

An Assessment of the Contribution of the Anglican Diocese of Sydney to the Debate on the Introduction of 'No-Fault Divorce' in the Family Law Act (1975).

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Introduction

Gough Whitlam, the Prime Minister of Australia from 1972 to 1975, and many members of his Government, were immensely proud of the Family Law Act that passed with bi-partisan support in the Australian Parliament in 1975. Opinion polls showed the legislation, including its central provision that divorce would be granted for irretrievable breakdown to be evidenced only by twelve months continuous separation ('no-fault'), had the support of 60 – 70 per cent of the adult population.¹ Yet the Anglican Diocese of Sydney (the 'Sydney Diocese') fought a strong battle against 'no-fault' divorce. This assessment of that battle will consider how well the Sydney Diocese understood its role in society, how well it understood the social and political movement for changes to the divorce law, and how well it engaged with government and the wider society. This assessment is necessary in the light of contemporary assessments that 'no-fault' divorce destroyed the institution of marriage.²

The paper will start with a brief look at the history of divorce in non-indigenous Australia since 1788. The Government's case for divorce law reform will then be outlined. The discussion will be limited to the grounds for divorce and not other changes introduced with

¹ Opinion poll results quoted by Senator Alan Missen, Family Law Bill, 1974, Second Reading Speech, Senate, 29 October, 1974, at pp. 4-6, Hansard, http://www.aph.gov.au/Parliamentary_Business/Hansard.

² For this view see Philip Jensen, 'No-Fault Today; No Marriage Tomorrow', first published 17 July 2011, at <http://www.phillipjensen.com/articles/no-fault-today-no-marriage-tomorrow/> accessed 26/5/2013

the Family Law Act (1975).³ The Diocese's response will then be critically assessed, with a particular focus on the contribution of the leadership. The response of Sydney Anglicans was much broader than this, but that would be hard to assess in the space available.⁴

A Brief History of Divorce Before 1972

Prior to 1857 there was no divorce in Australia. In England divorce was expensive and rare. It was largely confined to the rich and powerful, as each divorce required a specific Act of Parliament.⁵ In the Australian colonies desertion was quite common, and remarriage could follow. The potential charge of bigamy was dealt with by the 'presumption of death'. Finlay says, 'The defence was utilised particularly where the missing spouse had been beyond the seas for seven years, sometimes even where the defendant knew her or him to be alive'.⁶ This may be seen as a pragmatic forerunner of 'irretrievable breakdown' based on a period of separation.⁷ It appears that both bigamy and cohabitation were common in the Colonies.⁸ It is difficult to get accurate figures, but there are claims that the number of women in legal marriages could have been as low as twenty-five per cent.⁹ Hence, the colony was not

³ These included the establishment of The Family Court of Australia, attempts at reconciliation, and changes to laws relating to maintenance, custody and property division. The Sydney Diocese recognised the need for some of these changes.

⁴ However, for a very critical assessment of the letter-writing activities of Sydney Anglicans, see the quote from Senator Arthur Gietzelt at p.25 below.

⁵ Theoretically this avenue applied in the Australian colonies, but no Australian divorce is recorded: see Henry A. Finlay, *Family Law in Australia*, 3rd Edition (North Ryde, NSW: Butterworths, 1983), 8. Also see Henry Finlay, 'Divorce and the Status of Women: Beginnings in Nineteenth Century Australia', Presentation to a seminar at the Australian Institute of Family Studies, 20 September 2001, found at <http://www.aifs.gov.au/institute/seminars/finlay.html> accessed 26/5/2013

⁶ Finlay, 'Divorce'.

⁷ For example, see section 55 of *The Tasmanian Criminal Law Consolidation and Amendment Act of the 27th Vict*, section 55, Hobart 1864, at 30-31.

⁸ Professor Peter McDonald says of mid 19th Century Australia, 'The fact that only 27% of the adult women were reported as married should not, therefore, be seen as a revolt against the institution of marriage, but rather as a result of a number of factors which led the majority of the population to ignore the official or legal form of marriage.', *Marriage in Australia*, (Canberra: ANU 1974), at p.33

⁹ McDonald, *Marriage*, p.33. McDonald may have relied on Samuel Marsden's assessment of about 395 married women out of approximately 1,430 women, or 28%, which excluded Catholic marriages and common law marriages, hence was low. See - Revd Samuel Marsden: a few Observations on the Situation of the Female Convicts in New South Wales. c.1806 (M.L.Mss18) found at

established with a strong commitment to marriage, although marriage became the norm by 1900.¹⁰

The changes brought about by urbanisation and economic development resulted in the English Divorce and Matrimonial Causes Act of 1857. At the suggestion of the Colonial Secretary, Lord Stanley, each colony passed similar legislation. New South Wales was the last to do so in 1873.¹¹ The law differed from colony to colony, and was only unified in the Matrimonial Causes Act, 1959 (Cmth) (the '1959 Act'). The grounds for divorce in New South Wales changed over time, but at their most extensive were adultery, rape, sodomy, bestiality, drunkenness, various forms of violence, refusal to reinstate conjugal rights, imprisonment, insanity, and desertion for more than three years. So a spouse could walk out on his/her spouse, and abandon all care for that spouse and any children, and the deserted spouse would have grounds for divorce. It was not used much, as desertion often accompanied adultery or abuse, and they were quicker and easier to prove. In fact, in 1973, under the 1959 Act some 43-45 per cent of marriages were granted a divorce within one year of separation, usually on grounds of adultery or cruelty, and hence twelve months separation would be slower in many cases.¹²

One peculiarity of the debate in the early 1970s is how little reference there is to, or apparent knowledge of, the controversies that preceded the enactment of the 1959 Act. The most controversial provision was section 28(m),¹³ which introduced the new ground of separation

<http://www.records.nsw.gov.au/state-archives/guides-and-findings-aids/short-guide-2/marriages>, accessed on 26/5/2013.

¹⁰ See marriage rate at Australian Bureau of Statistics, <http://www.abs.gov.au/ausstats/abs@.nsf/94713ad445ff1425ca25682000192af2/0b82c2f2654c3694ca2569de002139d9!OpenDocument>, accessed 27/5/2013.

