No-fault divorce: counting the cost

by Christopher Brohier LLB (Hons), GDLP



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The concept of no-fault divorce that became law in Australia in 1975 was part of a revolution in divorce law reform that swept through the Western world in the late 1960s and 1970s.

It was based on the idea that the law should aim to strengthen marriage, but if the marriage was finished in fact, the law should "enable the empty legal shell to be destroyed with the maximum fairness, and minimum bitterness, distress and humiliation".[2]

However, many countries, Australia included, became part of the revolution without properly considering the financial consequences.[3] British academic Pamela Symes noted that in all the debate on divorce law reform, no one had asked how it was to be paid for.[4]

By 2014, the annual cost of divorce to the Australian economy in government assistance payments and court costs had blown out to $14 billion – an increase of $2 billion in the previous two years. Consequently, each Australian taxpayer contributes about $1100 a year to the costs of other people's divorces in these areas alone.[5]

The no-fault divorce revolution was based on the belief that after the divorce, the parties could make a fresh start to their lives. There would be, in addition to the divorce, a once-for-all settlement of property matters and even matters involving children. The courts not only allocated property, but children, on a binary basis. One parent was granted "custody" and the other, limited visiting rights. Once those issues were settled, the parties could be autonomous.[6]

But the past 40 years have shown that the rise in divorce has thrown a significant and probably unsustainable burden on the public purse – especially in aged care, health and youth affairs. Moreover the assumption that the parties could be independent after divorce has proven to be wrong. While a marriage may be dissolved, parenthood is indissoluble. Despite divorce, there is an "enduring family".[7]

Despite these negative outcomes, there has not been a re-evaluation of concept of no-fault divorce, or of the basic grounds for divorce. It is time this was done.

The costs of divorce

Divorce is a matter of private law – so why should governments be interested in cutting the divorce rate? The answer is that the costs imposed by family breakdown are being borne by the public purse – that is, the taxpayer.



The costs of family breakdown are borne by the taxpayer

According to Professor Parkinson:

> A British study found the costs of family breakdown were £41.74 billion in 2011, or £1,364 for every taxpayer.
>
> A Canadian study, published in 2009, estimated the costs in that country as 7 billion Canadian dollars per year.
>
> A US study estimated the costs of family breakdown and unmarried parenthood in 2008 as being at least $112 billion per year.
>
> There is of course plenty of scope for argument about the detail, but the broad picture is clear.
>
> Such calculations do not include the less measurable costs such as the intergenerational impacts considered in this article. The human costs are, of course, immeasurable.[8]

Accordingly, avoiding unnecessary divorces should be a public policy objective – especially when all sides of politics accept that budgetary savings are needed.

This paper looks at three areas where divorce imposes costs on the public purse: aged care, health and youth affairs.

Increased cost of aged care

The Australian Institute of Family Studies paper, *The Consequences of Divorce for Financial Living Standards in Later Life*, found that: "on average, having been divorced has negative consequences for income and financial circumstances in older age. However, the negative financial impacts of divorce are substantially reduced by remarriage."[9]

However, rates of re-marriage have fallen significantly, so any beneficial impact of remarriage may not be available to many divorced people.[10]

The negative financial impacts of divorce are reflected in lower rates of home ownership for those who have been divorced compared with those who have never divorced. Moreover, "divorced singles were more reliant on the public pension than those who had not divorced…"[11] The study found that the increased reliance on the pension by divorced singles "has important implications for the financing of retirement incomes in Australia in coming decades and the extent to which the taxpayer will have to bear the costs of providing for retirement incomes."[12]

Lower rates of home ownership will also affect the costs of providing aged care. They increase the likelihood of older people needing care in institutions – at greater cost to the community. They lower the number of those able to make some contribution toward the cost of institutional care.

