

## BOOK REVIEW

*To Have but Not To Hold: A History of Attitudes to Marriage and Divorce in Australia 1858–1975* by Henry Finlay (Sydney, The Federation Press, 2005) pages i–xiv, 1–434. Price A\$69.50 (hardcover). ISBN 1 86287 542 1.

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Divorce continues to stimulate controversy despite (or perhaps because of) its frequency, and much is written about its legal, financial and psychological consequences.<sup>1</sup> However, little scholarly attention has been paid to the origins of Australia's divorce laws. More specifically, little has been written about the ways in which the matrimonial causes legislation inherited from England<sup>2</sup> was adopted in the Australian colonies — and later adapted by the states and the Commonwealth — or the (frequently abortive) reform efforts that accompanied it. Henry Finlay's final and most ambitious book, *To Have but Not To Hold: A History of Attitudes to Marriage and Divorce in Australia 1858–1975*,<sup>3</sup> relies on contemporary accounts to illustrate the gradual, tortuous and often bitterly contested expansion of divorce in the Australian colonies from the mid-19<sup>th</sup> century until the passage of the *Family Law Act 1975* (Cth) ('FLA'). In so doing, it reveals as much about the politics of pre- and post-federation Australia and the influential individuals who fought for and against social and legislative change as it does about the language of the legislation itself. Until 1975, divorce laws continued to be steeped in ecclesiastical principles, gender inequity, and concepts of marital fault.

Divorce needs to be seen through the prism of marriage, and Finlay includes a brief but useful thumbnail sketch of the circumstances surrounding marital formation and termination in England prior to the passage of the *Divorce and Matrimonial Causes Act 1857*, 20 & 21 Vict, c 85.

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<sup>1</sup> See, eg, Grania Sheehan and Belinda Fehlberg, 'Families, Divorce and Family Law' (2000) 55 *Family Matters* 4; Belinda Hewitt, Janeen Baxter and Mark Western, 'Marriage Breakdown in Australia: The Social Correlates of Separation and Divorce' (2004) 41 *Journal of Sociology* 163; Bruce Smyth and Ruth Weston, 'Financial Living Standards after Divorce: A Recent Snapshot' (Research Paper No 23, Australian Institute of Family Studies, 2000).

<sup>2</sup> See, eg, *Divorce and Matrimonial Causes Act 1857*, 20 & 21 Vict, c 85.

<sup>3</sup> See also Henry Finlay, Rebecca J Bailey-Harris and Margaret F A Otlowski, *Family Law in Australia* (5<sup>th</sup> ed, 1997); Henry Finlay, A J Bradbook and Rebecca J Bailey-Harris, *Family Law: Cases, Materials, and Commentary* (2<sup>nd</sup> ed, 1993); Henry Finlay and William A M Walters, *Sex Change: The Legal Implications of Sex Reassignment* (1988); Henry Finlay and J E Sihombing, *Family Planning and the Law* (2<sup>nd</sup> ed, 1978).

For the vast majority of English women and men, methods by which a marriage could be dissolved were neither needed nor sought. Poor husbands whose wives were not to their liking were able to sell or abandon them, but such remedies were harder to rely on for women.<sup>4</sup> Relationships were entered into for personal rather than dynastic reasons, and where there was nothing of value to hand down to the next generation, there was no material advantage to be gained by acknowledging a change of status through registration. If celebrated at all, marriage was, until the mid-18<sup>th</sup> century, an informal affair, and post-Reformation England ignored the rules set down by the Council of Trent in 1545 which required the presence of an ordained priest.<sup>5</sup> The *Clandestine Marriages Act 1753*, 26 Geo 2, c 33 ('*Lord Hardwicke's Act*') was passed to prevent clandestine marriages, and required for the first time the presence of clergy and witnesses, the giving of parental or guardian consent and a form of registration.<sup>6</sup>

Marriage remained undefined until 1866 when Lord Penzance in *Hyde v Hyde* described it as 'the voluntary union for life of one man and one woman, to the exclusion of all others'.<sup>7</sup> This was subsequently adopted in Australia by the *FLA*,<sup>8</sup> and was most recently given statutory recognition in the *Marriage Amendment Act 2004* (Cth)<sup>9</sup> as part of the government's current policy of preventing the recognition of same-sex marriages.