¹¹ *An Act to confer jurisdiction on the Supreme Court in Divorce and Matrimonial Causes*, No IX of 1873 (NSW).

¹² Senator Lionel Murphy, Family Law Bill 1974, Second Reading Speech, Senate, 3 April 1974, Hansard, http://www.Aph.Gov.Au/Parliamentary_Business/Hansard.

¹³ Which was referred to as section 27(m) in early debates before the final form of the bill was brought forward.

for five years.¹⁴ Among the other thirteen grounds for divorce was desertion for more than two years.¹⁵ One could be excused for saying, 'what's the difference between desertion for two or three years, and separation for five years, other than the number of years?' However, this question goes to the heart of the controversy. First, separation neither required nor permitted an allocation of guilt. Second, a 'deserter' could not sue for divorce, and thereby be 'rewarded' for his/her reprehensible behaviour, whereas seeking divorce was open to each separated spouse. As will be seen, many Christians could not accept divorce without identifying and punishing the 'guilty' party.¹⁶ Third, the evidentiary burden for proving desertion was hard because the 'deserter', unlike the 'separator', was unlikely to give evidence of his/her intention to not resume the marriage.

Although not unanimous, there was strong opposition from various churches to this new ground for divorce. The Anglican and Roman Catholic churches combined to send a petition to the Queen to disallow the whole Act because of this one provision.¹⁷ The debates in both houses of Parliament reflected the opposition from various churches that the change made divorce 'easier'. The Attorney General, Sir Garfield Barwick QC, defended his proposed legislation at a public debate at All Soul's Anglican Church, Woollahra, arguing 'laws of divorce do not cause breakdowns in marriage'.¹⁸ Similar arguments had been made for sometime but they did not persuade Sydney Anglicans. Archbishop Gough said, simply, 'The Divorce Bill now before the Federal Parliament cannot fully be supported by us for it

¹⁴ The text of the section is, '(m) that the parties to the marriage have separated and thereafter have lived separately and apart for a continuous period of not less than five years immediately preceding the date of the petition, and there is no reasonable likelihood of cohabitation being resumed'.

¹⁵ For all the grounds, see <http://www.comlaw.gov.au/Details/C2004C05265>. The text of the section for desertion was, '(b) that, since the marriage, the other party to the marriage has, without just cause or excuse, wilfully deserted the petitioner for a period of not less than two years'.

¹⁶ The biblical basis for this is discussed below in relation to the Family Law Act, 1975 (Cmth), but it is based on analogical thinking drawing on the teaching of Jesus in Matthew 5:31-32 and 19:8-9, that, it is argued, permits divorce when the 'guilty' party is an adulterer, or, by analogy, the perpetrator of some other offence that is clearly incompatible with marriage, e.g. repeated violence or desertion.

¹⁷ 'Appeal to Queen on Divorce: Backing in 2 Churches', Sydney Morning Herald, 4/9/1960, p.27.

¹⁸ Reported in Sydney Morning Herald, 21/11/1959, p.6.

would make divorce easier.’¹⁹ He recognised ‘the sincerest desire on the part of its supporters to remedy ills of the present situation’, but beside a ‘no’ to the bill, advocated ‘proper preparation and instruction for bride and bridegroom’ and suggested ‘that one practical thing that can be done towards...[preventing marriage breakdowns] is to raise the marriage age’.²⁰

The Case for Change

Despite the codification and changes introduced by the 1959 Act, recognition grew during the 1960s that the divorce laws did not work well. The problems included that ‘fault’ had to be established by the petitioning party. This involved costly lawyers and legal proceedings in local courts, which meant petitioners had to line up with petty criminals.²¹ The fact that 95 per cent of divorce applications were not contested²² suggests that, in most cases, both parties wanted the divorce.²³ Adultery was a common ground for divorce and this produced two social ills. The first was the need to use often unscrupulous private investigators, and the

¹⁹ Presidential Address to the Sydney Diocese Synod on 25/9/1959, reported in *Sydney Diocese Year Book*, 1960 at p.233.

²⁰ This does reflect a different social context to the present. Then cohabitation before marriage was widely perceived as ‘living in sin’ and reprehensible. Compare that with 2009, when the majority of couples registering their marriage in 2009 lived together before marriage (77.4%), per the Australian Bureau of Statistics, <http://www.abs.gov.au/ausstats/abs@.nsf/0/A6D91E3F9CAA4766CA2577ED001461A8?opendocument> (accessed 17/4/2013). Also, ‘in 2006, de facto partners represented 15% of all people living as socially married – that is, all those either in a registered marriage or a de facto relationship, per the Australian Bureau of Statistics’, <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/1301.0~2012~Main%20Features~Marriages,%20de%20facto%20relationships%20and%20divorces~55> (accessed 17/4/2013).

²¹ Senator McClelland, in his second reading speech, empathised with ‘the wife, who is already in a distressed condition which normally accompanies the breakdown of marriage, has to take her place in the queue with prostitutes, pickpockets and the general criminal element of society’, Family Law Bill 1974, Senate, 29 October, 1974, Hansard, p.4. http://www.aph.gov.au/Parliamentary_Business/Hansard.

²² Various speakers referred to this figure, including William McMahon, Speech, House of Representative, 19 May 1975, Hansard, http://www.aph.gov.au/Parliamentary_Business/Hansard.

²³ The cost of defending divorce proceedings would have been a factor in some cases.

second was fabricated evidence and perjury.²⁴ Both these practices were corrupting of personal morality and the legal system. The Senate agreed with Senator Lionel Murphy in 1971 to allow the Standing Committee on Constitutional and Legal Affairs (the 'SCCLA') to review marriage and divorce law.²⁵ The review continued when the Labor Party won the Federal election on 2 December 1972.

The Family Law Bill (the 'Bill') was introduced into Federal Parliament in late 1973 by Senator Murphy. Both major parties gave their members a conscience vote. The Bill passed in 1975 with bipartisan support.²⁶ The arguments for the Bill need to be considered, as it is these that the Church had to understand and respond to.

