

## A Question of Fault: A Short History of Australian Divorce Law Since 1959

### Background

In late 2003, Mr Barry Maley, a social commentator from the Centre for Independent Studies, published a book suggesting that Australian divorce law needs reform.

The suggestion is not novel. In this instance, Maley asserts that social instability (in the forms of juvenile delinquency, neglect and single parenthood etc.) is due to attitudes to marriage and the ease of obtaining a divorce. Maley suggests that if people *married*, rather than simply cohabited, social instability would be reduced. Likewise, but more importantly, he says that social instability would be reduced if married people *stayed married*, raising their children together.

Maley argues that divorce law should be reformed to require separated couples either to agree to the divorce or prove marital fault. He argues that people have organised their married lives to protect themselves against divorce (e.g. women have fewer children than they would ideally like, and work outside the home to maintain their employment skills).

Maley also argues that if spouses were required to prove marital fault to obtain a divorce, they would behave differently (i.e. more responsibly) during the marriage, because defective conduct during the marriage may entitle the other spouse to claim a greater share of matrimonial property following the breakdown of the relationship.<sup>1</sup>

While some may see merit in these arguments, other commentators argue that it is better for children to

live in happy, sole-parent households than in fractured, two-parent households.<sup>2</sup> Further, some argue that many cohabiting couples make a conscious choice not to marry (e.g. for religious reasons).<sup>3</sup>

The purpose of this research note is to examine the main legislative provisions of the system of fault-based divorce which existed under the *Matrimonial Causes Act 1959* (Cwlth) and the main legislative provisions of the current system of no-fault divorce under the *Family Law Act 1975* (Cwlth). It is not the purpose of this research note to discuss post-separation (or post-divorce) arrangements for children and/or property settlement.

### Fault-based Divorce

The *Matrimonial Causes Act 1959* provided 14 grounds for the grant of a decree of dissolution of marriage ('divorce'), including adultery, desertion, cruelty, habitual drunkenness, imprisonment and insanity.<sup>4</sup> To succeed on one of these grounds, a spouse had to prove marital fault.

In reality, obtaining proof often necessitated hiring a solicitor and/or a private detective to collect evidence to support the claim (e.g. statements from witnesses, photographs and hotel receipts). Such processes usually involved great expense, making it difficult for the less wealthy to access them. The media reported the salacious and intimate details of some cases (e.g. those involving celebrities), thereby adding an element of public humiliation to the system.

There was only one 'no-fault' ground: separation for more than five years. The court was obliged to refuse to grant a divorce on the ground of separation if granting the divorce would 'in the particular circumstances of the case, be harsh and oppressive to the respondent, or contrary to the public interest'; if the petitioner had not made 'provision for the benefit of the respondent, whether by way of settlement of property or otherwise' (e.g. spousal maintenance); or if the petitioner had committed adultery.<sup>5</sup>

The system was designed to permit genuinely injured spouses to end their marriages, but it was also intended to protect the institution of marriage by not permitting bored or disillusioned spouses to divorce at will (e.g. the law did not permit couples to *consent* to a divorce).

The law provided that *collusion* (i.e. behaviour designed to pervert the course of justice) was a bar to the grant of a divorce.<sup>6</sup> Nonetheless, sometimes couples conspired to end their marriages by divorce, fabricating evidence to 'prove' one of the grounds. Other bars included *condonation* (i.e. forgiveness of the offending conduct) and *connivance* (i.e. inferred permission to engage in the offending conduct).<sup>7</sup>

Except with the leave of the court, a spouse could not bring proceedings for divorce unless the parties had been married for at least three years.<sup>8</sup>

In 1975, just four grounds (desertion, adultery, separation and cruelty) accounted for 94 per cent of the 24 257 divorces granted.<sup>9</sup>

## No-fault Divorce

Since the commencement of the *Family Law Act 1975*, the sole ground for divorce is that the marriage has 'broken down irretrievably'.<sup>10</sup> The ground is established if a spouse can satisfy the court that 'the parties separated and thereafter lived separately and apart for a continuous period' for 12 months before the filing of the divorce application.<sup>11</sup>