In England, the accumulation of wealth by men who had inherited neither prosperity nor titles but whose marriages were not necessarily 'made in heaven' increased the need for some form of civil relief.<sup>10</sup> Prior to the Reformation, marriages could be declared void for those who had the money and patience to seek an annulment from the Catholic Church. This ecclesiastical mode of termination relied on a series of technicalities based on bigamy and definitions of prohibited relationships which expanded consanguinity and affinity to

<sup>4</sup> See Henry Finlay, *To Have but Not To Hold: A History of Attitudes to Marriage and Divorce in Australia 1858–1975* (2005) 12 fn 27, which refers to only one account of the sale of a husband.

<sup>5</sup> *Ibid* 5.

<sup>6</sup> See *In the Marriage of W and T* (1998) 23 Fam LR 175, 186–7 (Fogarty J).

<sup>7</sup> (1866) LR 1 P & D 130, 133. See Alastair Nicholson, 'The Regulation of Marriage' (2005) 29 *Melbourne University Law Review* 556, 558, where he comments that as civil divorce had been introduced prior to 1866, this definition of marriage as a 'union for life' was inaccurate even at the time of Lord Penzance's comment.

<sup>8</sup> *FLA* s 43(a). See also the discussion in *A-G (Cth) v Kevin* (2003) 172 FLR 300, 316 (Nicholson CJ, Ellis and Brown JJ).

<sup>9</sup> This Act amended the definition of marriage under *Marriage Act 1961* (Cth) s 5(1).

<sup>10</sup> Note also that between 1882 and 1893, the English Parliament passed the Married Women's Property Acts which progressively gave married women the same rights over their property as unmarried women. They could henceforth receive and retain ownership of property which had been received before or after marriage as a gift or an inheritance, or which had been purchased from their own earnings: see *Married Women's Property Act 1882*, 45 & 46 Vict, c 75; *Married Women's Property Act 1893*, 56 & 57 Vict, c 63. However, the number of women who benefited from these provisions was insignificant.

remarkable lengths.<sup>11</sup> The exercise has been described as being fraught with ‘intrinsic difficulties’<sup>12</sup> and as ‘a maze of flighty fancies and misapplied logic’.<sup>13</sup>

The Reformation ended the need for such ecclesiastical gymnastics, and in their stead divorce by Act of Parliament was permitted from 1669 until 1857. During this period approximately 300 parliamentary divorces were passed, all but four of which were in favour of male petitioners.<sup>14</sup> The process involved both the Ecclesiastical Courts and the House of Lords, and the sole ground was adultery. However, differential treatment of the sexes was a major feature, as a petitioning husband was only required to prove that his wife had committed adultery on one occasion, whilst she was required to produce evidence that her husband’s adultery was both aggravated and repeated.<sup>15</sup> This double standard was ultimately incorporated into *Divorce and Matrimonial Causes Act 1857*, 20 & 21 Vict, c 85, s 27 and formed the basis of the divorce legislation of the Australian colonies between 1858 and 1873.<sup>16</sup> The persistence of the requirement and the various attempts to remove it in both ‘the mother country’ and the colonies are discussed in detail by Finlay.<sup>17</sup>

Agitation for the introduction of civil divorce in 19<sup>th</sup> century England was encouraged by an increase in the ranks of the affluent middle classes, coupled with concern regarding the cost and complexity of the parliamentary process. However, there was also predictable opposition to the availability of ‘easy’ divorce as it had been perceived as a threat to the future of marriage. Several passionate, but ultimately futile, attempts were made by a small group of English politicians to prevent this double standard from becoming a statutory provision.<sup>18</sup> Despite this, even those who were, for religious reasons, antagonistic to the idea of divorce recognised its prohibition as being an encouragement of misery, illegitimacy, and the establishment of either bigamous or ‘illicit’ unions.<sup>19</sup>

The Australian colonies inherited their legal institutions from England and many of the English statutes of the time were adopted by the colonies almost

<sup>11</sup> Finlay, *To Have but Not To Hold*, above n 4, 8.

