

Fault, Gender Politics and Family Law Reform

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Recent public debates about family law reform have revealed both support for and criticism of legislative policies that seek to shape social norms. Amidst this debate was a suggestion from some quarters that the Whitlam Government's removal of fault-based divorce is responsible for the gendered tensions that characterise modern reform debates. This article draws on archival records and interviews conducted with family law professionals who worked in the system in the 1970s and experienced the transition to the no-fault system, to explore the principles underlying the introduction of the Family Law Act of 1975 and to identify the sources of continuing dissension about its impact.

Introduction

Reform is a constant in family law. Since the *Family Law Act 1975* (Cth) came into operation it has been the subject of more than seventy amending Acts, three major parliamentary inquiries (in 1979, 1992 and 2003),¹ and numerous investigations by the Australian Law Reform Commission,² the Family Law Council³ and the Australian Institute of Family Studies.⁴ Commentators have suggested that this reform activity is a response to the significant changes in family life over the past three decades.⁵ As John Eekelaar has argued, family law and social practices are in "constant interaction".⁶ But there has been no uniform pattern to this interaction, and disagreement about the extent to which policy initiatives should respond to or shape social practices has become a prominent feature of the politics of modern family law. Central to these debates have

^δ We are very grateful to Associate Professor Helen Rhoades, Margaret Harrison, Professor Richard Chisholm and Professor David Hamby for their assistance with the project reported in this article and for their helpful comments on an earlier draft.

¹ Joint Select Committee on the Family Law Act, *Family Law in Australia* (Canberra, 1980); Joint Select Committee, *The Family Law Act 1975: Aspects of its Operation and Interpretation* (Canberra, 1992); Standing Committee on Family and Community Affairs, Commonwealth Parliament, *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation* (Canberra, 2003).

² See for example, Australian Law Reform Commission, *Matrimonial Property*, Report No 39 (Canberra, 1987); Australian Law Reform Commission, *For the Sake of the Kids: Complex Contact Cases and the Family Court*, Report No 73 (Canberra, 1995).

³ For example, see Family Law Council, *Wardship, Guardianship, Custody, Access, Change of Name* (Canberra, 1982); Family Law Council, *Patterns of Parenting After Separation* (Canberra, 1992); Family Law Council, *Child Contact Orders: Enforcement and Penalties* (Canberra, 1998).

⁴ For example, see Peter McDonald, ed., *Settling Up: Property and Income Distribution on Divorce in Australia* (Sydney, 1986).

⁵ John Dewar, "The Normal Chaos of Family Law", *Modern Law Review*, Vol. 61, 4 (1998), p.468.

⁶ John Eekelaar, "Uncovering Social Obligations: Family Law and the Responsible Citizen" in Mavis Maclean (ed), *Making Law for Families* (Oxford and Portland, 2000), p. 16.

been concerns about reforms that respond to the lobbying of vested interest groups, such as the fathers' lobby,⁷ and questions about whose interests are served by the resulting laws.⁸

Recent stories in the Australian press have renewed criticisms of what some regard as the original source of these gendered reform dynamics, the introduction of no-fault divorce legislation in 1975. When introducing the Family Law Bill into parliament in 1974, the then Prime Minister Gough Whitlam claimed this reform was a popular one, supported by a majority of the community and each of the relevant stakeholder groups.⁹ However, the Act's early operation attracted significant public criticism,¹⁰ prompting a parliamentary review barely three years after it commenced. In more recent times, conservative commentators such as historian John Hirst and Liberal politician Tony Abbott have suggested that the reformers of the 1970s were profoundly misguided in abandoning fault,¹¹ and their views have drawn the support of men's groups like the Lone Fathers Association and the Men's Rights Agency, who believe that a no-fault system favours women.¹² In the "opposite corner", researchers, academics, family law professionals and women's organisations reject the idea of re-introducing any form of fault-based divorce, believing it would be a backward step for families.¹³

Such contemporary debates are little informed by a knowledge of history. This is perhaps understandable as the development of family law has been slow to attract the attention of historians. Henry Finlay's *To Have but not to Hold* provides a narrative history of the development of divorce legislation while Leonie Star's *Counsel of Perfection* takes a similar approach to the early history of the Family Court.¹⁴ However, this article locates itself more within the analytical approach pioneered by James Walter in his study of the 1959 Matrimonial Causes Bill, placing debates around family law reform within the cultural and political history of the time.¹⁵ It examines the claims

⁷ See Helen Rhoades, "Yearning for Law: Fathers' Groups and Family Law Reform in Australia", in Sally Sheldon and Richard Collier, eds, *Fathers' Rights Activism and Law Reform in Comparative Perspective* (Oxford and Portland, 2006), p.125.

⁸ Caroline Overington, "Divorce dads fear rollback of parent laws", *Australian*, 25 July 2009; Stephanie Peatling, "Shared care of children reviewed", *Age*, 14 July 2009; Michael Pelly, "Chief Justice questions parenting laws", *Australian*, 27 July 2009.

⁹ The Rt Hon. E.G. Whitlam, MP, "Family Law Bill" (Commonwealth Parliamentary Debates (CPD), House of Representatives, 28 November 1974), pp.4321-23; Kep Enderby, "The Family Law Act: Background to the Legislation", *University of New South Wales Law Journal*, Vol. 1 (1975-76), p.21; Leonie Star, *Counsel of Perfection: The Family Court of Australia* (Melbourne, 1996), p. 81.

¹⁰ See for example, G. Williams, "Divorce is still a long, painful operation", *Sydney Morning Herald*, 20 December 1977; D.B. Walker, "Husbands and divorce", Letters to the Editor, *Sydney Morning Herald*, 27 June 1978; K. Finlay, "What the Family Law Court means to Australian Women", *Australian Women's Weekly*, 18 November 1978; Patrick Tennison, *Family Court: The Legal Jungle* (Ashburton, 1983).

¹¹ John Hirst, "Kangaroo Court: Family Law in Australia", *Quarterly Essay*, no. 17 (2005), p. 1. For a feminist response to such arguments see Ann Genovese, "Family Histories: John Hirst v. Feminism in the Family Court of Australia", *Australian Feminist Studies*, Vol. 21, 50 (2006), pp.173-95.