There were three main parts to Murphy's argument. First, he said the SCCLA had received uncontested evidence that divorce based on 'the principle of matrimonial fault' was 'not in accord with current social standards' and the 'public attitude to divorce had changed dramatically since 1959'.²⁷ This evidence included two opinion polls taken in late 1973. Despite the question being loaded against the 'yes' vote,²⁸ the Gallup Poll showed 63 per cent were in favour of the proposed change. The second poll was conducted along denominational lines, and showed that the total 'Protestant, Anglican and other' Christian

²⁴ Finlay, *Family*, 27. The major grounds for granting divorce in 1975 were desertion (8,888 cases), adultery (8,023 cases), separation for more than 5 years (3,390) and cruelty (2,615 cases). These ills were also referred to in the Parliamentary debate: see fn. 30.

²⁵ Although the Prime Minister of the time, William McMahon, lost badly to the Whitlam government in the 1972 Federal election, he was a strong supporter of the Family Law Bill: William McMahon, Speech, House of Representative, 19 May 1975, Hansard, http://www.aph.gov.au/Parliamentary_Business/Hansard.

²⁶ The vote for the single ground of separation for 12 months was approved in the committee stage of the legislative process in the House of Representatives by 66 votes to 52, see 'Single ground for divorce, Parl't decides', Sydney Morning Herald, p.1, 20/5/1975.

²⁷ Senator Lionel Murphy, Family Law Bill 1973, Second Reading Speech, Senate, 13 December 1973, Hansard, http://www.aph.gov.au/Parliamentary_Business/Hansard.

²⁸ The question was 'The Federal Attorney-General has proposed that in future the only ground for divorce should be evidence of 12 months separation. *This will make divorce easier to obtain.* Do you think this is a good thing or a bad thing?' (italics added): quoted by Senator Alan Missen, Family Law Bill 1974, Second Reading Speech, Senate, 29 October 1974, Hansard, p.4. http://www.aph.gov.au/Parliamentary_Business/Hansard. As discussed below, the claim that the proposed change made divorce 'easier' was hotly contested, including by Senator Missen.

(but not Catholic) support for divorce after no interval or an interval of 12 months was 71.8%.²⁹ Murphy noted some 'traditionalists' had wanted to retain some sense of fault and preferred two to three years separation over the proposed sole ground of twelve months separation, but Murphy contended they were in the minority and out of step with community views.³⁰ Second, the laws were 'unnecessarily prolix and cumbersome'. Third, the current legal practices resulted in 'high costs, delays and indignities to the parties'.³¹

Murphy went on to argue the laws were in line with developments elsewhere,³² and that his new 'good divorce law' would 'buttress, rather than undermine, the stability of marriage'. He made the point that the laws should be 'understandable and respected by the public'.³³ It was hard to see how people could respect laws based on fault, when most people accepted one defaulting party alone very rarely caused a failed marriage.

A significant feature of the Bill was the initial focus on meetings to assess whether reconciliation was possible. This was subsequently watered down after the Bill became law, but this focus may have taken some of the sting out of the argument that divorce was to become an easy, administrative process that took the marriage out of the hands of someone seeking reconciliation.³⁴ Murphy argued 'the Bill recognises the desirability of reconciliation' while also contending that the evidence was that very few marriages were

²⁹ Quoted by Senator Alan Missen, Family Law Bill, 1974, Second Reading Speech, Senate, 29 October, 1974, at pp. 4-6, http://www.aph.gov.au/Parliamentary_Business/Hansard.

³⁰ The second poll referred to in the preceding footnote suggested only 3.7% wanted divorce granted after 2 years separation.

³¹ Other speeches buttressed this criticism with reference to the 'proof of fault [being] nearly always defective, often collusive and frequently manufactured': Senator James McClelland, Family Law Bill 1974, Second Reading Speech, Senate, 29 October, 1974, Hansard, http://www.aph.gov.au/Parliamentary_Business/Hansard. It also involved perjury. Interjection from Senator Poysner, confirmed by Senator McClelland: Senator James McClelland, Family Law Bill 1974, Second Reading Speech, Senate, 29 October, 1974, Hansard, http://www.aph.gov.au/Parliamentary_Business/Hansard.

³² For example, England, Canada and California.

³³ Senator Lionel Murphy, Family Law Bill 1973, Second Reading Speech, Senate, 13 December 1973, Hansard, http://www.aph.gov.au/Parliamentary_Business/Hansard.

³⁴ The reconciliation provisions under the 1959 Act were referred to as a 'hollow farce': Senator James McClelland, Family Law Bill 1974, Second Reading Speech, Senate, 29 October, 1974, Hansard, http://www.aph.gov.au/Parliamentary_Business/Hansard.

ever retrieved after twelve months separation.³⁵ Murphy asserted that people did not rush into divorce because of the financial and social implications, and that society needed to recognise that marriages breakdown, and needed to be dealt with 'the maximum fairness and the minimum bitterness, distress and humiliation'.³⁶

The Anglican Diocese of Sydney Responds

The Sydney Synod resolved on 18 October 1972 to establish a committee to 'examine the teaching of the Bible and the doctrine and practice of the Church of England concerning marriage and divorce'.³⁷ The committee was called 'The Committee on Marriage, Divorce and Re-Marriage'. The addition of 'Remarriage' is significant. It is apparent from the interim (and only) report delivered to Standing Committee in August 1973 that the committee saw its primary task to consider whether, and in what circumstances, the Church could remarry a divorced person.³⁸ This issue had been around for some time. For a number of centuries remarriage was precluded by the Canons of 1603. Broughton Knox opined that the position changed about the time the English Divorce and Matrimonial Causes Act of 1857 was passed, but the position was unclear.³⁹ The Archbishop of Sydney, Dr H.W.K. Mowll, said in response to some Anglican clergy in England in 1957, who were revolting against their bishops and proposing to marry divorcees, 'The clergy has not my approval if

³⁵ This was substantiated later by reference to evidence from lawyers and the Scottish Law Commission that after 12 months separation 'all prospects of reconciliation have in the vast majority of cases evaporated': Senator James McClelland, Family Law Bill 1974, Second Reading Speech, Senate, 29 October, 1974, Hansard, http://www.Aph.Gov.Au/Parliamentary_Business/Hansard.

³⁶ Senator Lionel Murphy, Family Law Bill 1973, Second Reading Speech, Senate, 13 December 1973, Hansard, http://www.Aph.Gov.Au/Parliamentary_Business/Hansard.

