

# Grounds for Divorce in Australia and England

At the time of writing, proposed changes set out in the English Divorce Bill, discussed below, would essentially make English law more like Australian law by leaving irretrievable breakdown as the sole basis for divorce. The changes would also remove the fault bases for establishing irretrievable breakdown.

The English Lord Chancellor has admitted, however, that the Divorce Bill may 'come a cropper' (*Guardian Weekly*, 5.11.95, p.10). The fate of the proposed English reforms has been influenced by the recent withdrawal of proposals contained in the Family Home and Domestic Violence Bill which would have allowed unmarried couples to have identical rights to their married counterparts in evicting violent men from their homes for a maximum period of six months. The right wing of the Tory party has interpreted this as an attack on marriage.

## **The position in Australia**

It is interesting to note that Australian politicians have also shown particular sensitivity when it comes to debates over marriage breakdown. Despite the liberal approach contained in the Family Law Act, the legislation makes no specific mention of the word 'divorce', but refers to the (apparently) less threatening and disruptive phrase 'dissolution of marriage'.

Australia has now had nearly 20 years experience of no fault divorce. Although not without its detractors, the Family Law Act provision allowing divorce on the sole ground of irretrievable breakdown of marriage as shown by 12 months separation has become one of the least frequently criticised aspects of the legislation.

The operation of the Family Law Act was first examined by a Parliamentary Joint Select Committee in the late 1970s and one of the areas of its inquiry was the ground of divorce and whether there should be other grounds. The Joint Select Committee's (1980) report recommended, by a majority, that the ground for divorce should not be changed. Some members indicated that a final decision could not be made as the Act had been in operation for too short a time; others preferred to await research findings from the Australian Institute of Family Studies (established in 1980, although created by the Family Law Act four years earlier).

The terms of reference of the second Joint Select Committee (1992), which began its deliberations some 13 years after its predecessor, did not extend to any examination of the ground for divorce and noted that 'matters of common concern now appear to be the ancillary matters relating to children and property, as opposed to the principal relief matter of divorce' (p.1).

MARGARET HARRISON examines moves to reform the English divorce law in the context of both the Australian experience of no fault divorce and the controversy over whether no fault divorce promotes or undermines marriage. The article, while considering policy issues which fuel discussions about family stability in both countries, seeks to raise some general questions about family law reform.

Hence the substantive law as regards dissolution has not changed in Australia since 1976, although several procedural aspects have made divorce somewhat easier to obtain.

- Divorces were previously granted by judges, which attached some symbolic weight and significance; this power has now been delegated by judges to senior registrars.
- Joint applications are permitted, which further reduces the sense of contest between the parties.
- Applications may be heard in the absence of the parties where there are no children of the marriage, and the respondent does not object;
- The Court has recently re-designed the divorce application form to make it more easily understood and straightforward: this is not, as some would argue, designed to make divorce a more attractive option, as couples must already have been separated for at least 12 months before they may apply; it is intended to make the procedures more accessible and to remove unnecessary complications and expense.

One innovation of the Family Law Act was its treatment of divorce separately from ancillary matters such as arrangements for children and financial disputes, which are so often the main areas of contention. Thus a divorce is not a prerequisite for the making of other family-related orders.

## **The position in England**

The position in England, from which Australia's divorce laws originally derived, is very different. Its law currently provides that divorce may be granted on the basis of irretrievable breakdown, which in turn is shown by one or more of the following fault or no fault bases:

- the respondent having committed adultery and the petitioner finding it intolerable to live with the respondent;
- the respondent having behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;
- the respondent having deserted the petitioner for at least two years;
- the parties having lived apart for at least two years and the respondent consenting to a divorce; or
- the parties having lived apart for at least five years.

In England, approximately 75 per cent of divorce petitions rely on either adultery or intolerable behaviour, and thus involve the granting of a decree with no waiting time period attached. (Some commentators see this widespread use of fault as a convenient means of getting a quick divorce.) The median time between the filing of the petition and the decree absolute is six months where fault is alleged. undefended divorces (which are the vast majority of all divorces) are decided by a District Judge on the papers, with no attendance of the parties required. Usually financial matters are dealt with subsequently, as they are in Australia.

England's divorce rate is the highest in Europe and exceeds the Australian rate. This has fuelled the movement for change, as have, from a somewhat different perspective, complaints that divorces based on fault are difficult and expensive to defend, that the attribution of fault exacerbates hostilities which makes things worse for children, and that the system does nothing to save marriages which may not have permanently broken down.

However, the reform process in England has been a protracted one. The Law Commission published a discussion paper in May 1988 (Harrison 1989) which was followed by a Final report and recommendations in November 1990. The Government published a Consultation paper in late 1993 which sought comment on a number of proposals and these were incorporated into the White paper, *Looking to the Future, Mediation and the Ground for Divorce*, which was released in April of this year (Lord Chancellor's Department (1995).

The major feature of the proposed reforms is the requirement that divorce be preceded by a period of 'reflection and consideration', the most favoured of the options originally proposed by the Law Commission. The sole ground for divorce will be irretrievable breakdown following such a period, which must be at least 12 months. The divorce process will commence with the filing of a statement of marital breakdown which can only occur after the initiating

spouse attends a compulsory information session. This will explain the availability of services such as marriage guidance, family mediation and legal advice and their likely costs, and will be supplemented by an information pack. The 12-month period will then begin to run.