¹² Stephanie Peatling, "The love-hate reality of Murphy's law", *Sydney Morning Herald*, 18 July 2009; Sue Price, "Fathers' rights are in danger once again", *Newcastle Herald*, 18 July 2009; Farah Farouque, "No fault of Abbott's, but big marriage idea gets little support", *Age*, 13 July 2009.

¹³ Stephanie Peatling, "Ping-pong children to play a new game", *Sydney Morning Herald*, 14 July 2009.

¹⁴ Henry Finlay, *To Have but Not to Hold* (Sydney, 2005); Star, *Counsel of Perfection*.

¹⁵ James Walter, "Designing Families and Solid Citizens: The Dialectic of Modernity and the Matrimonial Causes Bill, 1959", *Australian Historical Studies*, Vol. 32, 116 (2001), pp.40-56.

made about the culpability of no-fault divorce and the links between the innovations of the original Act and current family law politics, drawing on both the archival record and the recollections of the system's early personnel — the first judges and counsellors appointed to the Family Court of Australia and family lawyers who practised in the jurisdiction at its inception. The recollections were gathered for an oral history project that is exploring the establishment and early operation of the Family Court by drawing on the reflections of its founding actors, those who were charged with putting the Whitlam government's policy aims into effect.¹⁶ In order to provide context for this discussion it begins by examining the background to the passage of the *Family Law Act* and the policy aims and community expectations that accompanied its introduction.

The Case for Divorce Reform in the 1970s

Writing soon after the passage of the *Family Law Act*, Kep Enderby, the then Attorney General, suggested that “few pieces of legislation” had provoked as much public controversy.¹⁷ However, the same had been said of its predecessor, the *Matrimonial Causes Act 1959* (Cth), at the time of its introduction.¹⁸ Indeed, Enderby commented that divorce law reform had a long history of being “attended by the vigorous expression of conflicting opinion”, and acknowledged that the *Family Law Act* had simply “conformed to past precedents in that regard”.¹⁹ Its proponents shared the key concerns of the 1959 reformers: the desire to promote and protect the family; the intention to privilege the secular over the religious; a concern to promote equality in gender relations, and an intention to bring legislation into line with the “modern conscience”.²⁰ Similarly, the opponents of the *Matrimonial Causes Act*, which permitted divorce after five years separation, had expressed identical sentiments to those raised by detractors of the Family Law Bill sixteen years later. Their concern had been that the addition of a fault-free ground would “open the floodgates” to marriage breakdown and “bestow a benediction on promiscuity”.²¹ But as a 1972 family law textbook noted, such “gloomy prophecies” were not borne out by subsequent experience,²² and a decade later divorce law was ripe for further reform.

Despite the furore at the time of its introduction, the main divorce grounds in the *Matrimonial Causes Act* were fault-based. These required petitioners to prove that their spouse had committed a “matrimonial offence” — such as adultery, desertion or cruelty — in order to secure a divorce.²³ Adultery was the most commonly invoked ground as it allowed an immediate divorce.²⁴ But such petitions involved a series of indignities for the parties. They usually relied on photographic evidence acquired by private detectives to “prove” that the respondent had been enjoying the company of a “third party”, and the “wronged” spouse was required to disclose his or her own acts of

¹⁶ Melbourne University Ethics Approval No. 0824947. The interviews were collected for an Australian Research Council-funded research project, *The Helping Court: Examining the Early History of the Family Court of Australia*. The interview sample at the time of writing comprised fifty-two participants: fourteen judges, twelve counsellors, sixteen family lawyers, six registrars, one family law academic, two court administrative staff and one women's refuge worker.

¹⁷ Enderby, “The Family Law Act”.

¹⁸ H.A. Finlay and A. Bissett-Johnson, *Family Law in Australia* (Melbourne, 1972), p.27.

¹⁹ Enderby, “The Family Law Act”, p.10.

²⁰ Walter, “Designing Families and Solid Citizens”, p.48.

²¹ The Hon. A.A. Calwell, MP, “Matrimonial Causes Bill”, *CPD* (House), 12 November 1959, p.269.

²² Finlay and Bissett-Johnson, *Family Law in Australia*, p.27.

²³ *Matrimonial Causes Act 1959* (Cth), ss 28(a), (b) and (d).

²⁴ Finlay and Bissett-Johnson, *Family Law in Australia*, pp. 286-7.

infidelity to the court before the petition would be granted.²⁵ Adding to this humiliation, the details of such cases, including the names of co-respondents to the adultery, were often reported in the tabloid press.²⁶ As one former practitioner from the time described it, fault-based divorce was “something of a spectator’s sport”.²⁷

But by the early 1970s, there was a growing view in the community that this punitive approach was at odds with the shifting moral attitudes in Australian society.²⁸ Increasing acceptance of married women working outside the home had seen a 41 per cent jump in “wives going out to work” in the decade to 1971,²⁹ and increased school retention rates for girls and the advent of the Women’s Liberation Movement gave rise to demands for new rights, including equal pay, access to “abortion on demand”, free child care,³⁰ paid maternity leave and family-friendly workplaces.³¹ The widespread availability of reliable contraception was also credited with creating a “sexual revolution” in which the stigma attached to unmarried cohabitation was beginning to wane.³² The 1970s saw a growing rejection among the post-war generation of their parents’ values and choices and an increased emphasis on “personal satisfaction” and individualism.³³ In this climate, fault-based divorce, which constructed “desertion” of a marriage as an offence and regarded a mother who had committed adultery as “unfit” to have custody of the children, looked decidedly out of date.

Compounding these developments, new psychological understandings of relationship dynamics challenged the individual responsibility explanation for marriage breakdown that was embedded in the law. Marriage Guidance services, which had been set up under the *Matrimonial Causes Act*,³⁴ had witnessed an enormous growth in demand, and many of their counselling staff, who were increasingly regarded as the experts in the field of human relationships, were ardent advocates of divorce reform.³⁵ From their perspective, the law’s focus on assigning blame to one spouse was out of step with the reality of married life, in which both parties were seen to be complicit in the creation of relationship problems.³⁶ At the same time, new child development understandings began to question the view implicit in the law that unhappy spouses

²⁵ *Matrimonial Causes Act* 1959 (Cth) s 41; Finlay and Bissett-Johnson, *Family Law in Australia*, p.373.