<sup>12</sup> Henry Finlay, ‘Divorce and the Status of Women: Beginnings in Nineteenth Century Australia’ (Paper presented at a seminar at the Australian Institute of Family Studies, Melbourne, 20 September 2001) 2 fn 6 <<http://www.aifs.gov.au/institute/seminars/finlay.html>>.

<sup>13</sup> Sir Frederick Pollock and Frederic William Maitland, *The History of English Law before the Time of Edward I* (2<sup>nd</sup> ed, 1893) vol 2, 389, which is incorrectly cited in Finlay, *To Have but Not To Hold*, above n 4, 8 fn 13 as *A History of English Law* (1912).

<sup>14</sup> Finlay, *To Have but Not To Hold*, above n 4, 10.

<sup>15</sup> The common justification was that although the sin was equally great for men and women, the consequences of the crimes were different: see Editorial, *The Argus* (Melbourne), 23 January 1860, 4, cited in Finlay, *To Have but Not To Hold*, above n 4, 71.

<sup>16</sup> See, eg, *Matrimonial Causes Jurisdiction Act 1864* (Qld); *An Ordinance To Regulate Divorce and Matrimonial Causes 1863* (WA). Cf the *Marriage and Matrimonial Causes Statute 1861* (Vic), essentially a copy of the *Divorce and Matrimonial Causes Act 1857*, 20 & 21 Vict, c 85, which remained in force until the Commonwealth enacted the *Matrimonial Causes Act 1959* (Cth).

<sup>17</sup> See Finlay, *To Have but Not To Hold*, above n 4, 50–5. Ultimately the double standard was abolished in all Australian jurisdictions (except Victoria) between 1881 and 1922 and in England in 1923: at 54.

<sup>18</sup> *Ibid* 19–20. One such politician was William Gladstone, who also supported the Married Women’s Property Acts.

<sup>19</sup> *Ibid* 18.

verbatim, particularly those relating to the family.<sup>20</sup> In his comprehensive treatment of the early Australian divorce experience, Finlay emphasises the universal themes of family law: the differential treatment given to men and women of varying levels of class and wealth; the battle for control of marriage formation and termination by church and state; the pecuniary concerns of communities who assumed — or ignored — responsibility for abandoned women and their children; and the wishes of the wealthy and powerful to keep their property safe from the scourge of illegitimacy.

Despite the colonies' adoption of the *Divorce and Matrimonial Causes Act 1857*, 20 & 21 Vict, c 85, and England's insistence on legislative uniformity, it soon became apparent that the new and old worlds were very different from each other in their composition, social mores and values. There were more fragile class barriers in Australia; the population was more mobile; and men outnumbered women to a considerable degree. Furthermore, the country was large and mostly unexplored, and was initially populated by a number of men and women transported against their will, or who conversely had chosen to move to the colonies in order to avoid familial responsibilities and various financial and matrimonial 'controversies'.<sup>21</sup>

Finlay explains that a concentration of poverty and deprivation in the colonies meant there was even less justification for the double standard here than there was in England. The search for gold and the opening up of the continent to agriculture caused significant social upheaval, and the support of large numbers of deserted women and children became a serious concern for the authorities.<sup>22</sup> A related pragmatic argument in favour of more liberal divorce laws was that the scarcity of women in the colonies increased their chances of remarriage, which in turn would, presumably, eliminate their reliance on the public purse.<sup>23</sup> Sir Alfred Stephen, a New South Welshman who fought tirelessly for divorce reform, sought to encourage support for it by pointing out that men against whom women had issued warrants for desertion were unlikely either to reconcile, to be chaste or to maintain their children who 'go into the public asylums to be educated at the expense of the people.'<sup>24</sup>

Given the distances involved, which made communication extremely difficult, and the differences between England and Australia, it is not surprising that points of tension developed between the mother country and her fractious Australian colonies in the decades before federation. These were exacerbated by the many attempts to extend the grounds for divorce across Australia, resulting repeatedly in the disallowance of Bills and censure 'at home' of the politicians and bureaucrats who supported them.<sup>25</sup> The issue of colonial comity quickly became a bone of contention as the more populous — and less conservative — colonies sought

<sup>20</sup> Ibid 25.