As the then Attorney-General, Lionel Murphy, explained in his 1973 submission to Cabinet proposing the reform of family law, one of his aims was:

... to enable marriages that have irretrievably broken down to be dissolved by simple, dignified, inexpensive proceedings heard in private.<sup>12</sup>

The Attorney-General explained:

There is general agreement, both among the public and the legal profession, that [the *Matrimonial Causes Act 1959*] is in need of drastic reform and that the principle of matrimonial fault on which much of the Act is based should be replaced with one more in line with current standards. [The present procedures] ... are too cumbersome and [cause] unnecessary expense.<sup>13</sup>

Today, obtaining a divorce is an administrative exercise for most couples. It is a matter of filling in an application form and paying a filing fee. Lawyers are not required. Where there is no child under 18 years or the parties make a joint application, the couple does not have to go to court.

Often, divorcing spouses agree that they separated on a particular date. It is thus usually unnecessary for an applicant to *prove* that separation occurred on a particular date; the applicant simply swears (or affirms) that the date is correct. If the respondent disagrees with the details provided by the applicant (e.g. incorrect birthdate), he or she files a response correcting them. If the respondent contests that

separation has occurred (or asserts a different separation date), both parties must present evidence, usually in the form of signed statements ('affidavits') from witnesses. Neither party need prove fault. Parties married for less than two years must usually attend counselling before filing a divorce application.<sup>14</sup>

Notably, 'separated' spouses can continue 'to reside in the same residence' or render 'some household service' to each other, notwithstanding the end of the marriage.<sup>15</sup> Sometimes a married couple may live 'separately and apart' (due to imprisonment or work etc.), but the court does not consider the couple to be 'separated' for the purposes of obtaining a divorce.

Where there is a child under 18 years, the court cannot grant a divorce unless it is satisfied that 'proper arrangements in all the circumstances' have been made for the care, welfare and development of the child.<sup>16</sup>

Unlike its predecessor, the *Family Law Act 1975* prohibits the publication of details of family law cases which would identify parties, associates or witnesses.<sup>17</sup> This prohibition is intended to protect people's privacy.

## Conclusions

The current system of no-fault divorce is simpler than the fault system which existed under the *Matrimonial Causes Act 1959*. It is less expensive and delay-prone, and causes less embarrassment than before (although some cost and social stigma still attach to divorce).

While some argue that marriage is a hallmark of society requiring protection, it is not necessarily undermined by a no-fault divorce system. A return to a fault-based system would not necessarily achieve happy marriages or social stability, but the current system may alleviate some angst and expense from the end of some marriages.

1. Barry Maley, *Divorce Law and the Future of Marriage*, (CIS Policy Monograph 58), the Centre for Independent Studies, St Leonards, 2003.
2. See, for example, Justin and Rohan Wolfers, 'Divorce is hell, but so is a bad marriage', *The Sydney Morning Herald*, 10 December 2003, p. 17.
3. Lindy Willmott, Ben Mathews and Greg Shoebridge, 'Defacto relationships property adjustment law—a national direction', (2003) 17 *Australian Journal of Family Law* 37 at 38.
4. Section 28.
5. Subsections 37(1), (2) and (3).
6. Section 40.
7. Section 39.
8. Section 43.
9. HA Finlay, RJ Bailey-Harris and MFA Otlowski, *Family Law in Australia*, fifth edition, Butterworths, Sydney, 1997, p. 25 at [1.61].
10. Subsection 48(1).
11. Subsection 48(2).
12. Cabinet Submission No. 777, November 1973, at <http://naa12.naa.gov.au/scripts/Imagine.asp?B=6993813&I=1>
13. *ibid.*
14. Subsection 44(1B).
15. Subsection 49(2).
16. Section 55A.
17. Section 121 (but there are some exceptions).

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