These findings are unsurprising, as divorce creates two households where before there was one. Professor Parkinson notes: "People cannot go from one household into two households, with a duplication of housing costs, furnishings and appliances, and other such expenses, without suffering a significant loss of living standards."[13]

Professor Parkinson points to another area where divorce increases the costs of aged care, albeit in a hidden way. Divorce reduces the capacity of adults in mid-life to care for the older generation, who need help with shopping, cleaning, paperwork, finances, medical appointments and so



Research shows that married people have overall better health

on. Such informal support is vital in "reducing the necessity for the elderly to go into institutional care, or in delaying that eventuality."[14]

The burden of care for the elderly has often fallen on women.[15] However, as separated and divorced women have taken an increased role in the workforce in the last two decades to be the sole breadwinner for the family (as well as caring for the children), their capacity to care for their elderly parents has decreased. Further, divorce also removes much of the sense of obligation an ex-wife or ex-husband may have had to care for parents-in-law.[16]

Thus the burden of providing services to keep people in their own homes, or the greater burden of providing institutional care, falls more on the public purse.

The cost of aged care, including the aged pension, is one of the largest items in the budget.[17] It is imperative to endeavour to reduce the number of divorces to reduce this budgetary pressure.

Increased cost of health care

Australian research has found large health differences between married men and women and those who are separated, divorced or widowed. The latter have greater mortality rates, more acute symptoms and more mental health problems than the former.[18]

As one researcher said: "I'm pretty sure that one reason men live approximately eight years longer if they are married (and are otherwise healthier in various ways) is that their wives tell them what to do and they do some of what their wives tell them."[19]

No doubt this also operates the other way around.

This differential is particularly evident in suicide rates. A 2010 Adelaide University study of factors predictive of serious suicidality by Kate Fairweather-Schmidt and others found that the risk of suicide among the divorced, separated and widowed is about 75% more than for the married.[20] Such findings are common in the research. Relationship breakdown is one of the major causes of suicide worldwide.[21]

A 2009 study has even linked lower blood pressure readings to being married, compared with those who are not married.[22]

Again, these findings are unsurprising. The emotional trauma associated with divorce means that the parties often suffer severe distress. The adverse financial impacts of divorce results in those involved having less to spend on health and related matters.

Increased cost of youth affairs

There is no doubt that children who live with their two biological married parents do better across the board than children in other family types. US academic Professor Susan Brown recently reviewed the evidence and said:

> Over the past decade, evidence on the benefits of marriage for the well-being of children has continued to mount. Children residing in two-biological-parent married families tend to enjoy better outcomes than do their counterparts raised in other family forms. [They] experience better educational, social, cognitive, and behavioural outcomes than do other children, on average. ... The benefits associated with marriage not only are evident in the short-term but also endure through adulthood.[23]

Professor Paul Amato, a leader in this field of research has said:

> Research during the last decade continued to show that children with divorced parents, compared with children with continuously married parents, score lower on a variety of emotional, behavioral, social, health, and academic outcomes, on average.
>
> Although many of these studies replicate earlier findings, they are useful in showing that the links between divorce and forms of child well-being have remained relatively constant across decades.[24]

Princeton University sociologists McLanahan and Percheski have reported that:

> A large body of research indicates that living apart from a biological parent (typically the father) is associated with a host of negative outcomes that are expected to affect children's future life chances or ability to move up the income ladder.[25]

In a 2005 study on the impact of family structure on the next generation, Professor Amato said:

> Increasing the share of adolescents living with two biological parents to the 1980 level ... would result in nearly half a million fewer children suspended from school, about 200,000 fewer children engaging in delinquency or violence, a quarter of a million fewer children receiving therapy, about a quarter of a million fewer smokers, about 80,000 fewer children thinking about suicide, and about 28,000 fewer children attempting suicide.
>
> Seen from this perspective, restoring family stability to levels of a few decades ago could dramatically affect the lives of many children.[26]

Again, these findings should not surprise us. They are the result of legal and sociological theories that conflict with the fundamental realities of our make-up – the natural law. In such a conflict, natural law must win.