<sup>21</sup> Ibid 25–34.

<sup>22</sup> Ibid 29, 60.

<sup>23</sup> Ibid 60. See also Finlay, 'Divorce and the Status of Women', above n 12, 25–6.

<sup>24</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 31 March 1886, 1044 (Sir Alfred Stephen), as cited in Finlay, *To Have but Not To Hold*, above n 4, 155.

<sup>25</sup> See generally Finlay, *To Have but Not To Hold*, above n 4, 56, chs 3–4.

to extend the availability of divorce, thereby distinguishing colonial legislation from the English law.<sup>26</sup>

The importance of comity was stressed by Lord Carnarvon, the Parliamentary Under-Secretary for the Colonial Office, in his written response to the Governor of South Australia to a minor amendment made in 1859 to the *Matrimonial Causes and Divorce Act 1858* (SA)<sup>27</sup> to which the Governor initially agreed:

It appears to me that there can be few subjects of greater importance to the welfare of the entire body which is united under the Government of the British Crown, than the maintenance of uniformity of legislation, as far as practicable, in matters of social and domestic interest among which the law of marriage stands prominent.

It would be indeed a matter of great satisfaction, if the British subject, in whatever part of the Empire he might find himself ... could feel that his position in these all important particulars, his rights and duties in married life, the legitimacy of his issue, the descent of his property, were legally the same.<sup>28</sup>

The following year colonial comity destroyed John Pascoe Fawkner's attempt in Victoria to abolish the double standard and add the ground of desertion. His divorce Bill of 1860,<sup>29</sup> although passed by the Victorian legislature, was disallowed,<sup>30</sup> and Victoria only rid itself of the discriminatory provision when the federal *Matrimonial Causes Act 1959* (Cth) repealed the state Act.<sup>31</sup>

However, the legislative control of England over her Imperial outposts was severely dented in 1882, when the House of Lords in *Harvey v Farnie*<sup>32</sup> upheld the validity of a Scottish divorce of a marriage contracted in England on the ground of a husband's 'simple' adultery, despite the retention of the double standard in English law. Colonial reformers such as Victorian politician, William Sheils, made valuable use of the decision to press for increased legislative independence, which was from then onwards made much easier.<sup>33</sup>

Religious opposition to divorce was also a constraining factor, and the influential Sheils managed to criticise interference from both the mother country and the established church, while bemoaning the lack of divorce reform: 'Now, as we were forced to copy the English Act, the imperfections, anomalies, and injustice of that Act are the evil inheritance this colony has received from the unjust ascendancy, in England, of a particular denomination.'<sup>34</sup>

<sup>26</sup> Ibid ch 3.

<sup>27</sup> See *Matrimonial Causes Act 1858* (SA) which sought to transform the mandatory bar to divorce in the case of condonation to a discretionary bar: see *ibid* 58.

<sup>28</sup> Letter from Lord Carnarvon to Sir Richard Macdonnell (Governor of South Australia), 1 June 1859, as cited in Finlay, *To Have but Not To Hold*, above n 4, 59.

<sup>29</sup> Finlay, *To Have but Not To Hold*, above n 4, 56–7.

<sup>30</sup> Ibid.

<sup>31</sup> The situation in New South Wales was initially no different, although politicians such as Sir Alfred Stephen and David Buchanan eventually succeeded in effecting divorce reform, after two decades of debate, in 1881: see Finlay, *To Have but Not To Hold*, above n 4, 146–7.

<sup>32</sup> (1882) 8 App Cas 43.

<sup>33</sup> Finlay, *To Have but Not To Hold*, above n 4, 117–18.

<sup>34</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 10 August 1887, 773 (William Shiels), which is cited incorrectly in Finlay, *To Have but Not To Hold*, above n 4, 112.