³⁷ Resolution 37/72, reported in the *Year Book of the Diocese of Sydney, 1973*, at p.300. This was in addition to the committee appointed by Synod resolution 20/71, *Year Book of the Diocese of Sydney, 1972*, at p.289. to consider Christian Teaching on Family Life. This committee submitted a report 'Christian Teaching on Family Relationships', referred to in Synod resolution 13/73, *Year Book of the Diocese of Sydney, 1974*, at p.250. This report recommended practical steps, including through the Diocese's Marriage Guidance Centre, to strengthen families, see *Year Book of the Diocese of Sydney, 1974*, at p.369-385.

³⁸ *Anglican Diocese of Sydney Year Book 1974*, 389-391. The interim report was received by the Synod by resolution 3/73, *Year Book of the Diocese of Sydney, 1974*, at p.248.

³⁹ Reported in 'Thou shalt not... Atomic age religion', *Sydney Morning Herald*, 21/7/1957, p.7.

they take the marriage of anyone who has been divorced'.⁴⁰ The attitude shifted in the 1960s with more Sydney Anglicans supporting remarriage for the 'innocent' party.⁴¹

The issue became more pressing with the prospect of more divorces and divorces with no external evidence of fault. The General Synod of Australia received a detailed report dated 20 November 1972 in which divorce on the grounds of 'irretrievable breakdown' was accepted, and recommended remarriage in church when 'due safeguards' were implemented.⁴² This view drew on 'An adequate doctrine of grace [which] can loose as well as bind, forgive as well as bless'.⁴³ It contended that it 'is to be doubted...whether the institution of marriage is really strengthened at all when the Church absolutely and unequivocally sets its face against affording relief in hard cases'.⁴⁴ A provisional canon permitting remarriage in limited circumstances was passed with the support of the Sydney Diocese, but was ruled invalid.⁴⁵

It appears that initially many in the Sydney Diocese focussed more on the internal issue of remarriage than the external threat to society proposed by Murphy's innovations. The only reference the interim report made to the reforms Senator Murphy was considering was to

⁴⁰ Reported in Sydney Morning Herald, 19/11/1957, p.9.

⁴¹ See the support for 'A Canon concerning the Marriage of Divorced Persons', discussed below.

⁴² Report of The Commission on Marriage and Divorce from the Commission appointed by General Synod of the Church of England in Australia (Minute 7/69), presented to the General Synod, Session - May, 1973, at p.7. Source: General Synod Archives. Bruce Smith, then a lecturer at Moore Theological College was a member of the Commission, and contributed to the majority submission. The Sydney Synod noted the majority conclusion was in accord with its own view, although 'reached upon a different theological basis', resolution 3/73, *Anglican Diocese of Sydney Year Book 1974*, p.248.

⁴³ Here citing from 'Putting Asunder: A Divorce Law of Contemporary Society.' (The Report of Group appointed by the Archbishop of Canterbury), S.P.C.K. 1966, p. 73. We will meet this report again below, as proponents of the Family Law Bill were able to use it to good effect against the Sydney Diocese, and other church opposition

⁴⁴ Report of The Commission on Marriage and Divorce from the Commission appointed by General Synod of the Church of England in Australia (Minute 7/69), p.7. The report contained a long 'indissolubilist' view of marriage in a minority report. The indissolubilist view was not a significant position in the Sydney Diocese.

⁴⁵ 'A Canon concerning the Marriage of Divorced Persons, revised version containing all amendments', dated 25/5/73. Source: General Synod Archives. The indissolubilists challenged the provisional canon and it was found invalid in a ruling of the Appellate Tribunal: Report of The Hon. Mr. Justice Athol Richardson, dated 25 September, 1974. Source: General Synod Archives.

correspondence with Senator Murphy. It was reported that the Senator Murphy had replied on 18 June 1973 that he was 'inclined to the view that irretrievable breakdown of marriage should be established by one year's separation of the parties'. The Committee reported that it was seeking the views of other interested parties on this proposal and waiting on draft legislation.⁴⁶

The rest of the interim report comprised an analysis of the biblical teaching on divorce, an endorsement of the pastoral recommendations of the Lambeth Conference in 1948,⁴⁷ and a comment on General Synod Provisional Canon. In other words, the Committee said nothing on the social, legal and political pressures that had given rise to the proposed rewrite of the law of marriage and divorce. It did not recommend making any submission to the SCCLA or the Attorney General, despite a general invitation to do so. There was no recognition of the support for 'no-fault' divorce in the community, or the need to stop or redirect the initiative before it was introduced in Parliament.

The interim report was not unanimous as some argued an 'indissolubilist' position. However, the first conclusion in the interim report is worth quoting in full:

'We accept that Matthew 19:1-12 and Mark 10:1-12 are both equally to be determinative in relation to Christ's teaching, and we reject the view that material found exclusively in Matthew is to be treated as non-authentic or later church additions.'⁴⁸

In the later debates Sydney Anglicans generally did not take an 'indissolubilist' position, but extrapolating from Matthew 19, they accepted divorce when there was fault akin to adultery, or other objective evidence that the marriage was untenable or had been abandoned.⁴⁹

⁴⁶ *Anglican Diocese of Sydney Year Book 1974*, 389-391.

⁴⁷ Resolutions 92-99 from the 1948 Lambeth Conference, <http://www.lambethconference.org/resolutions/1948/>

⁴⁸ *Anglican Diocese of Sydney Year Book 1974*, 389-391

⁴⁹ See the endorsement of the Open Letter of Concerned Christians to the Attorney General: Family Law Bill, dated 3 February, 1975, discussed below: Standing Committee of Synod - Minute Book, 1973-1974, Volume 30, at p. 45, Sydney Diocesan Archives, [Accession Number 2008/001]..

Various inferences could be drawn from this report. First, the Committee may have seen its primary purpose was to get the theology of divorce right, rather than to engage with arguments for and circumstances behind the push for 'no-fault' divorce. Second, differences of opinion, evident in the need to address the apparent absolute prohibition on divorce in Mark 10 took up the time of the Committee. Third, the very existence of the report suggested, beside a general opposition to divorce, that a coherent, agreed, well publicised view on the biblical teaching on marriage and divorce had been absent.