Efforts to ease these consequences by enforced child support regimes are beneficial to some extent. But they do not address the issue, because:

- they are costly. In Australia it costs the government 34.6 cents for every dollar collected in child support through the Child Support Agency;[27]
- most of those who have to pay child support are on moderate to low incomes and often cannot contribute much, if anything;[28]
- maintaining two homes from an income that previously had to support one, inevitably means there is less for all and thus fewer opportunities for the children;
- most importantly, the natural biological benefit of a father and mother who are both present is irreplaceable.

As Professor Parkinson says, "The economics of separation inevitably dictate loss."[29]



Family relationships are indissoluble

As Justice Paul Coleridge, a senior Family Division Judge in the United Kingdom has said: "What is a matter of private concern when it is on a small scale becomes a matter of public concern when it reaches epidemic proportions."[30]

The indissolubility of parenthood

The assumption that divorce would dissolve the family unit, which was fundamental to the no-fault divorce revolution, has now been abandoned.

Emeritus Professor Margo Melli has said what many Australians have proved in the crucible of living with divorce: "Today, divorce is not the end of a relationship but a restructuring of a continuing relationship."[31] Marriage may be dissoluble by law but family is indissoluble in fact.

Australia has been at the forefront in recognising this truth by legislative reform – by the 2006 amendments to the Family Law Act, which require courts to consider shared care arrangements in relation to children.[32] Section 60B of the Act now provides that: "children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child."

Shared care or shared parenting is now more common; the old "custody" and "access" regime is over.[33] This movement towards some form of shared care has also occurred (or is being debated) across the western world.[34]

As Professor Parkinson has said:

> Legal systems throughout the Western world have not created the indissolubility of parenthood. Slowly, painfully, and through much conflict in the legislatures and the courts, legal systems have had to come to terms with the reality of parenthood's indissolubility. Positive law has had to become realigned with natural law. Having sought freedom from the pain of broken relationships, people have had to come to terms with the limitations on that freedom.[35]

It is now time to re-examine the concept of no-fault divorce on the basis of a 12-month separation.

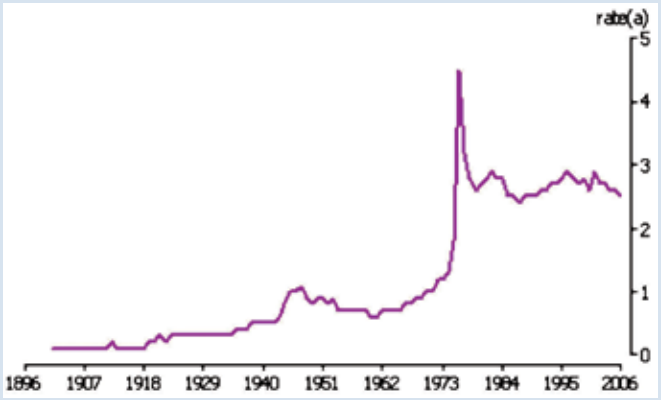
Possibilities for law reform

Why should the law try to reduce the number of divorces and keep families together? The impact on the public purse and the reality of the enduring family require such an attempt.

It is clear that the rise in divorce was aided and abetted by the no-fault divorce revolution:

> In Australia, the divorce rates started to climb from the mid-1960s and rose very sharply following the introduction of the *Family Law Act 1975* that introduced no-fault divorce. The sharpness of the divorce peak in 1976 was partly due to a backlog of long-term marital separations for which the end of the marriage was formalised as soon as the new Act came into effect. Following the 1976 peak, the divorce rate subsequently declined and has since been stable, but at a much higher level than prior to the introduction of the new Act.[36]

If the increase in the divorce rate was aided by a change in the law, attempting to reduce the rate by a law change is legitimate.



Divorces per 1,000 population from the ABS Australian Historical Populations Statistics, 2008

As a matter of public policy, legislative efforts will yield the greatest benefit through supporting marriage. Unmarried cohabiting relationships break up at a far higher rate than marriages. An Australian study has found that the chance of a cohabiting couple with children breaking up is greater, by a factor of seven, than that of a married couple who had not lived together before marriage. And cohabiting couples break up at four times the rate of married couples who had cohabited before marriage.[37] Where same-sex couples may "marry", the rates of those relationships breaking up are also significantly higher than for married couples.[38] Accordingly, the benefits to the public purse flow from supporting marriage rather than any variant thereof.