And several years later *The Argus* in Melbourne spoke out against objections to the divorce Bill in the following terms:

The people of Victoria have spoken constitutionally through their representatives in the two Houses of Parliament, and no one else has any right to speak in their name. ... What right have clergymen of any church either in England or here to speak as if they represented the public opinion of the colony?<sup>35</sup>

Calls for colonial independence intensified from the 1880s and the colonies, despite their differing statutes, increasingly joined forces to encourage the English authorities to allow them to legislate more independently. Unfortunately Finlay does not expand on the difficulties brought about by the need for interstate comity, which the continuance of separate state laws must have required. For, although the *Australian Constitution* gave the federal Parliament power to legislate in the areas of marriage<sup>36</sup> and 'divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants',<sup>37</sup> the power was not exercised until 1959 in relation to divorce and matrimonial causes,<sup>38</sup> and not until 1961 in relation to marriage.<sup>39</sup> Federation thus initially had little impact on the states in the area of family law, and Finlay argues that in fact it arrested the movement towards more liberal divorce,<sup>40</sup> whilst also fragmenting family law into the public (state) and private (federal) areas that bedevils Australian family law to this day.<sup>41</sup>

Divorce and issues of gender are perennial bedfellows, and for much of the period covered by the book divorce laws were characterised by an uneasy combination of blatant sexual discrimination and concerned paternalism. Finlay's focus on the voices of politicians prevents the less public contributions of women from being heard,<sup>42</sup> although as the Hon Elizabeth Evatt's foreword to the book recognises, a number of women, including Lady Mary Windeyer and Louisa Lawson, agitated long and hard for more accessible and

<sup>35</sup> Editorial, *The Argus* (Melbourne), 17 April 1890, 6, cited in Finlay, *To Have but Not To Hold*, above n 4, 126.

<sup>36</sup> *Australian Constitution* s 51 (xxi).

<sup>37</sup> *Australian Constitution* s 51 (xxii).

<sup>38</sup> As a wartime measure the *Matrimonial Causes Act 1945* (Cth) provided that where an Australian woman sought a divorce from a husband who was domiciled outside Australia, either party could initiate proceedings in the state of their residence without being domiciled there. This applied to marriages entered into between 2 September 1939 and the 'appointed day', and to matrimonial proceedings instituted within five years of 1 June 1950: see Finlay, *To Have But Not to Hold*, above n 4, 297–8.

<sup>39</sup> *Marriage Act 1961* (Cth).

<sup>40</sup> Finlay, *To Have but Not To Hold*, above n 4, 289.

<sup>41</sup> See Susan Nanlohy, 'The Best Interests of the Child? The Interaction of Public and Private Law in Australia' (Paper presented at the Expanding Our Horizons Conference: Understanding the Complexities of Violence against Women — Meaning, Cultures, Difference, Sydney, 18–22 February 2002) 1.

<sup>42</sup> The participation of Senator Dorothy Tangney in the debate on the Matrimonial Causes Bill 1959 (Cth) is the first reference cited by Finlay to a female politician in a debate on family law in this country. Senator Tangney argued for a unified divorce law (as she had apparently done 15 years earlier) in the hope that it would correct the lack of financial support for deserted wives and their children, and also criticised the absence of legal aid for matrimonial cases in Western Australia: Finlay, *To Have but Not To Hold*, above n 4, 339–40. See also Commonwealth, *Parliamentary Debates*, Senate, 29 November 1944, 2264 (Senator Dorothy Tangney).

non-discriminatory divorce laws.<sup>43</sup> As previously mentioned, attempts to remove the double standard provided the first battleground, to be followed shortly thereafter by proposals to expand the ground for divorce beyond that of adultery and to abolish the dependent domicile of married women.

Women *did* however write to the press and to their politicians describing their wretched lives and the impacts of their husbands' abandonment, drunkenness and cruelty on themselves and their children:

however indissoluble they may say my marriage is, he who was my husband, by his unnatural desertion, has dissolved it. The law interferes where it should not, and says that we are still husband and wife; but this empty title imposed by law only implies servitude on my part ...<sup>44</sup>

Such accounts provided ammunition for men who sought to expand the grounds for divorce.<sup>45</sup> They appear to have been totally ignored by those who opposed reform.

