

**BOOK REVIEW\****To Have But Not To Hold: A History of Attitudes to Divorce  
and Marriage in Australia*

1878 – 1975

by HENRY FINLAY

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The Hon Elizabeth Evatt AC, in her foreword to Henry Finlay's valuable study, states that:

The issues surrounding divorce have not been and will probably never be free of controversy and strongly held opposing views. Many of those directly involved will continue to experience severe distress, heartache and even anger, whatever the state of the law. This will ensure continued debate and discussion in our Parliament and in the community about divorce and family law. This work should help readers to put their ideas into a historical perspective.

There are, indeed, few areas of the law which do not immediately grow out of their historical bases and much of the heat which is generated by proposals for law reform (both within and outside the area broadly known today as family law) could often be dissipated by an understanding of those historical bases. Likewise, the limitations of the law as an instrument of social or normative change can be better understood if those bases are known and, more importantly, better understood. It is for those reasons, quite apart from its intrinsic merit, that this book deserves a wide readership amongst policy framers and legal practitioners as well as social historians, who must find themselves instantly drawn to its subject matter.

The book is divided, essentially, into two major parts: the first, 'Colonies and States' contains four chapters. These deal, first, with 'The Introduction of Divorce', the 'Reception of Divorce in the Australian Colonies', 'Divorce Extension and the Waning of Colonial Rule: The More Populous States' and 'Divorce Extension: The Smaller States'.

Despite its necessarily Australian emphasis, the first chapter on the 'Introduction of Divorce' is essentially concerned with English developments prior to 1857. As the organisation of this particular part suggests, much is to be gleaned from literary, rather than strictly legal sources. Finlay refers to the apparent duty of young women to marry as evidenced by Jane Austen's novels *Sense and Sensibility* and *Mansfield Park*, when taken together with the fact that such marriages were generally indissoluble. From that point, the author discusses the development of annulment and divorce by Act of Parliament. At this point,

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one might have expected to see the tongue in cheek address of Maule J to the bigamist in *R v Hall*<sup>1</sup> at Warwick Assizes on, strangely enough, 1 April 1845. That is well enough known and has been anthologised in, inter alia, R E Megarry's *Miscellany-at-Law* (1955) and does tell us that one judge, at any rate, held the law as it then stood in less than total respect.

Finlay refers (at 11) to the plight of the lower classes. A rather curious omission however is the plight of Stephen Blackpool, a central figure in *Hard Times* by Charles Dickens. The plight of the working class in this context was deepened by the corresponding rise of Methodism, which saw marriage as a religiously respectable state and condemned cohabitation. Cohabitation had permitted the non-property owning classes to more flexibility between relationships than was permitted to smaller property owners who had used marriage, as did Austen's characters, to create financial alliances and relationships.

He then goes on to discuss the use of the presumption of death and of 'wife-sales', which is generally best known through the activities of Henchard in Thomas Hardy's novel, *The Mayor of Casterbridge*. As the author points out, this wildly unsatisfactory situation led to the *Matrimonial Courses Act 1857* (UK) and its resultant double standard in the ground for divorce as it applied to husbands and wives. Divorce law and practice in 19<sup>th</sup> century England, thus, was well representative of society at large; 'a society', in the words of Françoise Barret-Ducrocq, *Love in the Time of Victoria*, 'which had nothing to say on sexual matters but left them to the professionals: medical specialists, pornographer and prostitute'. Finlay's account of that double standard is replete with appropriate questions and references and is a worthy addition to the literature on the public splendour and private squalor which characterised both the buildings and sexual mores of that age.

The situation in early Australia is likewise the subject of stimulating discussion which incorporates the middle class social values of the period. Finlay quotes the comment of Sturma that, '[i]n part, cohabitation in Australia may be regarded as an extension of English culture'. Indeed, that writer has suggested that many women classified as prostitutes might have been neither more nor less than cohabitants.<sup>2</sup> Of especial interest, Finlay notes that, in the absence of divorce, amongst free settlers and later populations at least, bigamy, being justified by a misuse of the presumption of death (above) provided something in the way of a convenient solution. That, of course, has to be taken in the context of Australian society as it at large existed and Finlay notes (at 34) that

If bigamy was widely practised, having regard to the forcible separation of convicts and their families, the home government had not done much to enhance the status of monogamous marriage in Australia. This was despite the lip-service that was always paid to the virtue of marriage and of marital faithfulness.