The report contained no discussion of how twelve months separation may relate to the biblical concept of 'sundering'. Further, there was no discussion of whether a divorce granted on the basis of twelve months separation satisfied the biblical test for divorce. By focussing on theological issues that could arise at any time, it appears that there was no perceived need to deal with the particular theological issues raised by the proposed changes to the law.

Following the introduction of the Bill in Parliament through the Senate in late 1973, the Standing Committee of the Sydney Synod, and three leading Anglicans in Sydney, Archbishop Marcus Loane, Dean Lance Shilton and Broughton Knox, Principal of Moore College, fought a public battle against the draft legislation. They were joined by Anglican clergy who preached against the Bill and who wrote letters to Members of Parliament.⁵⁰ Lay Anglicans also wrote letters to their members.

⁵⁰ Mention is made of this correspondence in the following speeches: Senator Arthur Gietzelt, Family Law Bill 1974, Second Reading Speech, Senate, 19 November, 1974, Hansard, http://www.Aph.Gov.Au/Parliamentary_Business/Hansard; Senator Don Grimes, Family Law Bill 1974, Second Reading Speech, Senate, 30 October, 1974, Hansard, http://www.Aph.Gov.Au/Parliamentary_Business/Hansard.

In February 1974, the Sydney Diocesan Standing Committee set up a committee to review the Bill.⁵¹ The next month it received a report on the Bill claiming it would make divorce 'easier' and that it was 'anti-family'. The report called the Bill 'A Bill for Disposable Marriages' and a 'fraud on the community'. Standing Committee resolved that it 'was not necessarily satisfied with the present law and is aware of human problems'. However, when it wrote to the Attorney-General on 3 April 1974 with a copy of the report, it proposed no alternative. Rather, it opposed the Bill outright because it 'may well cause fundamental changes in society and the family structure'.⁵² This assertion was neither argued nor substantiated. Nor was there any attempt to engage with the arguments Senator Murphy had advanced in support of the Bill. Murphy's arguments concerning many 'no-fault' divorces being slower, and his focus on reconciliation, were ignored. Further, the Sydney Diocese did not grapple with the common view that marriages fail because of the failings of both parties, yet its own theology was that all people sin.

The correspondence file of Archbishop Loane shows he was greatly concerned by the Bill.⁵³ He corresponded with many members of Parliament and kept annotated copies of speeches, reports and newspaper cuttings. In early 1974 he had Prime Minister Gough Whitlam to dine at Bishops court. This came as a surprise to Whitlam, who was even more surprised when Loane expressed his vigorous opposition to the Bill, and urged Whitlam to direct his party to oppose it.⁵⁴ Did Loane really expect Whitlam to oppose legislation his own party had introduced? Although Whitlam came from deeply religious parents, his irreligion was well

⁵¹ Resolution 10(e), dated 25 February 1974, Standing Committee of Synod - Minute Book, 1973-1974, Volume 28, Sydney Diocesan Archives, [Accession Number 2008/001]

⁵² Standing Committee of Synod - Minute Book, 1973-1974, Volume 28, Sydney Diocesan Archives, [Accession Number 2008/001]

⁵³ Archbishops Office - Correspondence Issues - 1973-1974. Family Law Bill. Sydney Diocesan Archives, [Accession Number 1992/026/139]

⁵⁴ Jenny Hocking, *Gough Whitlam, It's Time: The Biography*, (Carlton, Vic: Miegunyah Press, 2012), 183.

known and he would later describe himself as 'post-Christian' and the Sydney Diocese as 'wealthy, and aggressive towards its neighbours'.⁵⁵

It is hard to see that Loane's strategy of 'going to the top' stood much chance of success. Whitlam was immensely proud of the Bill. He said:

'Australia...will have the most enlightened matrimonial and family law in the world. The medieval concept of guilt and fault will be removed from divorce proceedings...By recognising the fundamental status of marriage as a profoundly personal human relationship, a relationship requiring the full consent, the continuing consent, of two partners.'⁵⁶

Loane followed up his meeting with Whitlam with a letter to the editor of the Sydney Morning Herald on 6 April 1974.⁵⁷ He criticised the Bill and urged it not to be passed because it would 'change our traditional understanding of marriage' and would be 'likely to encourage people to enter into marriage unadvisedly, lightly or wantonly'. He produced no evidence, such as market research, to support this. He then argued that a one year separation, 'without regard for causes, motives or consents', was not evidence that the marriage was broken beyond repair. He did not deal with the evidence the SCCLA had received that marriages were rarely retrievable after twelve months separation. His arguments were again based on the idea that 'easy divorce' would provoke more divorce. This had two problems. First, again there was no evidence to support it.⁵⁸ Second, it did not address the fact that

⁵⁵ Book launch reported by Tony Stephens 'Churches feel Whitlam's smiling wrath', <http://www.smh.com.au/news/National/Churches-feel-Whitlams-smiling-wrath/2004/12/08/1102182365088.html> accessed 14/5/2013

⁵⁶ E.G. Whitlam, Prime Minister, Press Conference 30 May 1975, Whitlam Institute E-Collection. Looking back on this, it is easy to see where the movement for 'gay-marriage' tapped into. Whitlam required only 'two partners' not a 'man and a woman'.

⁵⁷ 'Family Law Bill Attacked: Appeal to MPs to reject measure', Sydney Morning Herald, 6 April 1974, p.5. See also Archbishops Office - Correspondence Issues - 1973-1974. Family Law Bill. Sydney Diocesan Archives, [Accession Number 1992/026/139]. Loane wrote in similar terms in the Diocese's *Southern Cross* publication: J.R. Reid, *Marcus Loane: A Biography* (Brunswick East, Vic.: Acorn Press, 2004), 85-86.