The latter chapters of *To Have but Not To Hold* concentrate on the relatively recent history of Australian federal divorce law, beginning with the Matrimonial Bill 1957 (Cth) introduced by Percy Joske,<sup>46</sup> which acted as a catalyst to the drafting of the then landmark *Matrimonial Causes Act 1959* (Cth).

Despite frequent attempts to encourage the Commonwealth to exercise its constitutional powers over marriage and divorce, Sir Garfield Barwick explained its hesitancy as being due to

the wise understanding that the people of this widespreading continent had not heretofore attained that sense of unity which would enable them readily to forgo the familiar and distinctive features of their State systems of divorce, in favour of a uniform national law resulting probably if not necessarily from some degree of compromise.<sup>47</sup>

The 14 grounds for divorce provided by the *Matrimonial Causes Act 1959* (Cth)<sup>48</sup> were an amalgamation of those found in the majority of the states, except for the inclusion of the controversial five-year separation ground which had been unique to Western Australia.<sup>49</sup> The Act also retained a number of features inherited from its colonial and state predecessors and consequently from the English *Divorce and Matrimonial Causes Act 1857*, 20 & 21 Vict, c 85. For example: a person who falsely boasted that he or she was married to someone else could be penalised;<sup>50</sup> parties could obtain an order for judicial separation

<sup>43</sup> Elizabeth Evatt, 'Foreword' in Henry Finlay, *To Have but Not To Hold* (2005) v, vi.

<sup>44</sup> 'Rachel', Letter to the Editor, *The Age* (Melbourne), 21 February 1860, 4, cited in Finlay, *To Have but Not To Hold*, above n 4, 73. See also generally Finlay, *To Have but Not To Hold*, above n 4, 75–7.

<sup>45</sup> Finlay, *To Have but Not To Hold*, above n 4, 73.

<sup>46</sup> See *ibid* 304.

<sup>47</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 14 May 1959, 2222 (Sir Garfield Barwick, Attorney-General), cited in Finlay, *To Have but Not To Hold*, above n 4, 308.

<sup>48</sup> *Matrimonial Causes Act 1959* (Cth) s 28.

<sup>49</sup> South Australia had a similar provision which permitted divorce after five years of separation provided that the separation had resulted from an order for judicial separation: see Finlay, *To Have but Not To Hold*, above n 4, 222–3.

<sup>50</sup> The ancient offence of jactitation of marriage: *Matrimonial Causes Act 1959* (Cth) s 65.

which did not terminate the marriage but permitted the parties to live apart;<sup>51</sup> proof that an application was tainted by either condonation, connivance and/or collusion resulted in its automatic dismissal;<sup>52</sup> and costs could be awarded against co-respondents for indulging in ‘criminal conversation’ (adultery).<sup>53</sup>

The debates themselves show the high level of cross-party support for the Matrimonial Bill 1957 (Cth) and include occasional references to the changing role of women and a degree of scepticism about the role to be played by marriage guidance councillors.<sup>54</sup> However, there is an almost complete avoidance of any reference to ancillary relief — particularly proceedings involving children and property — and a general obsession with issues relevant to matrimonial conduct. This obsession, together with concern at the expense, hypocrisy and indignities associated with the judicial determination of fault, were responsible for the groundswell of opposition to the *Matrimonial Causes Act 1959* (Cth) which culminated in the move towards no-fault divorce and the eventual passage of the *FLA*.<sup>55</sup>

The second reading of the Family Law Bill 1973 (Cth) was moved by the Attorney-General, Senator Lionel Murphy, in December 1973. The Bill subsequently lapsed due to the dissolution of the Parliament and was revived in April 1974. Those senators and members who supported its general tenor spoke of the shortcomings of the fault approach to divorce and its perpetuation of gender equality. Senator Alan Missen referred to the attempt to apportion blame to one or other partner as being nothing more than ‘an exercise in futility’;<sup>56</sup> Senator James McClelland noted that socioeconomic factors were more likely to cause marriage breakdown than the offences contained in divorce law.<sup>57</sup> Kenneth Fry described the *Matrimonial Causes Act 1959* (Cth) as causing ‘gross injustice and ... bitter degradation and humiliation’,<sup>58</sup> and Dr Henry Jenkins blamed the concept of matrimonial fault for exacerbating ill will between the parties and damaging their children.<sup>59</sup> The Bill’s detractors accused it of being ‘an attack

<sup>51</sup> *Matrimonial Causes Act 1959* (Cth) s 54.