²⁶ Star, *Counsel of Perfection*, p.136.

²⁷ John Fogarty, “Establishment of the Family Court of Australia and its Early Years”, *Family Matters*, Vol. 60 (2001), p.97.

²⁸ Finlay and Bissett-Johnson, *Family Law in Australia*, p. 589.

²⁹ Helen Hurwitz, “Factory Women” in Allan Bordow, ed., *The Worker in Australia* (St Lucia, 1977), p.223.

³⁰ Ann Curthoys, “Doing it for Themselves: The Women’s Movement since 1970” in K. Saunders and R. Evans, eds, *Gender Relations in Australia: Domination and Negotiation* (Sydney, 1992), p.434.

³¹ Marian Sawer, *Making Women Count: A History of the Women’s Electoral Lobby in Australia* (Sydney, 2008), p.205.

³² Finlay and Bissett-Johnson, *Family Law in Australia*, p.589.

³³ Michael Caulfield, *The Vietnam Years: From the Jungle to the Australian Suburbs* (Sydney, 2007) p.369.

³⁴ Finlay and Bissett-Johnson, *Family Law in Australia*, p.592.

³⁵ Whitlam, *CPD*, (House), 28 November 1974, pp.4320-321.

³⁶ Marriage Guidance Victoria statistics from 1966 showed that of the couples it had seen that year, the largest single complaint (31.3 per cent) was about “quarrelling”, in which both parties were described as being “equally” responsible: Geoffrey A. Goding, “The Psychology of Marriage Breakdown” in H.A. Finlay, ed., *Divorce, Society and the Law: A Symposium*, (Melbourne, 1969), p.18.

should stay together for the sake of their children, and suggested that continuing parental conflict was more damaging to child wellbeing than a single loving parent.³⁷

The fault-based system was also recognised as posing significant economic hardship for deserted wives. Although a woman whose husband had committed a matrimonial offence might receive an order for maintenance, the costs of litigation and the onerous proof requirements and two year delay in being able to bring a petition based on desertion meant that many married women in need of support did not benefit from this law.³⁸ Moreover, an order for maintenance was no guarantee of support, with a survey of deserted mothers in the late 1960s suggesting that the majority of women in this circumstance rarely received the payments to which they were entitled.³⁹ The consequence was that by the early 1970s, separated wives who had been unable to secure a divorce accounted for almost 40 per cent of Australians living below the poverty line.⁴⁰

The situation was even more fraught for victims of domestic violence who sought to leave an abusive husband. The case law principles governing cruelty petitions providing substantial hurdles to securing a divorce: a woman who sought to rely on this ground needed to prove that her husband's violence had been "habitual" and that it had caused substantial injury to her health, the latter requiring evidence of medical treatment for physical injuries or evidence from "friends, relatives, neighbours and others" who had seen "bruises or other external manifestations".⁴¹ On the other hand, the late 1960s saw divorced men increasingly complaining about their obligation to pay maintenance to former wives, arguing that this represented a substantial burden for men on a "basic wage",⁴² a complaint that was central to the campaign of the most vocal advocacy group behind the push for no-fault divorce, the Divorce Law Reform Association (DLRA).⁴³ The most obvious illustration of the need for reform was the fact that unhappy couples had begun circumventing the requirements of the law in large numbers. By 1970, the vast majority of divorce petitions were undefended, and couples often colluded to make their voluntary separation look like desertion, or concocted evidence of infidelity by hiring someone to pose as their lover.⁴⁴ Despite the risks involved, such practices were an open secret, with former spouses publicly sharing their stories of deception on national television.⁴⁵ A number of divorce judges, too, were sympathetic to their plight, and conscious of the widening gap between the

³⁷ M. Rutter, "Parent-Child Separation: Psychological Effects on Children", *Journal of Child Psychology and Psychiatry*, Vol. 12, 4 (1971), p.233.

³⁸ Ray S. Watson, "The Deserted Wife and the Law", *Australian Law Journal*, Vol. 43 (1969), p.450.

³⁹ Around 14 per cent were receiving regular maintenance from their former husbands, despite the existence of court orders requiring men to pay: "The Deserted Mother in Victoria" (1970) reproduced in David Hambly and J. Neville Turner, *Cases and Materials on Australian Family Law* (Sydney, 1971), p. 411.

⁴⁰ *Annual Report of the Commonwealth Director General of Social Services, 1970-71*, p.75.

⁴¹ Paul Toose, Ray Watson and David Benjafield, *Australian Divorce Law and Practice* (Sydney, 1968), p.176.

⁴² Finlay and Bissett-Johnson, *Family Law in Australia*, p.437.

⁴³ ABC Television, *Monday Conference*, 9 September 1974.

⁴⁴ David Hambly, "Reforming Australian Divorce Law", *Federal Law Review*, Vol 5 (1972), pp.63, 68.

⁴⁵ T.A. Pearce, "The Broken Marriage — Is Modern Divorce the Answer?" in Finlay, ed., *Divorce, Society and the Law: A Symposium*, p.63.

law and social attitudes, began to liberalise the evidentiary requirements for desertion and adultery.⁴⁶

Agitation for reform brought together a diverse array of stakeholders — the unhappily married, divorce lawyers, marriage counsellors, legal academics, politicians and lobby groups, including an unlikely alliance between the DLRA and the Women's Electoral Lobby.⁴⁷ Although the then Attorney-General, Nigel Bowen, acknowledged there were problems with the *Matrimonial Causes Act*, and that rapid changes in “social attitudes and conventions” had taken place since it was enacted, divorce reform was not a policy priority for the Liberal Party, which was inclined in any case towards evolution, not revolution.⁴⁸ However, the cause garnered the support of the Australian Labor Party and the personal commitment of Senator Lionel Murphy.⁴⁹ When Whitlam came to power in 1972, Murphy, the new Attorney-General, sought Cabinet approval to replace the *Matrimonial Causes Act* with no-fault divorce legislation.