⁵⁸ The divorce rate did spike after the Bill became operational on 5 January 1976, but then dropped back to be in line with the slow increase that had been evident since 1950, such that the rate in the

nearly half of the petitions for divorce under the 1959 Act were filed earlier than 12 months after separation. Hence, the link between the grounds for divorce and marriage breakdown was never proved, and Loane's argument appeared as rhetorical speculation.⁵⁹

Loane went on to argue, 'Our legislators in the past have declined to allow divorce by mutual consent'. Although technically correct, this was misleading because that is not what the Bill proposed. Further, the 'no-fault' Rubicon had been breached in the 1959 Act. Loane objected to 'divorce by abandonment', although this had been the law and practice since the Colony was founded. He criticised divorce 'without penalty or disability', without explaining what good such penalties or disabilities would be to a couple whose marriage had in fact broken down irretrievably (a state he recognised as a reality, despite Christian hope and prayer), or how that would preserve a marriage in difficulty. Finally, he criticised the law change for not being based on 'wider consultation', although English Anglicans had advocated the change eight years before,⁶⁰ and there had been a huge public debate for several years. The Anglican Church had been consulted, but had been slow in responding.⁶¹

Murphy responded to Loane personally with a long, detailed letter which Loane received on 10 May 1974. Murphy criticised Loane for showing no evidence to support his assertion that people would now enter marriage 'unadvisedly'. He argued that requiring an objective

early 2000's was at the rate it could have been expected to have been at without the change of law in 1975. Hence, Loane's speculation has not been proved right. Since then, the divorce rate has dropped. See Australian Bureau of Statistics, <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/947114F16DC7D980CA25773700169C64?opendocument> (accessed on 23/5/2013).

⁵⁹ See, for example, Senator Alan Missen, Family Law Bill 1974, Second Reading Speech, Senate, 29 October, 1974, Hansard: http://www.Aph.Gov.Au/Parliamentary_Business/Hansard.

⁶⁰ See the 'Putting Asunder' report referred to above.

⁶¹ Senator James McClelland stated that the view there had not been enough consultation was 'just so much hogwash' and that it took the churches, including the Anglican church, two years to make submissions to the Senate Committee, and did so only after he wrote to them to chase them up, 'We had to go after them to get them to tell us what their opinions were': Family Law Bill 1974, Second Reading Speech, Senate, 16 October 1974, Hansard: http://www.Aph.Gov.Au/Parliamentary_Business/Hansard.

ground of fault had not worked in England,⁶² and criticised Loane for not recognising that one party alone seldom caused marriage breakdowns.

Loane followed up with a letter of 22 May 1974 in which he did not refute Murphy's criticisms. Rather he changed his point of attack, claiming not recognising fault 'must lead to injustice in many cases'.⁶³ He had in mind the moral opprobrium that would attach to deserted wives. Again Loane missed the point, which was that the Bill was trying to deal with marriages that had failed because both parties had failed, and to let parties get on with their lives without pretending that fault lay only with one party. Murphy's argument was that the stigma of divorce would not keep a marriage together as a marriage, though it may keep two people under the same roof.

Dean Lance Shilton took a more strident position than Loane. He derisively claimed that people marrying at marriage registries would use 'the Murphy Marriage Manual with verbal inspiration of the Family Law Bill' as their Bible when marrying. He criticised the Bill for its 'take it or leave it approach to marriage' and contrasted it with Christian marriage.⁶⁴ Shilton spoke at a mass rally of 25,000 in Hyde Park on 7 April, 1974 organised by the Festival of Light. He linked divorce law reform with concurrent debates on pornography, euthanasia and abortion, and questioned the openness and integrity of some politicians.⁶⁵

Other leading Sydney Anglicans bought into the debate. Broughton Knox wrote to the Sydney Morning Herald:

⁶² Following the recommendations of the Archbishop of Canterbury's Committee in 1966, England had streamlined its divorce laws, but kept the requirement for a finding of fault. This was removed for 'no-fault' in 1976.

⁶³ Archbishops Office - Correspondence Issues - 1973-1974. Family Law Bill. Sydney Diocesan Archives, [Accession Number 1992/026/139]

⁶⁴ Alan Gill, 'Vote 1 for Morality Dean Tells Rally', Sydney Morning Herald, 8 April 1974, p.8.

⁶⁵ Alan Gill, 'Anglican dean hits out at divorce bill', Sydney Morning Herald, 23 October, 1974, p.20.

'Up until now marriage has been "for better, for worse, for richer, for poorer, in sickness and in health," but Senator Murphy's Family Law Bill scraps this. Marriage is now only "for better" ... Divorce by consent has never yet been accepted by the Australian community but at least if both parties consent to the divorce the likelihood of injustice will be minimised but Senator Murphy's Bill is divorce by unilateral decision by one spouse only forced on the other willy-nilly. It will be a fruitful source of great and cruel injustice and indignity.'⁶⁶

The similarities with Loane's position are obvious. One cannot doubt Knox's sincerity or concern for the oppressed, but this letter evidences how much Knox was out of touch with Australian culture, both past and present. He correctly quoted the promises made in many church weddings, but ignored the high level of unmarried cohabitation in the early colony and the growing incidence of it in the 1970s. The high level of uncontested divorces prior to 1975,⁶⁷ and the incidence of contrived evidence, suggest that 'consent' was a very common feature of divorce. Further, desertion had always been a 'unilateral decision' of one spouse, and a feature of practice since the early 1800s and a feature of the law since 1873.⁶⁸ It is one thing to bravely and consistently put forward the biblical view of marriage and divorce, as many Sydney Anglicans (including Knox) did. It is another thing to misunderstand the context in which one speaks and writes.

Two days later Knox took to the airwaves with a talk on 'Marriage and Divorce' in his 'The Protestant Faith' series.⁶⁹ His arguments were largely the same, but more rhetorical. He

⁶⁶ D.B. Knox to the Editor, Sydney Morning Herald, 15 March 1974, Box 16, Folder 2, Knox papers, Moore College archives, cited in Marcia Cameron, *An Enigmatic Life: David Broughton Knox, Father of Contemporary Sydney Anglicanism*, (Brunswick East, Vic: Acorn, 2006) p.217.

⁶⁷ Senator McClelland cited the 'Putting Asunder' report of the 'Archbishops of Canterbury's Group' as noting 'every uncontested divorce is in fact a divorce by consent': Senator James McClelland, Family Law Bill 1974, Second Reading Speech, Senate, 29 October, 1974, Hansard, p.2.

http://www.Aph.Gov.Au/Parliamentary_Business/Hansard.

⁶⁸ Technically, desertion did not end a marriage, only a legal divorce did that. However, the common view was that the behaviour of the parties ends marriage, and the role of the law was to reflect reality.