Three suggestions for reform

1. Revisit the one year period of separation

The one-year period of separation as proof of an irretrievable breakdown of marriage was selected arbitrarily. Some European countries require a three year waiting period.[39] Requiring a greater period of separation, say two years, would force couples to give greater consideration to staying together and resolving their conflicts.

Alternatively, the grounds for filing for divorce could be period of separation for one year, but the court could be precluded from granting the application for a further year. The period could be shortened to one year if a court finds there are special circumstances that require it. Special circumstances could be left to the courts' discretion, with guidelines such as:

> When the respondent has been convicted, during the marriage, of a violent or sexual [offence] against the [applicant] or a minor child; or
>
> When a court has made a final, non-preliminary civil protection order against the divorce respondent, based on a final determination that the respondent committed or threatened physical violence against the divorce petitioner or a minor child of the divorce [applicant], where the respondent had advance notice and an opportunity to participate in an evidentiary hearing.[40]

There is evidence that longer waiting periods are associated with lower divorce rates.[41] This complements other evidence that nearly half of divorcing couples are from low conflict relationships that could survive with help.[42]

Recent research shows that about 40% of American couples who are already in the divorce process say that one or both of them would be interested in pursuing reconciliation.[43] There is therefore good evidence to consider extending the period before parties may obtain a divorce.

2. Mandatory reconciliation counselling

Australia has already legislated for mandatory mediation to resolve issues such as parenting orders before an application may be filed.[44] These provisions would need to be refined to require counselling specifically directed at the possibility of reconciliation. Matters to be addressed could include:

- questions to help individual spouses reflect on their potential interest in reconciliation;
- potential benefits of avoiding divorce for children and adults;
- resources to assist with reconciliation;
- information on when the risk of domestic violence should rule out working on reconciliation at this time.[45]

Aligned to such counselling could be a requirement for a formal notice before action process. Such a process is widely used in civil courts. In the Family Court this could take the form of a formal notice by one party to another that their marriage faces serious difficulties and suggesting that

they undertake counselling together.[46] Such a procedure might overcome the common situation where one party first knows of the issues in the marriage only when the other announces they are leaving.

3. Allow damages for a breach of the marriage contract

Marriage is a contract. The law gives a right to claim damages for breaches of contract in the civil and commercial arenas. Why should marriage be the only contract that may be breached with impunity? The law, by means of ascribing consequences to actions, signals to us what we as a community hold important.

It is clear that the no-fault revolution, in allowing the marriage contract to be breached without any legal consequences (though as this paper has demonstrated there are serious and unavoidable consequences in fact) has undermined the value we place on marriage to the detriment of Australian society.

It is time to change and give new value to marriage. The courts could be given the power, on application, to award damages to a party who has breached the marriage contract, namely of a "the union of a man and a woman to the exclusion of all others, voluntarily entered into for life."[47]

Clearly this would involve the courts having to make awards of damages for intangible losses. However, courts routinely do so in awarding damages for non-economic loss in personal injury claims and damages for loss of reputation in defamation claims.

This could be by means of an actual award of damages or by weighting any division of property to account for the breach.

The benefit from assisting the longevity of marriages is that once it became known that damages could flow, parties might be more inclined to abide by the marriage contract. Such a coercive tool is a well-used legislative method to bring about social change.[48]

Such a reform is likely to find community support.[49]

Conclusion

Forty years after the no-fault divorce revolution gave Australia the *Family Law Act*, our society has experienced the massive financial and human costs flowing from legislative reform that was enacted without adequate forethought.

The ensuing cost of fragile families is now significant. As Professor Parkinson has said: "Fragile families lead to broken hearts. They also threaten the wellbeing of the community as a whole. Turning this around will require a herculean effort, but we cannot afford not to make the attempt."[50]

Now is the time to start.

