

REGULATING THE TERMINATION OF MARITAL STATUS: IS IT WORTH THE EFFORT?

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[This paper discusses how socio-legal and economic analysis of law might be combined to investigate the extent to which those sections of the Family Law Act which regulate the termination of marital status fulfil their purported aims. Attention is drawn to the paucity of information which currently informs policy decisions and the type of research which would be necessary for this to be remedied.]

Introduction

Married people who no longer wish to be so need a decree of dissolution to terminate their marital status. Under section 48 of the Family Law Act 1975 (Cth) they must prove to the Family Court that they have,

separated and thereafter lived separately and apart for a continuous period of not less than 12 months

Where there are children of the marriage who are under the age of 18, the Court must declare itself satisfied that,

proper arrangements in all the circumstances have been made for the welfare of those children.¹

These two sections, which are considered at the same hearing, create a regime which Parliament must be deemed to have intended to confer benefits on society. The two sections involve costs, such as the provision of judges, court-rooms and legal services, being expended in pursuit of the benefits. The costs are borne by the state and by divorcing parties themselves. The question posed by this paper is: how might we calculate whether the two sections are 'worth it'? To be more precise, how might we go about examining whether sections 48 and 55A provide value for money compared to some possible alternatives?

Cost/benefit and planning balance sheet approaches

Posner has argued that,

The purpose of legal procedure is . . . the minimization of the sum of two types of costs: 'error costs' (the social costs generated when a judicial system fails to carry out the allocative or other social functions assigned to it), and the 'direct costs' (such as lawyers', judges', and litigants' time) of operating the legal dispute-resolution machinery . . . this formulation is usable even when the purpose of the substantive law is to transfer wealth or to bring about some other noneconomic goal.²

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¹ Section 55A(1) of the Family Law Act. Section 55A substantially reproduces section 71 of the Matrimonial Causes Act 1959. In the Family Law Act 1975 it became section 63, redesignated as section 55A with effect from 1 April, 1988.

² Posner, R. A., 'An Economic Approach to Legal Procedure and Judicial Administration' (1973) 2 *Journal of Legal Studies* 399, 399-401.

On this line of argument we would try to examine whether the costs of (i) judges, courts and their accoutrements; (ii) legal representation; and (iii) the divorcing parties themselves, provided benefits which were equivalent to those figures, or whether alternative schemes of regulation could produce the same benefits for lower costs.

But attacks which have been made on the cost/benefit approach are of particular relevance to this context.³ One criticism is 'the obvious difficulties'⁴ in converting social costs and benefits into monetary terms. In this context, respect for the institution of marriage or the welfare of children on divorce would, at least at first blush, seem to fall into such a category. A second, and perhaps even more pressing, criticism made by Alexander is the cost/benefit approach's,

consistent failure . . . to deal adequately with the equity aspects of projects, *i.e.* the distribution of costs and benefits.⁵

Rather than starting from the presumption, which seems implicit in the cost/benefit approach, that the maximization of efficiency is in the interests of all, the planning balance sheet approach's starting point is,

the identification of all relevant community groups which are likely to be affected by, and/or involved in, the plan or scheme in question, whether this involvement be direct or indirect.⁶

One particular aspect of this identification of relevant groups is to draw a distinction between producers and consumers.⁷ This suggests that the difference between cost/benefit and planning balance sheet approaches reflects a fundamental distinction between the approaches of different socio-legal researchers. Researchers who adopt a 'consensus' or 'functionalist' model of society would tend to favour cost/benefit analysis. Researchers whose assumptions were based on 'conflict' or 'antagonistic' models of society would see the planning balance sheet approach more favourably because of its explicit recognition of the diversity of interest between producers and consumers. Other differences between the two approaches will be pointed out as they arise throughout the article.

To illustrate this point in the context of regulating the termination of marital status, we would note that costs are not 'neutral'.⁸ An increase of costs in one sector can decrease the costs in the other and vice versa. For example, the Family Law Regulations prescribe a court fee of \$300 to be payable in respect of proceedings for a decree of dissolution.⁹ The \$300 is a cost to divorcing parties but a saving to the court. The level of filing fees is important to producers and

³ See generally Alexander, I., 'The Planning Balance Sheet: An Appraisal' in McMaster, J. C. and Webb, G. R., (eds) *Australian Project Evaluation: Selected Readings* (1978) 46.

⁴ *Ibid.* 47.

⁵ *Ibid.*

⁶ *Ibid.* 50.