⁶⁹ Transcript of talk in Robinson, Donald - Personal Papers - 1973-1974 Family Law Bill, Sydney Diocesan Archives, [Accession Number 1993/053/114].

claimed, 'every existing marriage and every future marriage comes under threat', without showing how this applied to the majority of marriages that were between people who worked through the difficulties of marriage and stayed together until death separated them, or how the Bill was conceptually different from the 1959 Act. It appears part of his anger was directed against the Labor Party, as he claimed it had no mandate for this legislation.⁷⁰ Claims of what constitutes a mandate are notoriously slippery, but whether Knox was accurate or not, the issue would evaporate on 18 May 1974 when Labor was re-elected. Knox could not claim to have the people on his side.

A review of the private papers of Donald Robinson (then Bishop of Parramatta) indicate there was much sharing of letters and reports between Loane, Knox and Robinson.⁷¹ However, there is no evidence that an assessment was ever made of what was achievable, given the broad community and political support for the Bill. Nor was any detailed plan made to prosecute the 'no' case. Throughout 1974, the position that Loane, Shilton and Knox took was outright rejection of the Bill (while recognising there were some good bits).

This changed in 1975. The debates in Parliament in late 1974 showed the 'no' position was getting nowhere. The arguments of the Sydney Diocese were rejected by Labor.⁷² Standing Committee resolved in February 1975 that 'the existing divorce and family laws require substantial reform and improvement' but advocated unspecified changes that would assist the preservation of marriage as a 'voluntary and exclusive union of one man and one woman

⁷⁰ Divorce law reform did not get a mention in Whitlam's famous 'It's Time' election launch and policy speech on 13 November 1972: <http://whitlamdismissal.com/1972/11/13/whitlam-1972-election-policy-speech.html>, accessed 24/5/2013. However, Murphy had showed his hand in 1971 with his arguments for the referral of divorce law to the SCCLA.

⁷¹ Robinson, Donald - Personal Papers - 1973-1974 Family Law Bill, Sydney Diocesan Archives, [Accession Number 1993/053/114].

⁷² Letter from Senator Alan Missen to Archbishop Loane dated 22 October 1974, Standing Committee of Synod - Minute Book, 1974-1975, Volume 30, at p. 45, Sydney Diocesan Archives, [Accession Number 2008/001].

for life'.⁷³ Standing Committee supported an open letter to Members of Parliament from a number of Christians, including some Sydney Anglicans, dated 3 February 1975. This accepted 'irretrievable breakdown as the ground for divorce', but wanted 'objective tests' beyond twelve months separation. They wanted evidence (a) that the other party had behaved in such a way that the applicant cannot be reasonably expected to live with that party, or (b) of adultery, or (c) of three years separation.⁷⁴ This represented something of a compromise. They appeared to be happiest with attributing fault, but would accept three years separation. Again there was no evidence adduced that a marriage that had been separated for 3 years was less retrievable than one separated for 12 months. They compromised on the principles, without being able to support their pragmatics.

The Anglican Church was not united in its opposition to the Bill. Although Sydney at times is at odds with the General Synod, the General Synod, through its Social Responsibilities Commission, 'strongly criticised' the 'no-fault' provision of the Bill.⁷⁵ However, there was 'vocal minority support' for the Bill, including from Anglican Dean of Brisbane, Ian George, and this minority position at times got more media coverage than the Anglican opponents of the Bill.⁷⁶

The Effect of Sydney's Arguments

The Sydney Diocese, along with Anglicans elsewhere, detected a drafting flaw in the Bill. While divorce could be granted only after twelve months separation, an application for divorce could be lodged earlier (e.g., after one day of marriage). The proponents of the Bill

⁷³ Resolution 8(c), 24 February, 1975, Standing Committee of Synod - Minute Book, 1974-1975, Volume 30, at p. 45, Sydney Diocesan Archives, [Accession Number 2008/001].

⁷⁴ Standing Committee of Synod - Minute Book, 1973-1974, Volume 30, at p. 45, Sydney Diocesan Archives, [Accession Number 2008/001]. Copies of this open letter also in the private papers of Loane and Robinson referred to above.

⁷⁵ Alan Gill, 'Churchmen disagree on family law issue', Sydney Morning Herald, 6 December 1974, p.6.

⁷⁶ Ibid.

recognised this flaw and thanked the Church for bringing it to their attention.⁷⁷ However, beyond this, it is difficult to see that anything positive was achieved outside the Church. It is hard to assess whether the mobilisation of many Anglicans against the Bill did any good within the Church. It probably encouraged some to see their leaders involved in social action, while it irritated others with the failure to grapple with the arguments for change.

Seeing where the legislation was heading, some Sydney Anglicans, including Shilton, tried to delay the debate by six months.⁷⁸ This was lost.⁷⁹ It is hard to see what the delay would have achieved, as the Bill had bipartisan support, and this delaying tactic only diminished the standing of the Sydney Diocese.⁸⁰

Senator Gietzelt argued that the delaying tactics and the letter writing campaign containing the same phraseology, advocated by Standing Committee and adopted by some Sydney Anglicans (who, he claimed, represented a 'church that grew out of bigamy but which has been pretty conservative over the years in these matters'), and public preaching, 'does not move us at all. In fact, it probably went the other way and hardened one's attitude because of the infantile tactics' that had been adopted.⁸¹ The case against the Bill was also hampered by intemperate abuse. Senator Grimes referred to an offensive phone call in which he was told

⁷⁷ Senator Alan Missen, Family Law Bill 1974, Second Reading Speech, Senate, 29 October, 1974, Hansard p.8: http://www.Aph.Gov.Au/Parliamentary_Business/Hansard. In this Speech Missen made specific reference to a letter from the Melbourne Synod noting this problem, but the Sydney Diocese had noticed and communicated the same problem.

⁷⁸ The delay had the support of Sydney Synod, see resolution 27/74, *Year Book of the Diocese of Sydney, 1975*, at p.245.

⁷⁹ See the speech of Senator Sir Kenneth Anderson, and the petition referred to in it, Family Law Bill 1974, Second Reading Speech, Senate, 30 October, 1974, Hansard, http://www.Aph.Gov.Au/Parliamentary_Business/Hansard.