Policy Aims and Community Expectations

The *Family Law Act* commenced operation on 5 January 1976. A slim piece of legislation, its centrepiece was the replacement of the forty-seven sections of the *Matrimonial Causes Act* and the vast body of case law guidance that had governed fault-based petitions with a single no-fault ground for divorce based on twelve months separation.⁵⁰ The primary aim of the Act was to reduce the costs and enhance the dignity of the divorce process for separated couples.⁵¹ But the policymakers also envisioned a wider cultural impact for the Act, in which its non-punitive approach would encourage new social understandings of marriage breakdown. Rather than signifying a moral failure, divorce was now constructed as little more than an administrative step in the transition from a marriage that had already ended. Whitlam also hoped to de-centre the role of law in this process, by creating a dedicated Family Court with an in-house counselling service. The objective of this initiative, the second key component of the Act, was to ensure the parties' “human problems, not just their legal rights” were addressed.⁵² While similar pressures had produced reform in other Western jurisdictions, the combination of the complete elimination of fault and the new multi-disciplinary court placed Australia at the radical edge of such change.⁵³

The *Family Law Act* also introduced new legal frameworks for settling disputes over custody and property. Although the *Matrimonial Causes Act* required the courts to “regard the interests of the children as the paramount consideration” in custody disputes,⁵⁴ Supreme Court judges had typically incorporated assessments of the parties' moral conduct as a spouse into their deliberations. The no-fault underpinnings of the

⁴⁶ Toose *et al.*, *Australian Divorce Law and Practice*, p.171.

⁴⁷ National Archives of Australia (NAA), M1232/106, Women's Electoral Lobby, Submission to the Senate Standing Committee on the Law and Administration of Divorce and Related Matters and the Clauses of the Family Law Bill 1974.

⁴⁸ Nigel Bowen, “Foreword”, in Toose *et al.*, *Australian Divorce Law and Practice*.

⁴⁹ Enderby, “The Family Law Act”, p.15.

⁵⁰ Which could be satisfied even if both parties had continued to live under the one roof during that time: Family Law Act 1975 (Cth), ss 48, 49(2).

⁵¹ Whitlam, *CPD* (House), 28 November 1974, p.4321.

⁵² *Ibid.*, pp.4322-23

⁵³ For a summary of divorce law reform in other Western jurisdictions at this time see Lynn D. Wardle, “No Fault Divorce and the Divorce Conundrum”, *Brigham Young Law Review* (1991), pp.82-92.

⁵⁴ *Matrimonial Causes Act* 1959 (Cth), s 85(1)(a).

new Act and the provision of court welfare officers channelled the Family Court judges in a different direction, directing them to replace moral assessments of the parties with expert social science opinion about the child's needs.⁵⁵ Property division also saw a new approach, with orders based on a consideration of the parties' needs and contributions, including — following lobbying by the Women's Electoral Lobby — contributions made to the welfare of the family as "homemaker and parent".⁵⁶ And reflecting the concerns of the DLRA and Whitlam's belief in public responsibility for sole parent families, the Act established a new needs-based approach to spousal maintenance awards, with judges required to take a woman's entitlement to social security benefits into account when assessing her need for support.

These shifts were based around a notion of sexual equality, and reflected the values espoused by the reformers and key stakeholders alike, telling us much about their expectations of the pace of social change that was taking place.⁵⁷ The belief underpinning the Act's provisions was that women should no longer have to look to men for financial support or be confined to the role of primary caregiver for children.⁵⁸ Nevertheless, the parliamentary debates reveal that some in government were more circumspect than others in their forecasts of sexual equality, and recognised that genuine change would require a major attitudinal shift among men and would take "at least a generation" to achieve.⁵⁹ In particular, these politicians, like some women's organisations,⁶⁰ foresaw problems with the Act's equality expectations for wives who had made a career of "the upkeep of a home and the nurture of their children".⁶¹

While the reformers and lobbyists may have over-estimated the gains being made by women, there were clearly some in the community whose expectations of change were more utopian.⁶² Opinion polls taken during the extended debate saw rising approval rates, never less than 60 per cent and on one occasion rising to 75 per cent.⁶³ The press reports of the day suggest that many of the Act's supporters read it as a guarantee of equality. Gershon Weiler writing in the *Age* in 1973, predicted that no-fault divorce would see an end to the traditional division of labour in family relationships, solving in "one stroke, almost all the problems that women's liberationists so consistently, and often justifiably, raise about the institution of marriage".⁶⁴ At the same time, opponents of no-fault divorce argued that it would bring about the end of marriage as an

⁵⁵ These directions are now found in *Family Law Act 1975* (Cth), ss 60CA and 62G.

⁵⁶ Sawyer, *Making Women Count*.

⁵⁷ Senator Baume, "Family Law Bill", *CPD* (Senate), 29 October 1974, p.2047; Senator McClelland, *CPD* (Senate), 29 October 1974, p.2045; Senator Missen, *CPD* (Senate), 29 October 1974).p.2033.

⁵⁸ The Hon. J.W. Howard, "Family Law Bill", *CPD* (House), 28 February 1975, pp.940-42.

⁵⁹ The Hon. I. McPhee, "Family Law Bill", *CPD* (House), 12 February 1975), p.163.

⁶⁰ NAA M1232/106, Women's Electoral Lobby, Submission to the Senate Standing Committee on the Law and Administration of Divorce and Related Matters and the Clauses of the Family Law Bill 1974, p.18.

⁶¹ McClelland, *CPD* (Senate), 29 October 1974, p.2045; Senator A. Missen, "Family Law Bill", *CPD* (Senate), 29 October 1974, p.2033. Based on this concern, a provision was added to Part VII of the Act requiring judges to "protect the position of a woman who wishes to continue her role as wife and mother" when making financial orders: The then Family Law Act 1975 (Cth), s 75(2)(l). This provision was amended in 1983 to read "the need to protect a party who wishes to continue that party's role as parent".

⁶² John Fogarty, "Thirty Years of Change", *Australian Family Lawyer*, Vol. 18, 4 (2006), p.4.

⁶³ Jenny Hocking, *Lionel Murphy: A Political Biography* (Melbourne, 2000), p.216.