The introduction of divorce in the Australian colonies followed remarkably quickly after the English legislation – from, the earliest, 1858 in South Australia

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1 (1845) 1 Cox CC 241.

2 Michael Sturma, 'The Eye of the Beholder: The Stereotype of Women Convicts 1788–1852,' (1978) 34 *Labor History* 6.

to 1873, the latest, in New South Wales. Of particular interest are the minutes of evidence which were attached to a Progress Report of a Select Committee of the Victorian Legislative Council in 1857, which include the situation of one married woman whose total lack of control over property and inability to support herself when her husband was unable or, often, unwilling to do so. The witness' final comment is both simultaneously platitudinous and chilling. In response to a question as to whether her case merited divorce, she responded: '[c]ertainly divorce; he has been guilty of everything that makes the Marriage Law void both in the sight of God and man. During my married life he has been three time diseased and, of course, no man could be that if had been a pure man'.

As Finlay points out though (at 47) it was not this woman's situation, or that of others like her, which might have provided the stimulus for such rapid action but rather matters of Empire comity – in this context of avoiding limping marriages and divorces – and the uniformity of laws and institutions, particularly relating to matters of personal status, within the Empire. Although the initial legislation closely represented the English model, and though different reactions were provoked in the various colonies, 'it soon became obvious', in Finlay's words (at 51), 'that further changes must follow because of the differences in social conditions between the mother country and the Australian colonies'.

The tension between the two social systems was due to a number of factors: one was the far more subdued impact of class distinctions on the English mode; another was the greater migratory propensity of the population. An immediate consequence of the former difference was the abolition of the double standard, as between husband and wife in adultery (above), which did not happen in England until 1923, yet had disappeared in New South Wales as early as 1881. Only Queensland had clung on until the year of its abolition in the country of its generation.

The author's attention in his discussion of the 'Reception of Divorce' is centered upon Parliamentary debates and with good reason. Finlay's view, and it is one with which I wholly concur, is that (at 55) the growing divergence between conditions in England and its Australian colonies was probably more noticeable amongst politicians than amongst lawyers, who had been conditioned by English law and English Precedent. To a degree, particularly in aspects of Equity jurisdiction, the same is apparent today. The need for change was further generated by the fact that, in Australia, deserted wives and children could constitute a serious financial burden on communities which were small and could not adequately cope financially with potentially large and serious social problems. Thus, for instance, in Tasmania, a clause in the proposed Bill in 1858 which permitted divorced people to remarry was supported by one member on the grounds that it would, 'enable the poor to obtain a protection and a benefit which hitherto had been only within the reach of the wealthy'. In other words, the protection of the deserted wife, albeit indirectly, had become something of a priority – a situation graphically depicted in an Editorial in the *Hobart Mercury* for 10 September 1860.

Throughout the extracts from speeches and newspapers quoted in this chapter, literary allusion springs to mind again: thus, in New South Wales, in supporting

proposed legislation, Sir John Hay stated that '[t]here were numerous cases where men married simply to obtain the property of their wives (Hear, hear). It was in these cases where cruelty and ill-treatment was most likely to arise'. One cannot but be reminded of the abominable Murdstone in *David Copperfield*, again by Charles Dickens, and his treatment of Clara, the central character's defenseless mother. Murdstone, as is less well known, made a brief, second appearance towards the end of the novel and was poised to marry a seventeen years old heiress. In the same debate, reference was made by Mr David Buchanan, an especially ardent supporter of the Bill, who, again, referred to wives affected by, 'the desertion of their husbands, who left them on various missions, and were perhaps never heard of again'. One is reminded here of Tennyson's poem *Enoch Arden*.