⁷ *Ibid.*

⁸ Chapper, J. A., and Hanson, R. A., 'The Attorney Time Savings/Litigant Cost Savings Hypothesis: Does Time Equal Money?' (1983) 8 *Justice System Journal* 258.

⁹ Regulation 11(1). Regulation 11(4) creates some exceptions to this liability, most importantly where the applicant is legally aided or where payment would lead to hardship. The Family Law Council note that in 1988, remission of fees was granted in 9,530, that is 23.4 per cent of the 40,972 applications which were filed, and in 89.1 per cent of cases where it was requested: *Annual Report 1988-89* 40-1.

consumers respectively but could only save the total costs if they deterred parties from proceeding.¹⁰

Identification, classification and objectives of producers

The planning balance sheet approach demands that all relevant community groups be identified and classified as producers and consumers, and that their objectives be identified.¹¹ The range of groups who have an interest in the divorce process is a wide one. The producers might be taken to include the following:

- (i) The Attorney-General's Department;
- (ii) The judiciary; and
- (iii) The legal profession.

These three groups together produce the divorce process. But we should note that the groups themselves are not homogeneous. The judiciary and the legal profession represent a variety of interests. Some members of the judiciary might be committed to the scheme of no-fault divorce; others might prefer alternatives which are stricter or more liberal. Some members of the legal profession might see their interests in the process being efficient; others might consider that they can profit from the greatest amount of complexity. After all, if the system was too straightforward, more clients might decide that they could negotiate it themselves.

This discussion reveals one of the acknowledged problems in the planning balance sheet approach, the difficulties in identifying the interests of groups.¹² To some extent the identification must incorporate the researcher's inferences. But let us assume for the sake of this argument that the producer's goals are as follows. The Attorney-General's Department wants the service produced as cheaply as possible within levels of political acceptability; the judiciary want control over the way that the service is produced with as little of their actual involvement as possible; and the legal profession want the service produced with as much administrative efficiency as possible. The presumptions in these goals are that the Attorney-General's Department concern is with the size of the budget and the next election, the judiciary's concern is to reduce their workload and to be able to concentrate on judging rather than quasi-administrative duties, and the legal profession's concern is to process as many divorces as quickly as possible.

Identification, classification and objectives of consumers

The consumers of the divorce process represent a wider and less certain range than the producers. The most obvious group is the divorcing parties and their children. But is this one group? Although the consensus-oriented approach referred to above would categorize the family as the archetypal form of unity,

¹⁰ Note Posner's proposal for higher filing fees as a technique for dealing with the caseload crisis and decreasing the total costs of the American legal system: *op. cit.* 389.

¹¹ Alexander, I., *op. cit.*

¹² *Ibid.* 50, 55.

¹³ E.g. Bottomley, A., 'Resolving Family Disputes: A Critical View' in Freeman, M. (ed.) *The State, the Law and the Family: Critical Perspectives* (1984) 293.

other writers¹³ have convincingly pointed out the conflicts of interest within the family. In the context of the termination of marital status there is a clear conflict between the party who initiates the separation and the partner who has to come to terms with that decision. The initiator's desire is to leave the relationship with as little fuss and guilt as possible; their objectives are simplicity, speed and privacy. Partners may feel the desire to allocate blame or to prolong the process of terminating the relationship; their interest is in as much scrutiny of the breakdown as possible.¹⁴

And although it may not be commonly acknowledged, there is a potential conflict of interest between parents and children. The impact of divorce on children is revealed by a number of studies.¹⁵ It can hardly be doubted that for many children, the separation of their parents represents a crisis. It must also be allowed that many parents will not be willing or able to direct their attention to the interests of their children during the emotional process of divorce. Children's interests lie in whatever process directs their parents' attention from each other to themselves.

In addition to the three groups of consumers who have been identified as (i) initiators; (ii) partners; and (iii) children, other groups 'consume' the divorce process, if not as directly as these first three. The church, and any other organizations who maintain a belief in the indissolubility, or at least the institution, of marriage, would have an interest in the process which best protected that institution. It has traditionally been maintained that one way to protect the institution of marriage is to restrict divorce. A fifth consumer of the divorce process is the Department of Social Security, which provides Supporting Parents Benefit to a group which includes divorced parents. The Department's interests would not seem so dissimilar to those of the church. Their objective is not so much to prevent divorce as to prevent the separation of parents which leads to greater demand for benefits. A sixth consumer of the divorce process is the Legal Aid Commission, which provides funding for the legal representation of those who are allowed to be deemed unable to fund themselves. The Legal Aid Commission's objective would be the reduction of costs as this would reduce their outgoings. A seventh consumer might be considered to be Community Services Victoria and its equivalent in other states. If it was accepted that there was any link between divorce and delinquency or other needs for state wardship, then the bodies who provide those services would have the objective of reducing the cause of the demand on their services.

