Book Reviews

Henry Finlay
To Have But Not To Hold:
A History of Attitudes to Marriage and Divorce in Australia 1858–1975
The Federation Press, 2005

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Since 1968 at least, Associate Professor H R Finlay, academic, mediator and barrister, has been publishing on family law. He was one of the first to use the modern term 'family law', which appeared in his initial 1972 edition of *Family Law in Australia,* (with A. Bisset-Johnson, Butterworths, Melbourne). His endurance and productivity almost qualify him as an historian of family law, having worked through many of the years which produced the attitudes he now reviews.

Finlay's latest book begins to fill a significant gap in Australian legal history and is a welcome addition to his impressive body of achievements. It consists of excerpts from Parliamentary debates concerning divorce over 117 years. The major topics are the introduction of divorce in all the colonies, the extension of 'equal' divorce rights to women, the reluctance of the Commonwealth to unify divorce laws in Australia and finally the abolition of matrimonial fault with the *Family Law Act* 1975 (Cth). In a rare collation Finlay graphs the historical progress of early divorce reform in England and the six Australian colonies, enabling quick comparisons at a glance. Also original is the inclusion of debates in the 'smaller states', South Australia, Queensland, Western Australia and Tasmania, enabling further analyses and breaking the dominance of NSW and Victorian histories which sometimes pose as the Australian story.

Covering a long period for a serious history, the book is still modest in scope, examining only attitudes with very little analysis, and stopping understandably at 1975. The reactions to the *Family Law Act 1975* (Cth) are continuing to impact on Australian society and their history to date would require several volumes of this size. This book however is not a history of attitudes of people generally speaking, but of some politicians as revealed through political debates. With minimal commentary it becomes a task for the reader to discern if the politicians are speaking

their mind, adhering to the party line, representing a vested interest (typically the church) or stating what people's attitudes should be. As Finlay acknowledges choices must be made.

The main flaw is that Finlay's choices include only scarce excerpts from non-Parliamentary sources and his own rare comments provide little to engage the reader or provide a social backdrop of the times. There are a few extracts from newspaper reports and letters to the editor, illustrating something of general attitudes, but these are only from the early period concerning the 19th century reforms. There is nothing from *The Sydney Morning Herald* or *The Age* for the periods around 1959, when the Commonwealth finally legislated to bring under its wing all of the various State laws on divorce, or the build-up to the major 1975 Act, which among many things abolished all forms of matrimonial fault. These were times when arguments for both sides of reform appeared frequently in the press. Press reports and letters to the editor are a valuable and available historical source that could have provided context and background as well as relief from the slabs of political *Debates.*

The general reader nevertheless will not be bored as there is good narrative here, even drama, prejudice, denials of justice, bravery and pandering. Like many Western countries in the late nineteenth century Australia struggled to find ways to introduce liberal reforms without jeopardising social stability. In reforming the laws of divorce, which in a sense defined marriage, there was strong resistance from conservative forces such as the church which had significant power in Australian society until the 1970s.

The major change between 1858 and 1975 involved shifts in the manifestation of patriarchy. The dualist fiction of man's public realm of law and state, and woman's private realm of the family began crumbling with the rise of liberal ideals of democracy and equality in the nineteenth century. Clearly man controlled both public and private realms while he had control over divorce. The fear was that extending divorce rights to women jeopardised male control of capital and risked the stability of economic systems, a problem for government in England where the wealth of the middle-classes had grown rapidly due to the industrial revolution. In young Australia, however, the bigger fear for conservatives was that giving women rights of divorce risked destabilising the family, which they assumed to be the basis of society and ultimately the nation. These fears were seldom expressed in Parliaments but hovered above the petty disputes, the religious references, entreaties for the abused and the need for social reform.

Finlay makes no reference to, or acknowledgement of, indigenous influences or experiences, reflecting their almost complete absence in mainstream Australian legal history. Instead, the Australian story begins in England, where before 1858 only a few rich and powerful men could divorce their wives, and only by private legislation. Up to 325 legislative divorces were recorded between 1670 and 1825, and interestingly

according to C H Curry writing in 1955, only one was from Australia and four were initiated by women.

The 1858 English reform (*Divorce and Matrimonial Causes Act 1857*) allowed less-wealthy men and women in England to apply for divorce in a court of law. The double standard involved a male petitioner only needing to prove that his wife had committed adultery to justify divorce, while a woman had to prove her husband's adultery plus another matrimonial offence to get the same relief. The rationale for the difference was briefly put by Samuel Johnson with his quip 'The man imposes no bastards on his wife'. Wealthy men were afraid that their property could be lost to 'spurious offspring' of their wives. They depended on the law to inhibit adultery by wives and to facilitate divorce for cuckolded husbands.