As regards the two most populous States: in New South Wales, there were at least eight attempts to introduce divorce law. The law of divorce in Victoria had been consolidated in 1864 and had lain dormant until the debates which had begun in 1883 culminated in legislation in 1889. These debates are, as might have been expected from the author who taught at Monash University for over twenty years, discussed in some detail and, indeed, some of the points made during them are of general historical interest. Thus, Sir Charles Pearson, a major supporter of change, commented on the attitudes and position of lawyers:

English law had been powerfully influenced by the regard English lawyers felt for large properties. Entailed estates assumed a sort of sanctity in the eyes of English lawyers, and their anxiety was that there should be no disputed title. The people of this colony were not influenced by considerations of that kind.

That comment is of considerable general interest, when one considers that, in the mid-18<sup>th</sup> Century, approximately, the economic historian Habbakuk estimated that half of the land in England was held under strict settlement, a device aimed at maintaining property within social groups (when one considers the quantity of property owned by the Crown and by the Church of England, not much then remains).

It is, perhaps, not surprising that arguments which were to be heard at different times and in different countries were to be rehearsed in these debates. Thus, Finlay refers (at 110) to the views expressed by the Victorian Solicitor-General, Dr Frank Dobson, on the dangers of the possibility of collusion in order to obtain a divorce. Dobson was quick to demonise the lower orders when he said that a wife who was anxious to obtain a divorce only had to 'procure the services of an immodest housemaid' to commit adultery with her husband in the family home. The petitioner had only to swear to the truth of the allegation, so that 'laxity of procedure ... will be to encourage not only the crime of adultery, but also the further crime of perjury'. In a later attempt, in 1887, the views of Henry Wrixon the Attorney-General, albeit expressed in a private capacity, will strike many a chord in historians of family policy. '[W]here the marriage contract', he said, 'is known to be final and irrevocable, it has a wholesome influence in teaching people to submit to what they would not submit to if they know they could break the bond. Necessity teaches the duties it imposes'. Thus, early in the 17<sup>th</sup> century,

one Alexander Nicholes had written that because marriage was a permanent relationship,

therefore as wise prisoners inclosed in narrow roomes, suit their mindes to their limites, and not, impatient that they can go no further, augment their paine by knocking their heades against the walles, so should the wisdom both of Husbands and Wives...beare [marriage] with patience and content...and not storme against that which will but plunge them deeper into their own misery.

The contributions of Wrixon to the various debates in the Victorian Parliament are interesting for the predictable and oft-rehearsed views espoused by those opposing necessary and readily desirable societal change. Thus, in July 1889, he was to say:

Will you tell me how, if two or three years hence someone proposes to enlarge it you can resist the proposal? ... What I contend is this: that you are merely taking the first stage on a journey which has no certain termination.

Eventually, all the relevant law was consolidated in 1890 as the *Marriage Act 1890* (Vic), even though the extension and amendment process continued until 1958, a process which was significantly replicated in New South Wales over the period of 1873 to 1958.

The parliamentary experience in that jurisdiction seems to have been less graphic than that represented by its passage in Victoria. At the same time, as Finlay appositely points out (at 145) obvious embarrassment could be caused by adjoining jurisdictions having differing marriage laws. Nonetheless, it was not until 1881 that the double standard was finally removed in respect of adultery in that State. Mr David Buchanan, as reported in the *Sydney Morning Herald* for 15 January 1881, stated that '[t]he law of England with singular pertinacity from time immemorial had gone out of its way to wreak the most perfect injustice on woman, and so it remains to this very day'. Though not given the gift of prophecy, the report might have added '... and past it'. Thus, Senator Ivor Greenwood, a former Commonwealth Attorney-General, speaking in the Senate in 1974 on the Family Law Bill, stated that 'by stressing the necessity for a divorced wife to go out and earn her own living from her spouse who has deserted her we are emphasising a degree of independence and separateness which is not in the interests of the marriage contract'.

In further unsuccessful attempts, characterised by frequent prorogations of Parliament, the Bill was passed on 30 August 1892 and grounds almost identical with the 1889 Victorian Act came into operation. In introducing that new Bill, Dr Andrew Garran had quoted from the *Melbourne Argus* of 15 March 1892 where it was written that:

no observer, lay or churchman, who has investigated the merits of the instances under review can refuse to applaud the new law unless he first banishes from his heart and mind all traces of the milk of human kindness, and next resolves to approve a direct incitement to immorality.