⁶⁴ Gershon Weiler, *Age*, 3 September 1973.

institution,⁶⁵ with a small but vociferous contingent of religious conservatives predicting the disintegration of the family⁶⁶ and “the destruction of the nation”.⁶⁷

Realised Hopes and Unforeseen Consequences

The elimination of fault-based divorce initially rendered the *Family Law Act* a popular reform. The opening of the Family Court in January 1976 was met with long queues, composed largely of people who had been unable or unwilling to pursue their cases under the previous system.⁶⁸ Justices Asche and Lindenmayer, two of the Court’s original judges, recalled being “besieged by vast numbers” of people who “had put off going to law” until this time because of the prohibitive costs of Supreme Court litigation or because they had been “the ‘guilty’ party”.⁶⁹ Lawyers who had practised under the *Matrimonial Causes Act* also remarked on the helpful attitude of the Family Court judges, and the relative expediency and informality of the new divorce. A Brisbane solicitor recalled:

A clerk came over in her denims and t-shirt and said, ‘Are you here for the divorce of such and such?’, and I said ‘Yes’, and she said ‘Come this way’ and we went behind a partition, a divider, and sitting behind there at a desk was Justice Lindenmayer saying ‘Oh hello, sit down’. My client and I sat down in front of him, and basically very informally he said, ‘Yes, this is your divorce’, and spent two or three minutes and then said ‘Thank you very much’ and that was it. I walked out of there thinking, ‘That was pretty easy compared to appearing before a Supreme Court judge and having a two day trial’.⁷⁰

Legal practitioners and their clients applauded the dignity of the no-fault process.⁷¹ As the reformers had hoped, the legal system no longer formed a central part of the divorce experience, with solicitors typically making the ten minute appearance in court on their client’s behalf.⁷² In addition to these procedural shifts, the new provisions brought relief to wives who, under the previous legislation, had been forced by the onerous evidentiary requirements of fault-based petitions to remain in abusive relationships.⁷³ For such women, a former refuge worker recalled, “no-fault divorce was a godsend”.⁷⁴ This sense of liberation is also evident in the many submissions to the 1978 Inquiry from women’s organisations, which praised the Act for providing

⁶⁵ See Enderby, “The Family Law Act”, p.27.

⁶⁶ See for example, NAA M132/105, Foundation for the Family, “The Family Law Bill, 1974: An Analysis”; Rev. Marcus Loane, “Letter to the Editor”, *Sydney Morning Herald*, 6 April 1974; Cardinal James Freeman and Rev. Marcus Loane, “Letter to the Editor”, *Sydney Morning Herald*, 10 September 1974; Rev. Alan Walker, “Divorce for the asking”, *Age*, 28 October 1974.

⁶⁷ *Sydney Morning Herald*, 4 November 1974, cited in Colin James, “Media, Men and Violence in Australian Divorce”, *Alternative Law Journal* Vol. 31, 1 (2006), p.6.

⁶⁸ “Thousands line up for easier divorces in first-day rush”, *Australian*, 6 January 1976; P. Heinrichs, “New Quickie Divorce Starts Rush”, *Age*, 6 January 1976; “Rush for easier divorces”, *Age*, 29 January 1976.

⁶⁹ Interview J4, The Honourable Austin Asche; Interview J10, The Honourable Travis Lindenmayer.

⁷⁰ Interview L9, Peter Sheehy.

⁷¹ Margaret Harrison, “Attitudes of Divorced Men and Women to the Family Court” in *Family Law: Australian Family Research Conference Proceedings Vol. II* (1984) p.5.

⁷² *Ibid.*

⁷³ “A Woman’s Guide to the Law: Facts of Divorce Without Guilt”, *Courier-Mail*, 20 February 1976. Note that government funding for women’s refuges was not secured in most states until 1974: see L. Wells, “Freedom from Fear”, *Herald*, 8 October 1974; N. Dexter, “Budget May Open a Closed Door”, *Age*, 17 September 1974.

⁷⁴ Interview W1, Di Otto, Women’s Liberation Halfway House.

mothers with a way “to take children from a harmful environment into a stable environment without fear of adverse repercussions”.⁷⁵

Participants in our study also suggested that the Court’s interpretation of the Act helped to generate new cultural understandings of family relationships. They shared the belief that the *Family Law Act* had promised a more equitable approach to custody and property issues than its predecessor. As the Court’s first Chief Judge, Elizabeth Evatt, explained, it offered avenues to distance decision-making from the former moralistic approach, and, to “break away from traditional assumptions about parental roles” and “the old prejudices” about the roles of husbands and wives.⁷⁶ Her vision is evident in the Court’s early case law, where judges actively resisted passing judgement on the parties’ marital behaviour in custody cases, and accorded equal value to the contributions of stay-at-home wives and their earning partners in property disputes.

But fault-free divorce and these enlightened case law developments were not universally welcomed. As had been predicted, the Act’s equality approach held little appeal for older women who had been “supported wives” and did not qualify for social security benefits.⁷⁷ Audrey Marshall, Director of Counselling at the Court’s Sydney registry, recalled that the first few years saw many wives, unprepared for the changes wrought by no-fault divorce, who felt “indignant” that they could be divorced by their husband when they had “not done anything wrong”.⁷⁸ Letters published in broadsheet newspapers suggested that some husbands were having difficulty adjusting to women’s new-found freedom, with claims that women were leaving their marriages “by the hundred” without any justification.⁷⁹

However, concern for “older wives” was quickly overshadowed by a growing anger amongst men, with the Court’s equal treatment of “breadwinner” and “homemaker” contributions proving particularly contentious. Groups like the Army of MAN complained that “women cry discrimination” when it is men who are “economically wrecked” by divorce, arguing that the division of marital assets should not be left “to the capricious discretion” of Family Court judges.⁸⁰ Legal practitioners recalled that male clients often “struggled to get their minds around how could you value women’s unpaid work at the same level as men’s paid work”,⁸¹ finding it difficult to see how the Court could value their wife’s care for the children in the same way as their paid labour.⁸²

Sometimes you used to have to say [to such clients], ‘While you might have been out working seven days, you could only do that because your wife was at home running the home and looking

⁷⁵ Women’s Electoral Lobby (Australia), Submission to the Joint Select Committee on the Family Law Act, *Official Hansard Report* (Canberra, 1978), p.909 (hereafter *Ruddock Inquiry*).