<sup>52</sup> That is, the forgiveness of the commission of a matrimonial offence (condonation); behaviour by one spouse designed to cause the other to commit a matrimonial offence (connivance); and an agreement made by both spouses to commit an offence in order to provide a ground for the divorce (collusion): *Matrimonial Causes Act 1959* (Cth) ss 39–40.

<sup>53</sup> *Matrimonial Causes Act 1959* (Cth) s 44.

<sup>54</sup> Described by James Killen as ‘a lot of well-meaning busybodies’: Commonwealth, *Parliamentary Debates*, House of Representatives, 18 November 1959, 2801 (James Killen), cited in Finlay, *To Have but Not To Hold*, above n 4, 321.

<sup>55</sup> See extracts from the second reading of the Family Law Bill 1974 (Cth) in Commonwealth, *Parliamentary Debates*, House of Representatives, 28 November 1974, 4320–2 (Gough Whitlam, Prime Minister), cited in Finlay, *To Have but Not To Hold*, above n 4, 391. See also Nell Alves-Perini et al, ‘Finding Fault in Marital Property Law: A Little Bit of History Repeating?’ (Paper presented at the 24<sup>th</sup> Australia and New Zealand Law and History Society Annual Conference, the University of Auckland, New Zealand, 10–12 July 2005).

<sup>56</sup> Commonwealth, *Parliamentary Debates*, Senate, 29 October 1974, 2033 (Senator Alan Missen), cited in Finlay, *To Have but Not To Hold*, above n 4, 366.

<sup>57</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 29 October 1974, 2044 (Senator James McClelland), cited in Finlay, *To Have but Not To Hold*, above n 4, 368.

<sup>58</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 6 March 1975, 1163 (Kenneth Fry), cited in Finlay, *To Have but Not To Hold*, above n 4, 400.

<sup>59</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 9 April 1975, 1368–9 (Henry Jenkins), cited in Finlay, *To Have but Not To Hold*, above n 4, 401.

upon marriage, the family, the woman, the homemaker, the mother'<sup>60</sup> and as removing 'the fundamental responsibility of ... parties to make ... marriage endure.'<sup>61</sup> Final assent to the Bill was nevertheless given in June 1975, and the *FLA* came into effect the following January, only months after the dismissal of the Whitlam Government.

Finlay's almost complete reliance on extracts from the *Parliamentary Debates* in his description of this process is disappointing. The significance of the introduction of no-fault divorce should not be underestimated, nor obviously should the role of the federal Parliament in the passage of the *FLA*. However, the arguments for and against the Family Law Bill 1973 (Cth) were fought out in the contemporary media with great passion and, when it became apparent that opposition to the no-fault clause was faltering, there was considerable debate in the community about the most appropriate period of separation to establish irretrievable breakdown.<sup>62</sup> These accounts are not the subject of comment in *To Have but Not To Hold*, and what is otherwise an interesting book suffers as a consequence.

Once the *FLA* came into operation the debate continued with sufficient vigour to justify the establishment of a Joint Select Committee in 1978, chaired by Philip Ruddock, with its principal term of reference being 'the ground of divorce and whether there should be other grounds'.<sup>63</sup> Although the Committee's report did not recommend a reconsideration of no-fault divorce, there was some disquiet at the impact of the *FLA*, fanned by the sudden increase in divorce applications following its passage.<sup>64</sup> Such concerns seemed to recede after this, and the second Joint Select Committee in 1991 dealt primarily with ancillary matters, with a subsequent term of reference on the Family Court's funding and administration.<sup>65</sup>

The other unfortunate omission from the discussion of the *FLA* is the superficial reference to the new concepts introduced in the Act, other than the inclusion of concerns about the constitutional powers of the Family Court in the exercise of its non-judicial functions.<sup>66</sup> Innovations such as the separation of principal relief from ancillary relief allowed divorce to be granted independently of, for example, children and property proceedings for the first time, thus preventing

<sup>60</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 28 February 1975, 943 (Anthony Luchetti), cited in Finlay, *To Have but Not To Hold*, above n 4, 399.