Yet, globally, it must not be thought that the view expressed in the *Argus* was uniformly held: thus, Roderick Phillips quotes an 1895 letter to the American temperance newspaper, *Union Signal*, which encapsulates almost wholly contrary views. The correspondent states

I cannot think, or anything more dangerous to home and society ... whatever breaks down the home, hurts the woman most, because she is most dependent on home affections for her happiness ... There are no true friends of the advancement of women who would attempt to loosen the bond of marriage or make it any less than the life long union of one man and one woman.<sup>3</sup>

As in Victoria, various pieces of legislation dealing with peripheral issues were subsequently introduced.

As regards the smaller States, Finlay deals (at 206 ff) with South Australia, where political sympathies in tune with the extensions in Victoria and New South Wales could readily be found, especially in the expressions of experienced politician and former Premier, Sir John Downer in 1888. It is also of interest to note that the 'annual blister', as WS Gilbert described it, of marriage with 'deceased wife's sister' had come to public attention. At the same time, it was clear that there was a strong body of public opinion in favour of divorce reform. Nevertheless, it was not until 1918 that the double standard in adultery was to be abolished in South Australia and until 1928 when new grounds were added. In that context, Mr Walter Hamilton in the House of Assembly did strike a more than usually modern note when stating that (at 216):

Apparently the old idea of marriage is being gradually undermined. Whether that be right or wrong I am quite unable to say. It certainly does appeal to commonsense that when a couple are tied together for all time and they are hopelessly unsuited to each other, where a person is an habitual drunkard, or continual cruelty or desertion come between the couple, the law should be constructed so as to allow them to separate on proper terms.

There followed a period of finetuning, but in 1938, another ground was added: namely, that the parties had been living apart for a period of five years in consequence of an order of judicial separation. That amendment, transplanted apparently, from New Zealand, together with another ground, added in 1941, relating to a presumption of death on reasonable grounds of one of the parties over a seven-year period, completed development in South Australia. One matter of interest which seems to arise from Finlay's account of developments in that State is that opposition did not seem to have been couched in such strident terms as that in Victoria and New South Wales.

In Queensland, the process took from 1875–1953, though the process was altogether more sporadic. By far the most interesting discussions seemed to have taken place in 1943 over a suggestion that the period of desertion be reduced from five years to three. An opponent of the Bill, a Mr Louis Barnes, felt obliged to say that, '[w]hat God hath joined together, let no man put asunder'. To which Frederick Paterson, the only avowedly Communist member ever to be elected to an Australia Parliament, commented that '[w]hen the State joins people together, no-one can suggest that God joined them together'. Another Member, Mr Thomas Aikens, was still more outspoken: 'Without any disrespect to the Almighty, I say that if God has joined together some of the married couples of whom I have knowledge, I humbly suggest that I could have made a better job than the Deity'.

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3 Roderick Phillips, *Untying the Knot: A Short History of Divorce* (1991) 171.

All this badinage apart, the debate was notable for some forward looking suggestions by various members: thus, Mr Aikens looked to 'see the day when, after a certain period, divorce can be arranged by mutual consent between the parties'. Second, it was suggested by Mr Edward Maher that some variety of conciliation process 'presided over by someone with a noble and sympathetic outlook with understanding of all the feelings of mankind' could be devised to help couples experiencing difficulties. Indeed, that theme was taken up by various other speakers, although no one suggested where such a presidential paragon might be found. Third, the Commonwealth was criticised by other speakers for not having used its powers under the Constitutional and intervened in the creation of uniform laws. Finally, after the passage of a Bill which included mental sickness and conviction for bigamy as grounds, the Queensland saga ended in 1953.