At the end of that time either spouse may file a statement that the marriage has broken down irretrievably but, unless the welfare of the children suggests otherwise, the divorce may still not be granted unless arrangements regarding children and the allocation of property and other financial matters have been finalised. Thus the divorce itself and the ancillary arrangements will be contemporaneous and dependent on each other.

The use of mediation is encouraged, and a considerable portion of the White Paper is devoted to extolling its virtues, which the Lord Chancellor in his foreword to the report maintains will be offered to everyone.

From this distance, and in the context of Australian family law, the English proposals appear unnecessarily bureaucratic, cumbersome and somewhat confused. While the removal of mixed fault-no fault grounds and the adoption of irretrievable breakdown is to be welcomed, it is long overdue. The provision of information sessions (which has been influenced by the Australian Family Court model) will be of assistance, but the consolidation of divorce and ancillary matters has the potential to increase litigation.

It was agreed on 6 November 1995 that controversial plans to reform the divorce law be included in the Government's program for the next Parliamentary session, despite strong opposition from Tory right-wingers. It was also agreed that Tory MPs would be given a free vote. In return, the Lord Chancellor is said to have given a commitment to Cabinet colleagues who oppose the legislation that he will be prepared to amend the Bill as it goes through Parliament.

Great concern is being expressed in England that these proposals will damage the institution of marriage while the Government is emphasising that they will actually make people more cautious about ending their marriages. The reforms reflect the ambivalence that all societies – and particularly governments – feel towards the availability of divorce and the prospects of its increasing marriage breakdown. Despite the rhetoric it is still unclear what resources will be directed at education and preventative services.

### References

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Picture: Rhonda Milner

## Cost of Children in Australia

There are two important differences between results obtained by using the basket-of-goods method and the expenditure survey method as presented in the accompanying Tables. First, the basket-of-goods approach provides only part of the cost of a child, while the expenditure survey measures the total amount spent on the child. Second, the basket-of-goods method indicates how much parents would spend on their children if the child was to enjoy the fruits of the basket specified by the researcher. In this sense, it provides an 'ideal' or desirable costing. In contrast, the expenditure survey method indicates how much parents actually spend on their children, even though the amount spent might be considered inadequate or excessive by the objective standards of the basket-of-goods method.

### Basket-of-Goods Approach Based on Lovering 1983 Adjusted to CPI figure June Quarter 1995

	2 years	Age of child 5 years	8 years	11 years	Teenage
<i>Low income families</i> (below average weekly wage)					
Per week	30.82	39.54	48.51	51.42	76.59
Per year	1606.95	2061.52	2527.32	2682.07	3993.73
<i>Middle income families</i> (average weekly wage and above)					
Per week	46.36	52.01	67.14	84.96	127.43
Per year	2417.23	2713.10	3500.21	4418.91	6644.50

*Note:* Included are food and clothing, fuel, household provisions, costs of schooling (not fees), gifts, pocket money and entertainment. NOT included are housing, transport, school fees or uniforms, child care, medical or dental expenses. Holidays are a component of the middle income figures only.  
*Source:* Lovering, K. (1984), *Cost of Children in Australia*, Working Paper no.8, Australian Institute of Family Studies, Melbourne.

### Expenditure Survey Approach Based on Lee 1989 Adjusted to AWE figure June Quarter 1995

Age of child (years)	Household goods			Housing and utilities	Clothing	Other*	Total expenditure weekly	
	Food	Transport	Recreation					
0–1	30.07	44.40	30.85	30.66	24.77	16.69	16.58	194.10
2–4	26.47	34.50	24.64	28.25	15.86	14.65	14.27	158.78
5–7	27.90	35.97	37.08	25.53	20.04	16.95	11.26	171.74
8–10	38.94	50.10	37.31	26.84	13.54	15.64	24.68	207.17
11–13	42.91	42.50	34.74	29.80	28.79	22.63	28.88	230.36

\* Includes medical and dental costs, education costs and other miscellaneous costs. Costs of children vary according to the number of children in the family, the parents' incomes and whether one or both parents are working.  
*Note:* The figures in the table relate to a one-child, one-income family with an income of \$652.70 gross per week. The Lee data show that two children cost about 55 per cent more than one child, while three children cost about twice the cost of one child. The dollar costs of children are relatively 'flat' compared with rises in family income: children in poor families cost proportionally more, and children in rich families proportionally less than those in middle income families.  
*Source:* Lee, D. (1989), *A program for calculating the direct costs of children based on the 1984 ABS Household Expenditure Survey*, Australian Institute of Family Studies, Melbourne.

### Workshop postponed

In recent issues of *Family Matters*, the Institute foreshadowed a workshop of experts to re-examine methods for assessing the costs of children. In the last issue we announced the deferral of this workshop. On 14 August 1995, the Minister for Social Security announced that the Department of Social Security had commissioned the Social Policy Research Centre at the University of New South Wales to 'undertake a study which, among other things, will examine the costs of children in different family circumstances'. In the light of this, the Institute has decided to cancel its proposed workshop on the subject. In the meantime, we will continue to update the cost of children tables in these pages.

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