⁷⁶ Interview J5, The Honourable Elizabeth Evatt.

⁷⁷ Harrison, “Attitudes of Divorced Men and Women to the Family Court”, p.35. See also Women’s Advisory Council of New South Wales, Submission to the *Ruddock Inquiry*, p.760; Women’s Electoral Lobby, Submission to the *Ruddock Inquiry*, p. 915; Peter Nygh, University of Sydney Law Faculty, Submission to the *Ruddock Inquiry*, p.1563.

⁷⁸ Interview C9, Audrey Marshall.

⁷⁹ B. Todd, Letter to the Editor, *Sydney Morning Herald*, 5 July 1978.

⁸⁰ B. Hooks, “Ban Maintenance for Women: Call”, *Age*, 1 June 1978. ‘MAN’ was an acronym for ‘Men Attacking Now’.

⁸¹ Interview R3, Judicial Registrar Bill Johnston.

⁸² Interview L14, The Honourable Stuart Fowler.

after the children and doing all those things'. But they'd say, 'Yes, but what money did she bring in?'⁸³

The earliest survey of Court clients confirmed a higher level of discontent among men than women, primarily focused on disputes over children.⁸⁴ Men expressed frustration at the Court's lack of interest in their wife's moral conduct, and railed against its habit of awarding custody to mothers who had "deserted" their marriage or who were cohabiting with a man they "did not intend to marry".⁸⁵ Although fathers, in the early years of the Court's operation, obtained custody in around one-third of contested cases, making them much more likely to secure custody orders from a judge than in private negotiations,⁸⁶ men's groups (in what has become a familiar refrain)⁸⁷ read the higher rate of orders for mother-custody as evidence of gender bias, and accused the Court of failing to recognise the much-vaunted "equality gains made by women".⁸⁸ This aspect of the reforms also found expression in the popular press.

Even some women's magazines began to run sympathetic articles suggesting that fathers were the victims of the new divorce law.⁸⁹ In submissions to the 1978 inquiry, men's groups described the family law system as a "tyranny unprecedented in the history of our courts", claiming that husbands were "treated like criminals and spoken to like dogs".⁹⁰ This discontent escalated in the years that followed, manifesting in threats and attacks on court personnel⁹¹ — including the murders of one Family Court judge and the wife of a second judge — with press stories that claimed the Court was "hated by thousands" of fathers⁹² and accusations that "the system" was driving men to kill their families.⁹³

Understanding Continuing Discontent

The 1978 Ruddock Inquiry was a response to such discontent. The majority of stakeholders continued to express support for the new divorce rules with only conservative religious organisations such as the Festival of Light and the Exclusive Brethren arguing for a re-introduction of fault.⁹⁴ Some of the participants in our oral history project explain the discontent by arguing that while the Act's liberal equality approach reflected changes that were already "afoot in society", it was still a model that "a lot of people weren't ready for".⁹⁵ Fault-free divorce was, they suggested,

⁸³ Interview L16, Fabian Dixon.

⁸⁴ Harrison, "Attitudes of Divorced Men and Women to the Family Court", pp.20-21.

⁸⁵ Tennison, *Family Court: The Legal Jungle*, p.11.

⁸⁶ Frank M. Horwill and A.M. Bordow, *The Outcome of Defended Cases in the Family Court of Australia: Research Report No. 4* (Sydney, 1983), p.30.

⁸⁷ See Rhoades, "Yearning for Law", p.125.

⁸⁸ Lone Fathers' Association of Victoria, Submission to the *Ruddock Inquiry*, p.1549.

⁸⁹ Maureen Green, "Is Dad the Most Neglected Member of the Family?", *Australian Women's Weekly*, 23 June 1976, p.26.

⁹⁰ Morris Revelman, Defence Against Women's Maintenance and Alimony, *Ruddock Inquiry*, p.611.

⁹¹ See "Judge's Death 'Only the Start' Warns Parent", *Australian*, 26 June 1980.

⁹² J. Hocking, "100,000 Hate Family Judges, Court Told", *Australian*, 16 August 1985; "Family Court Judges 'Hated'", *Sydney Morning Herald*, 16 August 1985.

⁹³ Tennison, *Family Court: The Legal Jungle*, pp.13, 26-28.

⁹⁴ For example, the Australian Association of Marriage and Family Counsellors, the National Marriage Guidance Council of Australia, the Australian Federation of Women Voters, the Women's Information Switchboard, the New South Wales Women's Advisory Council, the Lone Fathers Association of Australia, and Action for Children.

⁹⁵ Interview J6, The Honourable Josephine Maxwell.

“ahead of community standards”, incorporating values that some people had not yet come to accept.⁹⁶ The Court’s early decisional patterns, which equated women’s care work with men’s paid labour, had been “too progressive” for some men.⁹⁷ And as Therese Taylor has argued, the Act’s norm shift in custody cases, which replaced morality-based judgments with a regime built around social science understandings of children’s welfare, was difficult for many early litigants to grasp.⁹⁸

Central to these reflections was a belief that “people need fault”. Former court counsellors recalled that even though it was no longer legally relevant, fault remained “the elephant in the room” in post-separation disputes.⁹⁹ While counselling provided some scope for this issue to play out in negotiations, questions of moral responsibility for the marriage breakdown had no legitimate role in the court room. Yet clients who were hurt by the relationship breakdown, especially those who had been “left behind” when their spouse took advantage of the new divorce rules, wanted “someone to tell them they were right and the other party was wrong”,¹⁰⁰ and expected “the judge to tell that person off”.¹⁰¹ However, the early judgments suggest that this need was often thwarted by a new breed of judges who were committed to distancing the law from its fault-based predecessor, and who actively discouraged litigants from airing grievances about the past.¹⁰²

Other practitioners suggested that the early family law system had been a victim of inflated expectations, arguing that the negative reaction which the Family Court attracted was a consequence of its failure to effect the social changes that many had anticipated. These interviewees described the sense of optimism, rapid pace and extensive nature of the Whitlam government’s social reforms, and suggested that these factors had generated a “huge amount” of unrealistic expectation in the community, particularly about the achievement of economic equality between women and men.¹⁰³ This dilemma was evident in some of the interviews with the early judges and counsellors, whose stories of dealing with litigants revealed something of a juggling act in simultaneously managing expectations while trying to allay the anxieties of clients for whom the pace of change was too fast. For Elizabeth Evatt, dealing with this tension was a defining feature of the Court’s early work:

Men and women were to be equal. Was a wife then expecting to be maintained after divorce or what? That had to be thought through, and as you think through these things, well you don’t always get it right the first time, but you gradually find a way to make sense of those ideas — although not necessarily to the satisfaction of all the litigants.¹⁰⁴

The provisions of the original *Family Law Act* were designed for judges, to guide the resolution of contested cases, and not, as more recent amendments have been, to

⁹⁶ Interview J3, The Honourable Peg Lusink.