In Western Australia, the process lasted from 1897 until 1957, even though the first step could only be described as tentative. However, in 1858, a Bill modelled on the Victorian legislation was introduced and an interesting exchange occurred regarding a provision concerning a man's habitual drunkenness for three years or more, coupled with either leaving his wife without means of support or having been guilty of frequent acts of cruelty towards her. Mr Norman Ewing, the initial progenitor of the Bill had stated that:

this provision is in the interests of children; for as children they are brought up and as they see their parents do, so are they inclined to regard such a state of things as the ordinary condition of married life; and if they see a father who is an habitual drunkard, time after time making his home miserable and ill-treating his wife, they will think such conduct and such misery are the natural conditions of life, and will be very apt to become drunkards when they grow up.

All that is very redolent of modern discussion regarding the effect of family violence in modern context. Thus, for instance, Mullane J of the Family Court of Australia in *M v M*<sup>4</sup> commented that:

the greatest danger is that [the male child] particularly will learn from his father's behaviour that physical and emotional abuse are acceptable ways of dealing with other persons and thus come to share his father's disability. Such a disability would mar his dealings and relationships with others, including those he loves, bring him into contact with the police, the Courts and the Community, and result in him being penalised and even being imprisoned.

In 1898, Mr Frederick Illingworth, a noted opponent of the Bill protested Ewing's view with the optimistic comment that '[n]o; they will sign the pledge', to which Ewing rejoined, '[m]any children brought up in such circumstances, did not know what a pledge was'. Another opponent was the, then, Premier, Sir John Forrest, who crystallised his opposition by saying that the Bill had 'not been asked for; because the women of the colony do not desire it, because in my opinion it is not necessary, and if introduced, it would do more harm than good'. All that, after having earlier said that Mr Ewing

would have us believe that all the wrong-doing and all the bad things are on the side of men, and that they are a lot of brutes. And that all the ladies of the world are

angelic creatures, who never do anything that is wrong and never give their husbands any grounds for disapproval.

Even after detailed debate (some at rather higher level than that quoted), that attempt was abandoned. Resuscitation was attempted, less enthusiastically, the following year and was not successful until 1911, although there were demands for the Commonwealth to involve itself. Other issues of note in Western Australia occurred in 1945, when the Supreme Court Act 1935 (WA), included an amendment to section 69 which provided for a consent ground, where a ground based on living 'separately and apart' was included. After some less central changes and additions, the story in the West concluded in 1957.

In Tasmania, surprisingly or not, the first significant change occurred with the abolition of the double standard in adultery in 1919, to which lunacy, violence, attempt murder and desertion had been added. It is of interest that one protagonist was Ewing J of the Supreme Court of Tasmania, the same Norman Ewing who had been active in Western Australia. Acts relating to settlement of property and alteration of maintenance orders were passed in 1947 and 1959.

After all of these changes, the grounds for divorce in all the Australian jurisdictions were more or less congruent, so that at least some of the problems which had been considered, especially in the debates in Victoria and New South Wales, were resolved.

Eventually, the Commonwealth was forced to involve itself as had been urged in States' debates. Developments at a federal level are set out in the second Part of the book, 'Marital Relations in a Federation: 1911–1975'.

The Matrimonial Causes Power in the Constitution was, as Finlay notes (at 286) initially subjected to the same scrutiny as the Marriage Power. Even so, the scope of Commonwealth intervention was limited; and, as might have been expected from the above, the debates at the Constitutional Convention in 1897 demonstrate a clear difference between the views of the larger and smaller States. Further, the issue was regarded as being so politically sensitive that it was only in 1975 that a uniform, Commonwealth-based law was developed. In addition, although the relevant powers might have existed, there was no obligation on the Commonwealth to exercise them and it was thus not surprising that the attempt by the Tasmanian Senator Henry Dobson in 1901 to utilise them failed to come to very much. As Finlay (at 295) suggests, that might well have been because the Bill did no more than propose a law based on what had been found acceptable in the more populous States and which hence was unacceptable elsewhere.

Any such difficulties, however, were insignificant compared with those caused by the two World Wars, which required emergency action. In particular, World War II had shown, as the author properly notes (at 301) that

an Australian domicile was becoming necessary for reasons of jurisdiction, and that a uniform divorce law could not be delayed indefinitely. The commingling between Australians and people from other jurisdictions, even if temporary, showed up the difficulties that arose in such a situation. Australian insularity was beginning to break down.