<sup>61</sup> Commonwealth, *Parliamentary Debates*, Senate, 30 October 1974, 2158 (Sir Kenneth Anderson), cited in Finlay, *To Have but Not To Hold*, above n 4, 373.

<sup>62</sup> See Finlay, *To Have but Not To Hold*, above n 4, 406–8. Finlay refers to the one-vote defeat of the amendment proposed by Robert Ellicott, federal Member for Wentworth, New South Wales, which would have extended the 12-month separation period to two years where the parties did not consent to divorce.

<sup>63</sup> Joint Select Committee on the *Family Law Act*, Parliament of Australia, *Family Law in Australia: Report of the Joint Select Committee on the Family Law Act* (1980) vol 1, iii.

<sup>64</sup> The peak year for divorce numbers was 1976 (the first year of the Act's operation) when 63 230 divorces were granted, compared with 24 257 in 1975: see Australian Bureau of Statistics, *Marriages and Divorces, Australia*, ABS Catalogue No 3307.0 (1976) 10.

<sup>65</sup> See Joint Select Committee on Certain Aspects of the Operation and Interpretation of the *Family Law Act*, Parliament of Australia, *The Family Law Act 1975: Aspects of Its Operation and Interpretation* (1992); Joint Select Committee on Certain Family Law Issues, Parliament of Australia, *Funding and Administration of the Family Court of Australia* (1995).

<sup>66</sup> See Finlay, *To Have but Not To Hold*, above n 4, 378–80.

opportunities for blackmail. The original provision that each parent was the guardian of their children and each had joint custody of the child (in the absence of a court order), the recognition of both financial and non-financial and direct and non-direct contributions to property, and the availability of separate legal representation for children were all as significant as the introduction of no-fault divorce. Such omissions may be a consequence of Finlay's decision to focus on divorce itself, or they may reflect the superficiality of the debates, although there is no comment on this. Whatever the cause, the omissions unfortunately serve to perpetuate a narrow view of the Act.

The strength of *To Have but Not To Hold* lies in its very thorough documentation of the attitudes of politicians to divorce in Australia at a time when the colonies were seeking increased autonomy, and in the period following federation when the Commonwealth failed to exercise its matrimonial causes powers. Despite their limitations, the *Parliamentary Debates* and the other contemporary records provide a valuable insight into the public views of legislators operating in a very different social context from our own.

Debates about family law issues have accelerated since the passage of the *FLA*. Thirty years on, 'the legal regulation of marriage',<sup>67</sup> the re-emergence of 'joint custody'<sup>68</sup> and the introduction of less adversarial procedures in children's matters<sup>69</sup> are the subjects of public discourse and legislation, but many other reforms have been proposed, tried and abandoned in the intervening decades.<sup>70</sup> Divorce itself has been the subject of little critical attention,<sup>71</sup> and Australian family lawyers are undoubtedly grateful that they are not required to operate, as are their English colleagues, within the confines of legislation based on an awkward combination of fault and no-fault approaches.<sup>72</sup>

<sup>67</sup> Nicholson, above n 7, 556.

<sup>68</sup> The *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) was passed on 30 March 2006.

<sup>69</sup> See Family Court of Australia, *Child Related Proceedings* (August 2006) <[http://www.familycourt.gov.au/presence/connect/www/home/about/childrens\\_cases\\_program/#children](http://www.familycourt.gov.au/presence/connect/www/home/about/childrens_cases_program/#children)>.

<sup>70</sup> The referral of powers, attempts to introduce a community of property regime and the introduction of the child support scheme are some of many.

<sup>71</sup> Cf the recent works of John Hirst, "'Kangaroo Court': Family Law in Australia' (2005) 17 *Quarterly Essay* 1; Barry Maley, *Divorce Law and The Future of Marriage* (2003).

<sup>72</sup> *Family Law Act 1996* (UK) c 27.