⁹⁷ Interview R3, Bill Johnston.

⁹⁸ Therese Taylor, “Australian Terrorism: Traditions of Violence and the Family Court Bombings”, *Australian Journal of Law and Society*, Vol. 8 (1992), p.9.

⁹⁹ Interview C2, Geoff Smiley.

¹⁰⁰ Interview L5, Martin Bartfeld.

¹⁰¹ Interview C5, Lilia Szarski.

¹⁰² See on this, Nell Alves-Perini, Margaret Harrison, Helen Rhoades and Shurlee Swain, “Finding Fault in Marital Property Law: A Little Bit of History Repeating?”, *Federal Law Review* Vol. 34, 3 (2006) p.377.

¹⁰³ Interview J6, The Honourable Josephine Maxwell; Interview L1, The Honourable John Wilczek. See also Fogarty, “Thirty Years of Change”, p.4.

¹⁰⁴ Interview J5, The Honourable Elizabeth Evatt.

“radiate” messages to families about responsible behaviour and appropriate outcomes.¹⁰⁵ Instead of morality-based rules, the *Family Law Act*’s decisional frameworks relied on broad principles, providing the Family Court with a wide discretion to make such orders as it “thought fit” in financial disputes¹⁰⁶ and to promote “the welfare of the child” in custody cases.¹⁰⁷ But as Evatt noted, while this discretion empowered judges to “step outside” the stereotypes when crafting orders, any hopes of “making a difference” to traditional patterns were subject to a “consideration of the facts and the relationships in the particular case”.¹⁰⁸ And Family Court judges soon came to realise that despite the expectations of social change, the material reality of care work in families continued to be gendered.¹⁰⁹

This issue provides a clue to understanding men’s discontent with the Act’s early operation. The DLRA, which represented men’s interests, had been an ardent supporter of an equality approach in the lead-up to the reforms, and continued to espouse this view during the Ruddock Inquiry three years later. But its expectations of equality were very different to the version adopted by the Family Court and advocated by (most) women’s organisations which focused on achieving substantive equality for husbands and wives. This model involved factoring issues of dependency and need into financial settlements, including the history of care for children and a mother’s disrupted attachment to the paid labour force.¹¹⁰ The DLRA, by contrast, sought a formal equality model, and argued for a legal requirement “that each person stand on their own feet” and “A COMPLETE END TO ANY TYPE OF MAINTENANCE PAYMENTS”.¹¹¹

The Honourable Richard Chisholm, a family law academic at the time the Act commenced operation, suggested that the introduction of no-fault divorce, coupled with the Court’s treatment of women’s unpaid work in the home, threatened men’s traditional power base within the married family:

Well, if most of the time men have more money and more control over resources [...] then men will be likely to experience the impact of a family law system as adverse to them. If they have more resources than the women in the first place, they are likely to end up with less resources. If they had more power, then suddenly they are not going to be able to get their own way, and so on.¹¹²

This approach contrasted starkly with the understanding of married life implicit in the *Matrimonial Causes Act* which had placed a heavy burden on wives to keep their

¹⁰⁵ See on this point, Dewar, “The Normal Chaos of Family Law”, p. 483; Robert van Krieken, “The ‘Best Interests of the Child’ and Parental Separation: On the ‘Civilising of Parents’”, *Modern Law Review* Vol. 68, 1 (2005), p.25.

¹⁰⁶ The then *Family Law Act* 1975 (Cth) s 79(1).

¹⁰⁷ The then *Family Law Act* 1975 (Cth) s 64(1)(a).

¹⁰⁸ Interview J5, The Honourable Elizabeth Evatt.

¹⁰⁹ Commonwealth, *Interim Report on the Royal Commission into Human Relationships* (Canberra, 1976), pp.3-7.

¹¹⁰ See Ken C. Dempsey, “Men and Women’s Power Relationships and the Persisting Inequitable Division of Housework”, *Journal of Family Studies*, Vol. 6, 1 (2000), p.7; Grania Sheehan and Jody Hughes, *Division of Matrimonial Property in Australia*, Research Paper 25, Australian Institute of Family Studies (Melbourne, 2001), p.22.

¹¹¹ Emphasis in original.

¹¹² Interview A1, Professor Richard Chisholm.

marriage together.¹¹³ Hence, a wife's petition for divorce might be refused if the court regarded her "nagging" or refusal to have sex with her husband as justification for his bad behaviour. The *Family Law Act* challenged this view, "sending a social message that leaving your partner was okay",¹¹⁴ and removed, at least in part, the financial disincentive for doing so. By virtue of the Family Court's early jurisprudence, wives were guaranteed a share of the family assets regardless of their "desertion" or their limited income-production during the marriage. Women were suddenly free to leave "matrimonially virtuous husbands" without fear of social or economic penalty.¹¹⁵ But the corollary of this empowerment was a deep sense of injustice felt by men who complained about their loss of "control" over their families,¹¹⁶ and who saw the new family law system as a "feminist" conspiracy that was biased against men.¹¹⁷

Conclusion

By comparison with recent family law reforms, the emergence of the *Family Law Act* in 1975 reflected a consensus model of lawmaking. Whilst the proposal for a twelve-month separation ground was controversial,¹¹⁸ and attracted dire predictions about the end of marriage from some quarters, a belief in its "core values" of fault-free divorce and sexual equality was shared by all the key stakeholders, including both men's and women's groups.¹¹⁹ Within three years, however, this political alliance had dissolved, replaced by an atmosphere marked by opposition and resentment. Looking back on this time, those who worked in the early family law system argue that both unmet expectations and unforeseen consequences had played a role in the shift. The advocates of reform who had assumed that husbands, not wives, would be the main beneficiaries of the new divorce law, were surprised when women took advantage of the freedom it offered them, especially when they left husbands who saw themselves as having done "nothing wrong".¹²⁰ At the same time, the reformers' hopes of economic equality for men and women were not realised and the gendered patterns of care in families persisted, undermining any expectations of a formal equality approach to property and custody disputes.