The 1945 Act aimed at dealing with some of those issues was taken up by Mr Percy Joske QC, a person long active in the area, who brought forward the



Matrimonial Causes Bill 1955. This Bill was essentially concerned with matters of domicile, though the possibility of a uniform divorce law was presaged. In 1957, another Bill, moved by Joske, made a serious attempt to bring that about. In Joske's own words: '[t]he Bill does not make for either easy divorce or quick divorce. I believe it makes for divorce in proper cases where it is necessary from the stand-point of social policy, that divorce should be permitted'. Though that Bill was to vanish, Finlay points out that the debates, being based on party political considerations and anecdotal material, did not advance collective understanding much. But, by then, the way was well and truly open.

On 14 May 1959, the Commonwealth Attorney-General, Sir Garfield Barwick introduced the second reading of the Commonwealth Matrimonial Causes Bill. The content of that Bill contained the 14 grounds for divorce which were replaced by the *Family Law Act 1975* (Cth) and, in that context, are well known.

The author notes (at 313) that most speakers commented positively on the Bill and also that anecdotal instances which had been quoted in the debates, but 'for that no less relevant, and indeed illustrative of life as it was lived in reality'. Thus Finlay especially refers to the remarks of a Mr Henry Turner, from New South Wales, who examined changed social conditions that had caused the increase in divorce rates to which other speakers had referred. Thus, he said:

new economic factors are at work. Because of full employment, higher living standards and so forth, young people are able to marry earlier, perhaps when they are less mature, and difficulties arise from that situation. Today, unlike the situation that existed in the times of our grandmothers, woman are trained for work and can obtain it.

Yet he was still able to comment that 'too often the passions of the parents have been preferred to the welfare of the children'. However, the voice which had been heard throughout the earlier debates in the various States was not to be stilled. The well-known voice of the Deputy Leader of the Opposition, Mr Arthur Calwell, whose dicta are notorious throughout Australian political history refused 'to help raise the palsied arm of this Government as it seeks to bestow a benediction on promiscuity. I refuse to join the Attorney-General in giving some sort of smelly benediction to barnyard morality'. Although Calwell had incorporated the views of many religious groups and their leaders in his speech, he urged the creation of Commonwealth courts to deal with Commonwealth legislation, thus presaging creation of the Family Court of Australia in 1975.

The book analyses the arguments on both sides as they referred to particular clauses in the Bill, a detailed exposition of which is beyond a review of this nature, but it is quite clear that the Bill was subject to the greatest possible Parliamentary scrutiny, generally at a very high intellectual plane. The same, too, can be said of the debates in the Senate and ties, again, are documented by the author in appropriate detail. In the end, the legislation, as described in a leading practitioners' text, had been 'widely acknowledged to reach a peak of legislative excellence unequalled in the countries which have inherited the English tradition as to marriage and divorce'.<sup>5</sup> Yet it was not to last for very long – one of the

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5 Peter Toose, Ray Watson, David Benjafield, *Australian Divorce Law and Practice* (1968) vii.

authors of that text was one of the intellectual progenitor of its successor, the *Family Law Act 1975* (Cth).

Finally, in his historical analysis, the author then analyses the debates in both the House of Representatives and Senate which led up to the passage of the *Family Law Act 1975* (Cth). The Bill, of course, originated in the Senate and was introduced by the late Senator Lionel Murphy, the then Commonwealth Attorney-General:

It is apparent that the public attitude to divorce has changed dramatically in the comparatively short time since the 1959 Act was passed. Even amongst conservative thinkers, not a single voice has been heard in favor of retaining the grounds as they are ... But by far the majority of persons – lawyers and laymen alike – who have expressed views are undoubtedly in favor of ridding the law entirely of the concept of fault or matrimonial offence, as it is sometimes called.

In the Senate, there was strong and articulate support from, particularly, Senators Missen, McLelland and Everett. The first made a point which critics of the law at the present day seem not to have realised. ‘One must note’, he emphasised, ‘that under this Bill – far from it being a “quickie” divorce Bill which will give quick divorces – a great number, 45 per cent, of petitioners will be required to wait longer for the divorces which they seek’. Senator Missen, himself an experienced family law practitioner, then turned his attention to the establishment of the Family Court of Australia as well as the Bill’s reconciliation provisions and ancillary proceedings.