⁸⁰ For example, see the report of the failed delaying tactic in 'Move to stall Family Law Bill rejected', Sydney Morning Herald, date 20 November, 1974, p.20.

⁸¹ Senator Arthur Gietzelt, Family Law Bill 1974, Second Reading Speech, Senate, 19 November, 1974, http://www.Aph.Gov.Au/Parliamentary_Business/Hansard

supporters of the Bill were 'perpetrators of promiscuity'.⁸² This was not a claim the Sydney Diocese was making, but it made the 'no' case harder.

A number of Senators (Labor and Liberal) referred to the Church of England's 'Putting Asunder Report' of 1966.⁸³ This was a detailed report that analysed changes in society and defects in divorce law in Britain that were very similar to those in Australia. It recommended wide-ranging change, including 'no-fault' divorce. The tone of these contributions was that this report provided 'Church' backing for the move to 'no-fault'. Senator McLelland drew support from this report, and argued that divorce law should not be:

'a reward for marital virtue on the one side and a penalty for marital delinquency on the other; not the victory for one spouse and a reverse for the other; but a defeat of both, a failure of the marital "two-in-oneness" in which both its members, however unequal their responsibility, are inevitably involved together.'⁸⁴

In all the debates, this report was given far more prominence than any other submission by a religious group. Many outside the Church probably did not understand the political separation and theological differences between English Anglicans and Sydney Anglicans. It appears that some Senators saw the report as a more legitimate expression of the 'Church's position' than local expressions.

A number of members of Parliament undercut the arguments from the Anglican Church by arguing that the 'no-fault' provision was not a new thing advocated by 'permissive trendies', and had been around since 1959. Hence, the failure to stop the '5 year separation' ground in 1959 meant the argument was now about detail rather than the principle of 'no-fault'. The

⁸² Senator Don Grimes, Family Law Bill 1974, Second Reading Speech, Senate, 30 October, 1974, Hansard, http://www.Aph.Gov.Au/Parliamentary_Business/Hansard.

⁸³ 'Putting Asunder: A Divorce Law for Contemporary Society: the Report of a Group Appointed by the Archbishop of Canterbury in Jan. 1964', S.P.C.K. 1966

⁸⁴ Senator James McClelland, Family Law Bill 1974, Second Reading Speech, Senate, 29 October, 1974, Hansard, http://www.Aph.Gov.Au/Parliamentary_Business/Hansard.

evidence was that 'no-fault' had not 'opened the floodgates', yet a five year delay disadvantaged deserted wives.⁸⁵

Conclusions

Historian Marcia Cameron comments on the introduction of the Bill, and a number of social changes introduced by the Whitlam government, that the 'churches were caught unaware in the maelstrom of change'.⁸⁶ Yet, given the innovation of the 1959 Act, the opposition to 'no-fault divorce' then from the Church, the social change all so evident in the 1960s with the contraceptive pill, changing views on the role of women, obscenity, drugs, conscription etc, Cameron's conclusion stands only if one concedes that the Sydney Diocese had spent a large part of that time looking inwards, or perhaps looking outwards in evangelism following the success of the Billy Graham crusades in 1959 and 1968,⁸⁷ rather than also exegeting and engaging with the rapidly changing society. A good case can be made that the Whitlam Government was not shaping a new and poorer view of marriage, but rather bringing the law into line with significant changes that had occurred in the 1960s.⁸⁸

It is apparent that the Sydney Diocese had little understanding of the changes that had occurred in popular attitudes towards marriage, and was not representative of developments in attitudes of Christians, including many Anglicans. The Diocese's response was slow and reactive. It did not come up with a coherent view of what was achievable or what a 'good Christian' outcome might be. It was initially distracted by the need to clarify its own theology of divorce and to neutralise the indisolubilists, and the internal debate on

⁸⁵ Senator Alan Missen, Family Law Bill 1974, Second Reading Speech, Senate, 29 October, 1974, Hansard, http://www.Aph.Gov.Au/Parliamentary_Business/Hansard.

⁸⁶ Cameron, *Enigmatic*, p.215.

⁸⁷ Stephen Judd and Kenneth Cable, *Sydney Anglicans: A History of the Diocese*, (Sydney: Anglican Information Office, 1987), pp.258-59.

⁸⁸ Philip Jensen has noted that, 'It was not the law alone that brought about...social change. It was the consequence of the community moving from a Christian culture to a materialist culture, especially through the sexual revolution of the sixties.' 'No-Fault'.

sanctioning remarriage. It was later hampered by the well argued and very different approach advocated by the 'Putting Asunder' report.

The Diocese's strategy changed from advocating the total rejection of the Bill, to advocating changes that still relied largely on a determination of fault. It failed to engage with the fundamental argument that marriages fail because both parties fail. It never established beyond rhetorical assertion that divorce law shapes people's reasons to marry or their conduct in marriage. Further, the failure to engage with the arguments for change suggests the Sydney Diocese did not understand how it must engage with contemporary debate if it was to be an effective voice. Its position as 'the Church' was increasingly marginal. Evidence based argument was required, not claims to know what is right and best. Finally, Sydney Diocese failed to explain why something that applied to Christians should apply to a society that saw the Bible as largely irrelevant to its needs. Sydney Anglicans would need to learn to work from a biblical understanding of the world, but couch their arguments in ways that did not rely on society sharing that understanding.

In the light of the post-Enlightenment world-view Whitlam was expressing, and the broad support his views held, we may ask what the Sydney Diocese could have done differently. One suggestion would have been to endorse those changes that were either good or unobjectionable. These may have included the initial focus on reconciliation, recognising that 'fault' in marriage is rarely one sided, recognising that there is little, if anything, left of a marriage that one party has abandoned (whether physically, emotionally or financially), and lowering legal costs and complexity.

In time the Sydney Diocese would come up with a coherent, constructive strategy for advocating and protecting the biblical view of marriage. It did this by pouring more resources into marriage preparation, marriage enrichment and marriage counselling. With

the benefit of hindsight, one could conclude the Diocese would have prosecuted its mission better by accepting that marriage is shaped by how well people are prepared for it, and supported through it in understanding that a successful marriage must be based on love, understood as passionate, sacrificial, other person centred, action (John 3:16: Eph 5:22-33), rather than by the legal proceedings by which a failed marriage can be terminated.

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