The liberal movement in western society typified by the 1858 English divorce reform eventually produced the 'first wave' of feminist activism in the 1870s and 1880s in which many women and their political supporters demanded equality in the family, as well as in society. One aspect of these demands was the 'extension of divorce', which would allow women equal grounds for divorce with men. This demand was ultimately successful, at least in a formal sense, and Finlay's book includes some of the arguments for and against reform.

In Australia each of the colonies began the process to adopt the 1857 English law to permit divorce in their respective courts. Opposition to this and later reforms came from religious interests. In the NSW 1870 debates Dr John Dunmore Lang argued against divorce referring to the scriptures, critiquing the 'Mammon-worshipping community' and claiming divorce would 'open the floodgates to vice and immorality'. Progressives such as Sir John Hay supported divorce due to the needs of the poor. The effect of the existing law, he claimed, was to 'demoralise and degrade the lower classes'. Others were inconsistent, such as the statesman Henry Parkes who changed his mind to vote against reform due to a book he claimed proved divorce had caused social collapse in the United States. William Windeyer, a powerful orator and future Supreme Court judge, argued in favour of divorce and claimed the Bill did not go far enough because it discriminated against women. However the hero of reform in NSW at this time was David Buchanan. He proposed many Bills and gave many more speeches over a seven-year period in support of reform.

Interspersed in the local debates is the hint of nationalism. In 1870 Sir John Hay for example claimed that NSW was not beholden to English legislation and should take the lead. Going further, he proclaimed that English law's regard for the rights of women was 'the most barbarous of any civilized community'. Any rights a woman did have in England, said Hay, were dependent on 'the well paid contrivances of the Equity Court'. This speech won cheers and no doubt some silent enmity. It took NSW eight attempts and another three years before introducing divorce in 1873, and then the debates began for equalising the grounds of divorce for women.

In this first round of reform, some Australian colonies outperformed 'home', as Finlay calls England. NSW for example achieved 'equal' grounds of adultery for divorce in 1881, something that did not happen in England until 1923, although it never happened in Victoria until divorce law was taken under over by the Commonwealth in 1959. The NSW reform would have happened much earlier if several Bills passed locally after strenuous debate had not been rejected by our betters at 'home', in the voice of the Colonial Secretary due to 'insufficient consideration'. That slur was enough to engender nationalism in some hitherto imperial hearts sitting in the NSW Parliament and even opponents of reform objected to the patronising attitude of Her Majesty's Government.

There is little reference to other developments to show whether all this male puff reflected actual need in Australian society or if restricted divorce had much effect on people's lives. There is no mention of divorce rates or marriage rates for example which could have explained some of the extracts. Divorce was a function of not just legal availability but social, family and religious attitudes, wealth and employment. However, there were significant shifts in both marriage and divorce rates during the 20th century, generally showing marriage rates decreasing and divorce rates increasing.

Finlay restricts our reading to comments within the blind halls of parliament, and as a result many of the social issues associated with implementing these important social reforms are hidden. For example academics such as Hilary Golder have shown that after the laws in NSW had been reformed many lawyers, court staff and judges chose to ignore the changes. Apparently around 1900 Sydney solicitors continued to plead 'aggravations' on behalf of petitioning wives in divorce cases long after reform made them unnecessary. Collusion was illegal of course, but it was institutionalised and historians have noted that many lawyers made a living from helping clients construct the facts to suit the grounds. The registry staff of the Supreme Court of NSW allegedly handed to unrepresented women seeking divorce forms already printed with desertion allegations. Judges sometimes ignored the statutes or bent them to suit the cases before the court. Records show Windeyer J granted women divorces on evidence of desertion alone, without requiring proof of adultery. Other judges seemed to err by applying an unreasonably strict view of the law. In the case of *Pearce and Pearce* (1900) 21 NSWLR (D) 32 for example Simpson J refused a woman's appeal in a petition for divorce, despite finding the husband had cruelly beat and injured his wife and their baby over time and had made threats to kill.

In 1901 many hoped the Constitution for the new Australian Federation would lead to a unification of the various grounds of divorce in the different states. In fact the bitter and unresolved disputes about marriage and divorce at the Sydney Convention Debates in 1897 ensured that the power of marriage and divorce were expressed minimally in the Constitution of the Commonwealth. Sir John Downer

claimed: 'It is a highly proper power, and it will probably be exercised at the earliest possible moment'. To which Bernard Wise responded: 'They will get into trouble very quickly if they do exercise it'. Wise had the more accurate view because the Commonwealth took 58 years to unify the various State laws of divorce with its *Matrimonial Causes Act 1959–1965*.

In the intervening half-century social attitudes continued to develop, more people wanted divorce, politicians dithered, too afraid of the churches to initiate any change that could be interpreted as an attack on marriage. So lawyers continued to fill the gap, and many their pockets, helping people through the miasma of anachronistic regulations.

