connection with inter-country adoption

- the need for a system of supervision to ensure that these standards are observed
- the need to establish channels of communications between authorities in country of origin of children and of those where the children live after adoption and
- a need for co-operation between the countries of origin and of destination.

The view of the federal Departments of Foreign Affairs and Trade, Immigration, Local Government and Ethnic Affairs, and of State and Territory welfare and Attorneys-General Departments, are being co-ordinated in preparation for the Special Commission of the Hague Conference in April or May 1991 on this issue. □

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## **Parliamentary inquiry into family law**

*by Robin McKenzie*

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The federal Government has agreed to an Opposition request for a joint parliamentary inquiry into family law.

The terms of reference for the joint select Committee cover:

- the role, funding, effectiveness and availability of:

- Family Court Counselling service;
- approved organisations providing marriage counselling and family mediation services;
- the proper resolution of custody, guardianship, welfare and access disputes;

- the proper resolution of family law property disputes including the question whether the Family Law Act should be extended to cover property disputes of those in defacto relationships;
- the effective enforcement of rights and duties under the Family Law Act;

- the exercise of discretion by the courts, including the question whether the discretion in custody and property disputes should be better structured;
- the adversarial nature of proceedings under the Family Law Act and their associated legal costs, including the question whether greater use of arbitration, mediation or other forms of alternative dispute resolution should be required or encouraged;
- the prohibition in the Family Law Act on the publication of information about cases which identify parties, witnesses or others associated with the case;
- the retiring age for judges of the Family Court.

The terms of reference, moved by Senator David Brownhill (NP, NSW) in line with Opposition policy for the last election which considered that three aspects of the system needed looking at. These were the fact that many access and custody applications were needlessly protracted and expensive; that the enforcement of deliberately flouted court orders was frequently ineffective and became an unsustainable financial burden for the person seeking enforcement; and the fact that property settlements could be delayed for up to three years.

### Concerns of the Democrats

The Democrats have agreed to support the inquiry after a three month delay while they discussed with the Attorney General what action the government would take to deal with the concerns the inquiry might address. In his speech to the Senate, Senator Spindler (Dem, Vic) said that Democrat senators had been given positive responses from the Attorney on the question of increased

funding for mediation centres and marriage counselling, on the question of funding (in the short term) for the Network system used at the Melbourne Family Court and the maintenance in real terms of funding for the Institute of Family Studies and the Family Law Council. He also said that they had received government assurance that they would move as quickly as possible to resolve difficulties over superannuation and other matters which were affecting the implementation of the ALRC's proposals on matrimonial property.

### Democrat dissatisfaction

However, the Senator said that the Democrats were not satisfied with the response on a number of other matters which the party considered needed attention. These included the need for a duty lawyer at five priority registries, the need for more judges, independent representation of children, the question of supervised access, the video taping of counselling interviews and the reduction in the cost of transcripts of court proceedings from \$7.50 a page to \$2.00 a page.

### Previous inquiries

Many of the areas covered by the terms of reference have already been the subject of research or inquiry, for example,

- Joint Select Committee, Federal Parliamentary into the Family Law Act, 1978-1980
- Australian Law Reform Commission, *Contempt*, 1987 (ALRC 35)
- Family Law Council, *Administration of Family Law in Australia*, 1984-1985
- Family Court of Australia, *Review of the Family Court* 1990

- Australian Law Reform Commission, *Multiculturalism and the Law*, 1989-1991.

### Areas of family law already considered

In addition to these the Family Law Council (FLC) and the Institute of Family Studies (AIFS), which were set up specifically to monitor the operation of the family law and its effect on families, have published reports on specific aspects of family law including

- *Costs of Children* (IFS 1984)
- *Creating Children* (on issues in reproductive technology)
- *Settling Up: Property and Income Distribution on Divorce* (AIFS 1986)
- *Cinderella Revisited* (rights and responsibilities of step-families (AIFS 1986)
- *Access: Some Options for Reform* (FLC 1987)
- *Child Sexual Abuse* (FLC 1988)
- *Don't Feel the World is Caving In: Adolescents in Divorcing Families* (AIFS 1988)
- *Arbitration in Family Law* (FLC 1988)
- *Representation of Children in Family Law Proceedings* (FLC 1989)
- *Spousal Maintenance* (FLC 1989)
- *Who Pays for the Children: a First Look at the New Child Support Scheme* (AIFS 1990)
- *Parents and Children After Marriage Breakdown* (AIFS 1989)
- *Marriage Counselling in Australia* (IFS 1989)

The Family Law Council is also soon to release a discussion paper on *Patterns of Parenting After Separation* which considers ways in which the law might be changed to encourage people to take a more flexible and positive ap-

proach to making decisions about parental responsibility after separation.

### **Unimplemented recommendations**

The terms of reference allow the Committee to examine these earlier inquiries and reports. Although these inquiries and reports have resulted in some major amend

ments to the Family Law Act, there are a number of significant recommendations which have not yet been implemented. As Senator Spindler pointed out, the recommendations of the ALRC's inquiry into matrimonial property (ALRC 46) fall into this category as do the recommendations of the FLC and the 1980 Joint Select Committee concerning appropriate

levels of funding for the Family Court, including its counselling service.

### **Recent amendments**

Members and senators should also consider whether recent amendments to the Family Law Act in the area of contempt and child abuse have had sufficient time in operation for further inquiries to be worthwhile. □

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## **Federal Court representative actions**

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Many people denied access to a legal remedy because it is too costly will be able to get the compensation to which they are legally entitled. Acting on recommendations made by the ALRC, the federal Government is to build on its company law reforms with new legislation to give groups with a common legal claim better and cheaper access to the Federal Court. The changes will greatly assist groups ranging from small shareholders and investors to people pursuing medical or consumer claims. The reforms could benefit shareholders who had suffered loss as a result of a misleading prospectus or stock market manipulation.

The new procedure has been developed following the report of the Australian Law Reform Commission *Grouped Proceedings in the Federal Court* (ALRC 46) which was tabled in Federal Parliament in December 1988.

The legislation will allow people to assert existing rights collectively, effectively and more cheaply.

If such a measure was already in operation, the present actions by haemophiliacs and others who have medically-acquired AIDS could have proceeded with one action representing the general group of AIDS sufferers. Similarly, those individual investors affected by the Estate Mortgage collapse might well have been able to pursue their claims more cheaply and efficiently as a group using this type of procedure.

Announcing the new legislation Senator Tate said the improvements to representative action procedure available in the Federal Court will not be retrospective, and will apply only in the Federal Court where a federal matter is involved.

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