By 1978, disputes over children had replaced divorce as the new focus of contestation, with battle lines defined by gender. Concerned about the safety of mothers and children, women's organisations complained about the Court's failure to "take into account any history of mental or physical cruelty on the part of the access parent", spoke about the distress suffered by victims of violence who were "placed in a position of close proximity to the perpetrator" in counselling sessions, and argued that

¹¹³ James, "Media, Men and Violence in Australian Divorce", p.7. For a more detailed analysis of this shift see Heather Brook, "Just Married? Adversarial Divorce and the Conjugal Body Politic", *Feminism and Psychology* Vol. 14, 1 (2004), pp.81-99.

¹¹⁴ Interview W1, Di Otto, Women's Liberation Halfway House.

¹¹⁵ The Hon. Justice Nygh, "Sexual Discrimination and the Family Court", *University of New South Wales Law Journal* Vol. 8, 1 (1985), pp. 64-5.

¹¹⁶ *Ibid.*, p.71.

¹¹⁷ B. Todd, "Men and Divorce", *Sydney Morning Herald*, 5 July 1978; G. Lehmann, "The Fault in No Fault Divorce", *Quadrant* (April 1983), p. 25.

¹¹⁸ Many supporters of no fault divorce would have preferred a two-year period of separation: "Senate 'yes' on Divorce: Separation of One Year is Agreed to", *Australian*, 28 November 1974.

¹¹⁹ S. Bottomley and S. Parker, *Law in Context* (2nd ed, Sydney, 1997), p.161.

¹²⁰ Hirst, "Kangaroo Court: Family Law in Australia", pp.72-73.

“access should be considered at all times to be the right of the child”.¹²¹ Men’s groups, on the other hand, sought stronger enforcement of access orders and argued for a presumption of joint custody or sole custody to fathers, using a language that revealed just how deeply some men felt they had been victimised by the family law system.¹²² In an early indication of what Marian Sawer has identified as a move away from the concept of an ethical state which had a responsibility to intervene to eliminate disadvantage, the discourse shifted to a more individualist one which condemned such interventions as unfair positive discrimination.¹²³

Recent critiques have tended to obscure the successes of the original Act, and the significant extent to which the reformers’ aims were achieved. They had aspired to enhance the dignity of the legal process for separated couples and had hoped in the process that divorce would lose its moralistic and legalistic overtones.¹²⁴ In these respects the Act was undoubtedly successful. The new law allowed the unhappily married to sever their legal ties without the need for litigation or to “parade faults in public”,¹²⁵ and it brought to an end the salacious press reports about unfaithful partners and the industry of private investigators who had been ready to “stalk” suspicious spouses for a fee. Divorce applications in the new system quickly accounted for a tiny proportion of the Court’s workload,¹²⁶ and the idea that partners who have “drifted apart” should be free to end their marriage has continued to enjoy majority support.¹²⁷

But while divorce itself soon became unremarkable, many whose marriage came to an end in the late 1970s found themselves in a foreign land, their future governed by a law that was no longer anchored to the moral code within which they had constructed their marriage. Divorce was no longer a “remedy for the vindication of legal rights that have been infringed” but “a means for the restructuring of human lives”.¹²⁸ However, some in the community continued to expect vindication from the Court, and bitterly resisted the new family forms facilitated by the *Family Law Act*. In the way of modern family law reform, the Act was both reactive and proactive. It responded to the realities of contemporary relationships by removing a form of divorce which had become increasingly out of step with the changing moral attitudes in Australian society. Yet its underpinning message of gender equality also helped to shape expectations and provoke (sometimes violent) new equality-based demands for post-divorce rights that continue to influence family law politics to this day.

¹²¹ Women’s Electoral Lobby, Submission to the *Ruddock Inquiry*, p. 928; New South Wales Women’s Advisory Council, Submission to the *Ruddock Inquiry*, p. 762.

¹²² Lone Fathers Association of Australia, Submission to the *Ruddock Inquiry*, p.1551; Divorce Law Reform Association of South Australia, Submission to the *Ruddock Inquiry*, p.635.

¹²³ Marian Sawer, *The Ethical State? Social Liberalism in Australia* (Melbourne, 2003), pp.183-5; Chilla Bulbeck, “Gender Policies: Hers and His” in Peter Saunders and James Walter, eds, *Ideas and Influence: Social Science and Public Policy in Australia* (Sydney, 2005), pp.149-50.

¹²⁴ Whitlam, “Family Law Bill”, *CPD* (House), 28 November 1974, p.4323.

¹²⁵ The Hon. D. Erwin, “Family Law Bill”, *CPD* (House), 28 February 1975, p.916; The Hon. Dr. J. Cairns, “Family Law Bill”, *CPD* (House), 9 April 1975, p.1376.

¹²⁶ Judges of the Family Court of Australia, Submission to the *Ruddock Inquiry*, p.4187.

¹²⁷ David A. de Vaus, *Diversity and Change in Australian Families: A Statistical Profile* (Melbourne, 2004). The most common reasons given for ending marriage continue to centre on the affective qualities of the relationship, such as communication problems: Ilene Wolcott and Jody Hughes, *Towards Understanding the Reasons for Divorce*, Australian Institute of Family Studies, Working Paper No 20 (Melbourne, 1999), p.8.

¹²⁸ Henry Finlay, “Dispute Resolution in Australian Family Law”, *Australian Family Research Conference Proceedings: Volume II Family Law* (Canberra, 1983), p.63.

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