References

1. *Family Law Act 1975* (Cth), section 48 – a marriage is deemed to have irretrievably broken down if the parties have lived separately and apart for a continuous period of not less than 12 months.
2. *Reform of the Grounds for Divorce: The Field of Choice*, Law Commission Report (UK), Command 3123 (1966/7) Vol. xxxix; p 165.
3. Patrick Parkinson, *Another Inconvenient Truth: Fragile Families and the Looming Financial Crisis for the Welfare State*, Sydney Law School Legal Studies Research Paper 12/05, January 2012 and *Family Law Quarterly*, 2011, Vol. 45, pp 329-352.
4. Pamela Symes, "Indissolubility and the Clean Break", *Modern Law Review*, 1985, Vol. 44, Issue 1, pp 44-60; cited by Patrick Parkinson, "Another Inconvenient Truth", p 23.
5. Lauren Wilson and Lisa Cornish, "Divorce is costing the Australian economy $14 billion a year", *The Australian*, 6 July 2014.
6. Patrick Parkinson, *Another Inconvenient Truth*, p 4.
7. Irène Théry, "'The Interest of the Child' and the Regulation of the Post-Divorce Family", *International Journal of Social Law*, 1986, Vol. 14, p 341, cited by Patrick Parkinson, "Family Law and the Indissolubility of Parenthood", Sydney Law School Legal Studies Research Paper 06/31, October 2006, p 5.
8. Patrick Parkinson, *Another Inconvenient Truth*, p 23.
9. David de Vaus, Matthew Gray, Lixia Qu and David Stanton, "The Consequences of Divorce for Financial Living Standards in Later Life", Australian Institute of Family Studies Research Paper No 38, February 2007, p ix.
10. Kevin Andrews, *Maybe 'I Do': Modern Marriage and the Pursuit of Happiness*, Connor Court Publishing, 2012, pp 171-172.
11. David de Vaus et al., "The Consequences of Divorce for Financial Living Standards in Later Life", p xi.
12. Ibid.
13. Patrick Parkinson, *Another Inconvenient Truth*, pp 11-12.
14. Ibid, p 19.
15. L. Brewer, "Gender Socialization and the Cultural Construction of Elder Caregivers", *Journal of Aging Studies*, Vol. 15, Issue 3, September 2001, pp 217-235.
16. Patrick Parkinson, *Another Inconvenient Truth*, pp 20-21.
17. Mark Kenny, "'Nothing Is Free': Joe Hockey Warns of Budget Pain, with Pensions in the Firing Line", *Sydney Morning Herald*, 23 April 2014.
18. Kevin Andrews, *Maybe 'I Do'*, pp 34-35, notes 127, 128; citing "Married Live Longer – New Australian Data", *Threshold Magazine*, 2008, No. 94, p 3 (citing Australian Bureau of Statistics, *Causes of Death*, 2006) and S.H. Lee et al., *Health Differences among Working Age Australians*, Australian Institute of Health, 1987.
19. Scott M Stanley (2005), "What is it with men and commitment, anyway", *Threshold*, 2005, No. 83, pp4-11, cited by Kevin Andrews, *Maybe I do*, p 36, note 135.
20. Kate Fairweather-Schmidt et al (2010), "Baseline factors predictive of serious suicidality at follow-up: findings focusing on age and gender from a community-based study", *BioMed Central Psychiatry*, 2010, Vol. 10, p41, cited by Kevin Andrews, *Maybe 'I Do'*, p 37, note 141.
21. Fiona McAllister (ed.), *Marital Breakdown and the Health of the Nation*, London: One Plus One, 1995, cited by Kevin Andrews, *Maybe 'I Do'*, p 36, notes 136-7.
22. "Aisle Lowers the Blood Pressure", *Threshold*, 2009, No. 97, p 4; cited by Kevin Andrews, *Maybe 'I Do'*, p 34, note 126.
23. Susan Brown, "Marriage and Child Well-Being: Research and Policy Perspectives", *Journal of Marriage and Family*, 2010, Vol. 72, pp 1059, 1062.