No mention here of these shenanigans as Finlay takes us through debates on several minor statutes, the effects of the two world wars and some failed major Bills. The politicians thought they knew what they were doing. According to Dr Evatt during debate on one relatively minor Bill in 1955: 'I do not know of any other kind of legislation which, in so undramatic a way, will remedy so many cases of injustice'. A Labor backbencher Gough Whitlam responded with courage and acumen saying the Bill was good but insufficient: 'It is indicative of the timidity of all parties which have held office in this Parliament that a uniform divorce law has never been introduced.'

The Commonwealth's first major use of the divorce power, the *Matrimonial Causes Act 1959* (Cth) was not a reform so much as a coordinating statute that rendered the divorce law uniform in Australia by converting 30 surviving grounds of divorce in the state Acts, to 14 grounds. Without Whitlam's candour so evident four years earlier, Sir Garfield Barwick, then Commonwealth Attorney General, hid behind a slight on the people. The Commonwealth's reticence was justifiable he said because of people's inability 'to forego the familiar and distinctive features of their State systems'. Finlay, unwilling to call humbug for what it is, agreed with these statements 'so far as they went', adding they were however 'typical political rhetoric'.

The real reason for the Commonwealth's delay of course was fear of the church, which historically opposed any reforms of divorce laws to avoid weakening the male-headed, marriage-based family. By the late 1950s in Australia, religious influence was beginning to wane. Stirring the possum, Arthur Calwell, Deputy Leader of the Labor Opposition, criticised a provision in the Bill adopted from Western Australia that allowed divorce after 5 years separation. As a strict Catholic and applying his religion to his politics, Calwell supported criticism of the reform by church leaders and refused 'to help raise the palsied arm of this Government as it seeks to bestow a benediction on promiscuity' and create a 'secular sanctification of barnyard morality'.

Dr Herbert Evatt, Leader of the Opposition, contradicted his deputy and bravely retorted: 'I am not worried about what the distinguished church leaders think ... Why all the fuss about it? I had expected the

figures to show that in Western Australia everybody was committing adultery, judging by the absurd statements I have heard made in this chamber, but the reverse position obtains.'

The other issue in the late 1950s was gender: the rising independence of women and the beginning of 'second wave' feminism. Women had begun to organise in Australia and some politicians claimed there was strong support from them for an Act of this kind. Jeff Bate listed for the House many of the women's organisations that had lobbied for reform of the divorce laws. Senator Donald Cameron supported the reform because it was a step towards improving the economic status of women. Calling the bluff of the churches and aggravating other opponents he declared: '... this is essentially a women's bill'. Others in both Houses referred to the times changing so that more women were working outside the home, which they thought caused rising divorce rates. Eventually the *Matrimonial Causes Bill* was made law and praised as 'a peak of legislative excellence unequalled ... etc', despite the fact it was soon amended and then replaced by the *Family Law Act 1975*.

The final chapter on the introduction of the radical 1975 Act continues to leave the reader guessing what was going on outside Parliament. In legal and historical terms the *Family Law Bill* was truly a revolutionary proposal, but there is little in the *Debates* to explain why its time had come. How was it that after all the anxiety in passing the *Matrimonial Causes Act 1959-1965* things had changed so much and so soon that a completely new system was needed? AG Senator Lionel Murphy provided only a hint: 'It is apparent that the public attitude to divorce has changed dramatically in the comparatively short time since the 1959 Act was passed.' No doubt his colleagues knew to what he referred. Senator Jim McClelland supported the Bill and pointed out that that the real causes of the apparent 'disintegration of marriage' as he called it, were 'increasing urbanisation, increasing industrialisation, greater social mobility, the emancipation of women, the weakening of religious sanctions and ... increased all-round prosperity'. Was marriage disintegrating in the early 1970s?

The problem was fault. Ever since divorce was permitted an applicant had to prove fault in court by showing evidence that their spouse had committed a 'matrimonial offence'. The process was not only personally embarrassing but it encouraged collusion and damaged both the legal profession and the legal system. At one stage John Kerin (Macarthur, NSW) pointed out that in 1973 in NSW there were 1067 divorces based on cruelty, while only 72 in Victoria, implying NSW people were 15 times more cruel in marital relations than those in Victoria. The new *Family Law Bill* sought to abolish all grounds of fault, replacing the whole concept of 'matrimonial offence' with one ground for divorce, 'irretrievable breakdown' provable only by twelve months separation. It created the concept of 'joint custody', it enabled a court to appoint a solicitor to act for a child, paid for by legal aid, and to order the parties to attend counselling. It created guidelines for maintenance based on need and the division of property based on

contributions including those made by a homemaker or parent, typically the mother. Married women were also given an independent domicile, not based on that of their husbands. It set up the Family Law Council to advise the AG on family law matters and the working of the Act. During debate Murphy inserted an amendment to establish a specialist Family Court of Australia to take responsibility for all family law matters, and to act as a 'helping court' by providing a counselling service.