Senator McLelland’s comments are clearly likewise still of interest today. After having referred to the separation ground which existed in the 1959 Act, as well, of course, in still earlier State legislation, he stated that:

So the principle that a fault is necessary before a marriage can be dissolved is a principle which has already disappeared, but notion seems to have got around, especially during the currency of the present public debate on this Bill, that what we are suggesting stems only from the minds of permissive trendies who are attempting to undermine the institution of marriage.

He then referred to the report, *Putting Asunder*, prepared by a group in 1966 which had been set up by the Archbishop of Canterbury and had made recommendations on the same lines.

It is worth rehearsing these comments as similar arguments still arise, even though the *Family Law Act* is 30 years old, and has been so extensively amended that much of the impetus which existed in those debates has been, in part at the very, least dissipated. Senator McLelland, commenting on the reasons for marriage breakdown was to re-echo the comments of Mr Henry Turner (above) in the debates on the 1959 Act, when he said that

[t]he real causes of the disintegration of marriage, I suggest are to be found in such things as increasing urbanization, increasing industrialisation, greater social mobility, the emancipation of women, the weakening of religious sanctions and, I suppose we could say, the increased all-round prosperity.

Few of those matters (industrialisation's face has radically changed) could be regarded as innately bad.

Senator Everett was of the strongly held view that the present adversary system was

singularly unsuitable for the trial of matrimonial issues which under a fault system involve a meticulous examination of the most minute details of marital life to be conducted in an atmosphere of bitter recrimination, usually involving relatives and children and sometimes dividing families.

This, again, was at the thrust of what Lionel Murphy was aiming at. However, if I were to encapsulate the changes which have been wrought to the Act between 1975 and today, I would refer to the increased structure of judicial discretion and the increased formalisation of Court structure and business!

Once again, the author has detailed the debates in both Houses of the Commonwealth Parliament and his excellent analysis demonstrates how and, more especially, why the *Family Law Act* came to be, not as it is, but as it was. The quality of amendments has been massively variable and, some at any rate have detracted significantly from the aims of its progenitors. Without going into detail, for instance, those effected in 2000 must surely figure large in any work entitled *Disasters in Australian Law Reform*, or some such.

Inevitably, the arguments contrary to the Bill were resembled those found from 1858 onwards in Australia and elsewhere. Thus, for example, one speaker in the House of Representative said that the Bill 'is not divorce because the marriage has irretrievably or otherwise broken down; it is the destruction of marriage by abandonment. We have reached the ultimate in disposable society in this Bill'. However, it is clear that, at all stages, the Bill was thoroughly and effectively analysed and debated at a standard which should give Australian voters some grounds for pride or, possibly, relief. Many of the major protagonists in the 1974 debates later held much higher political and social office.

The final chapter of this excellent and admirable work is entitled 'Some Conclusions and a Forward Glimpse'. Of course, there are likely to be the occasional disaster such as the *Family Law Act 1996* (UK) which, thankfully for the already burdened taxpayers there, has never been put into practice. At the same time, as the learned author points out (at 418), same-sex marriage is, as it were, knocking on the door, though its sound may have been partly stifled by the 2004 amendments to the *Marriage Act 1961* (Cth).

The author concludes: 'divorce and informal marriage are well beyond the socially unacceptable. They are now part of our social order.' Henry Finlay has catalogued and commented on the history of divorce in Australia and attitudes to it in a fascinating and scholarly manner. He has put all of us who are interested in the development of the Australian family and socio-political attitudes towards it in his debt. It is part of a great tradition in Australian historical study and should, and will, be remembered as such.

I must end on a rather different note: Henry Finlay died on 3 June 2005. When, in 1970, I arrived as a young lecturer in Australia with an interest in family law and, to a lesser degree, in its history, Henry had become something of a landmark which was to become ever more significant, especially in the years leading up to the *Family Law Act 1975* (Cth). *To Have But Not To Hold* is a fitting memorial to a remarkable scholar and a good and kind man.