24. Paul Amato, "Research on Divorce: Continuing Trends and New Developments", *Journal of Marriage and Family*, 2010, Vol. 72, pp 650, 653.
25. Sara McLanahan and Christine Percheski, "Family Structure and the Reproduction of Inequalities", *Annual Review of Sociology*, 2008, Vol. 34, pp 257, 264-265.
26. Paul Amato, "The Impact of Family Formation Change on the Social, Cognitive and Emotional Wellbeing of the Next Generation", *The Future of Children*, 2005, Vol. 15 No 2, pp 88-89.
27. Child Support Agency, *Facts and Figures, 2008-09*, Commonwealth Department of Human Services, 2009, cited by Patrick Parkinson, "Another Inconvenient Truth", p 18.
28. Patrick Parkinson, *Another Inconvenient Truth*, p 17: "In Australia, for example, about 20% of all those with an obligation to pay child support are themselves on welfare benefits. The incomes of other non-resident parents are not high. In June 2009, the median income of all parents liable to pay child support was only $31,000. Taking account only of those who had a taxable income, the median was $40,677. In May 2009, full-time adult earnings were over $64,000 per year for the population as a whole."
29. Patrick Parkinson, *Another Inconvenient Truth*, p 12.
30. Tim Shipman, "Only marriage can mend broken Britain, says top judge in attack on 'pass the partner' society", *Daily Mail,* 17 June 2009.
31. Marygold S. Melli, *Whatever Happened to Divorce?*, Wisconsin Law Review, 2000, pp 637-638, cited by Patrick Parkinson, "Family Law and the Indissolubility of Parenthood", Sydney Law School Legal Studies Research Paper 06/31, October 2006, p 6.
32. Patrick Parkinson, *The Payoffs and Pitfalls that Encourage Shared Parenting: Lessons from the Australian Experience*, University of Sydney Law School Legal Studies Research Paper 14/47, May 2014.
33. Ibid, p 5.
34. Ibid, pp 1, 6-8.
35. Patrick Parkinson, *Family Law and the Indissolubility of Parenthood*, Cambridge University Press, 21 Feb 2011 p 278.
36. David de Vaus et al., "The Consequences of Divorce for Financial Living Standards in Later Life", p 3.
37. P. Butterworth, T. Oz, B. Rodgers & H. Berry, "Factors associated with relationship dissolution of Australian families with children", Social Policy Research Paper No 37, 2008, pp 22 and 29, table 9, cited by Patrick Parkinson, "Another Inconvenient Truth", p 8.
38. G. Andersson, T. Noack, A. Seierstad & H. Weedon-Fekjaer, "The demographics of same-sex marriages in Norway and Sweden", *Demography*, February 2006, Vol 43(1), pp 79-98.
39. William J Doherty and Leah Ward Sears, *Second Chances: A Proposal to Reduce Unnecessary Divorce*, New York: Institute for American Values, 2011, p 23.
40. Ibid, p 42.
41. Ibid, p 23.
42. Ibid, p 19.
43. William J. Doherty, Brian J. Willoughby & Bruce Peterson, "Interest in Marital Reconciliation among Divorcing Parents," *Family Court Review* 49, no 2, April 2011, pp 313–21; cited by Doherty et al., *Second Chances*, p 14.
44. Patrick Parkinson, *The Payoffs and Pitfalls that Encourage Shared Parenting*, p 21.
45. Doherty et al., *Second Chances,* p 33.
46. Ibid., pp 28-30.
47. *Marriage Act 1961 (Cth),* section 5.
48. The increase in the strictness of drink driving laws is a paradigm example.
49. Barry Maley, "Reforming Divorce Law", *AFA Journal* , 2012, Vol 33 (1), p 7.
50. Patrick Parkinson, *Another Inconvenient Truth*, p 30.