The mid-1970s marked an important time in Australia's history and the *Debates*, limited as they are, make fascinating reading. The Bill had huge potential for furthering gender equality and changing the face of marriage and family in society to better suit people's values and priorities. According to Ian McPhee (Balaclava Vic) the most important aspect of the Bill 'is that it makes men and women more equal before the law than they are at present.' Anthony Luchetti (Macquarie, NSW) said it was 'an attack upon marriage, the family, the woman, the homemaker, the mother'. Francis Stewart (Lang NSW) said it 'turned marriage into a cheap temporary union ... We have reached the ultimate in the disposable society in this Bill'. Some acknowledged the need for the law to stay abreast of social changes which had already occurred, such as the development of the birth control pill which according to Robert Whan (Eden-Monaro, SA) meant it was no longer 'absolutely essential to have a morality and a code of ethics that protected the unwanted child'. Such comments 'waved the red flag' at the churches and aggravated many whose politics were based on religious principles.

At this stage Finlay teases the reader with hints that the debate over divorce reform was raging in society as well as in Parliament. He quotes Peter Fisher (Mallee, Vic) who stated that all members had been inundated by 'numerous volumes of letters from individuals and groups, for and against this Bill'.

Feminism was a powerful force at the time and led some members to claim that the Bill did not go far enough. Jim Cairns (Lalor, Vic) said the maintenance provisions were unfair to women, in fact he said 'all laws are unfair to women. Women are part of the property system and their status reflects its requirements...Women occupy an inferior social status in Australia and society still wants to keep them in that position.' Paul Keating (Blaxland, NSW) also suggested the Bill was inadequate and it should include a provision for instant termination of a marriage if one party's behaviour caused it to break down.

John Howard (Bennelong, NSW) supported an amendment to extend the time to 24 months separation if there was no consent to divorce. Eventually this was defeated 59 votes to 60, a poignant moment witnessed in person by Finlay sitting in the Speakers Gallery at 6 pm on 19 May 1975.

Malcolm Fraser with support of others including John Howard sought to introduce a clause 'to protect the position of a woman who wishes only to continue her role as a wife and mother'. The amendment failed because it was adequately covered by the principles in clause 43. It

was eventually inserted into clause 75 on spousal maintenance and later changed to refer to 'parent' rather than 'wife and mother'.

Ultimately the Bill was read a third time and came into effect on 5 January 1976. In moving the third reading William McMahon (Lowe, NSW) thanked several people including 'Professor Finlay, the A[ssociate] Professor of Family Law at Monash University for the help he has given'. The author graciously demurs in footnote.

Given Finlay's intimate familiarity with the 1975 reforms, it is regrettable that the reader must wait until the postscript to be given a glimpse of the author's views about their significance. Finlay identifies the biggest change from 1850 to 1975 to be the position of women. He acknowledges there was no uniformity in the demands for reform; there were major differences between the colonies and diversity in the views of women for whom most of the reforms were fought. Another major change was the social decline of marriage itself, which Finlay predicted in 1980.

One problem of relying on the *Debates* is missing those important events that impact on people's lives but which politicians find difficult to discuss or to create legislation about. Two relevant issues seldom discussed in the build up to the *Family Law Act* were the significant change in attitudes to sexuality and the growing prevalence of domestic violence. The question of same-sex marriage for example never made it into the hallowed halls for debate in the 1970s. In his 1972 book Finlay displayed the legalist view probably shared by most at that time when he called the demands to recognise same-sex relationships 'as grotesque as they are nonsensical'.

The silencing of domestic violence is more obvious, as Finlay considers it briefly and only in the early decades. It is possible domestic violence did not rate much mention in Parliament because there was no language for it other than the unfashionable 'fault' of cruelty. In fact it was a huge and growing problem by 1970. In Australia and elsewhere rising notions of equality led increasing numbers of women to find their marriages unacceptable, and while many escaped their controlling husbands, risking the 'fault' of desertion, others were restrained from leaving by force, fear or finances. Men, on the other hand, were schooled in patriarchy and the cultures of masculinity and typically felt obliged to control their wives and families. Consequently in Australia in the early 1970s there was a sudden need for women's refuges; by 1979 there were 100 government funded refuges and 265 by 1990.

Overall this book should be titled for what it is, a history of parliamentary debates. People's attitudes are not represented adequately here, but need to be construed from the mass of contradicting assertions and political opinions. The book will interest many, including family, social, political and legal historians, and will be useful as a reference text for serious research. It should provoke broader studies that will show how major reforms are stifled or stumble into reality, despite the isolation of our Parliaments and the unrepresentative attitudes of our politicians.