This list of seven is hardly exhaustive, since the importance of the family means that the entire community could be deemed consumers, but for the sake of manageability, these are the groups which will be considered below. But even amongst these seven it is interesting to note how many are state agencies.

¹⁴ Vaughan, D., *Uncoupling: Turning Points in Intimate Relationships* (1987); Ingleby, R., 'Matrimonial Breakdown and the Legal Process: the Limitations of No-Fault Divorce' (1989) *Law and Policy* 1.

¹⁵ Mitchell, A. K., *Children in the Middle: Living Through Divorce* (1985); Wallerstein, J. S., and Kelly, J. B., *Surviving the Breaking: How Parents and Children Cope with Divorce* (1980).

Having identified and classified the groups, and imposed upon them their objectives, the next task in the planning balance sheet approach is to measure all the costs and benefits,

*whether or not they can be measured in monetary or other numerical terms. No attempt is made to arrive at an aggregate cost-benefit ratio in monetary terms.*¹⁶

It should be noted that this approach rejects the assumption in cost/benefit analysis, and much writing in the economic analysis of law, that there is a price which can be put on every consideration. But before measuring the costs and benefits for each of the relevant groups, we need to identify the various options whose costs and benefits are being considered.

Regulation options

The present system of regulating the termination of marital status is for divorcing parties and/or their legal representatives to apply to the court for a decree of dissolution. The application involves the submission of various documents in accordance with the Family Law Rules. The court then provides a date at which the parties are to attend, unless they are entitled to have the proceedings determined in their absence.¹⁷ This is not the only regulation option available to the legislature. Some alternatives are:

- (i) that parties are not allowed to dissolve their marriages by any means;
- (ii) that parties are allowed to dissolve their marriages on the demand of one of them and merely have an obligation to register their divorce with the public authorities in the same way that they might have registered the birth of a child;
- (iii) that parties are allowed to dissolve their marriages with restrictions which are not applied by the judiciary — the termination of marital status might be seen as an administrative procedure equivalent to obtaining a driving licence or a passport.

These four options, the *status quo*, the abolition, the registration and administrative models respectively, will be considered in the following sections of the paper. Each of the options will be considered in terms of its costs and benefits to the identified groups of producers and consumers, and then ranked in terms of the extent to which it fulfils each group's objectives.¹⁸

Producers 1: The Attorney-General's Department

Costs were earlier identified as this group's main objective. It is clear that consideration of this issue is hampered by the inadequacy of available data. How much does it actually cost to regulate the termination of marital status under the present system? The Law Council has drawn attention to the absence of 'any

¹⁶ Alexander, I., *op. cit.* 51, original emphasis.

¹⁷ This is permitted where the parties are agreed and there are no children of the marriage, under section 98A of the Family Law Act.

¹⁸ *Ibid.* Alexander, I., *op. cit.* 51.

¹⁹ Law Council of Australia, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs' 'Inquiry into the Cost of Justice'* (1989), 25.

clear picture of the operating costs of the court system'.¹⁹ They stated that this was due to,

- (a) the lack of accurate public financial accounting reflecting the true revenue and expenses of the court system;
- (b) the impossibility of the court system operating as strictly as a business both in terms of the need to provide justice and in terms of the difficulties of budgeting for the demands of society; and
- (c) the relatively small real shares of Commonwealth outlays allocated to the court system.²⁰

Attempts have been made to estimate the costs of the Family Court. McKenzie and Horwill calculated its total cost, excluding revenue, to be \$9,443,000 for the 1977/78 financial year.²¹ More recently, Barnard and Withers estimated the expenditure on providing the Family Court for the year 1984 as \$17,507,000.²² The Attorney-General's Department's 1988-89 Annual Report refers to the running costs of the Family Court as \$25,900,000 and the 'Special appropriations' as \$5,042,000.²³

Table 1 attempts to compare these data. Each of the years referred to by the respective studies is highlighted. The three figures are then retrospectively and prospectively index-linked to provide figures for the years 1977-78 to 1989-90. Barnard and Withers's 1984 figures have been placed in the 1984-85 financial year. Obviously index-linking is not wholly adequate for comparative purposes. The costs of running the Family Court, and the revenues which it receives from the public, particularly in its early years, are likely to be influenced by considerations other than inflation. But the tables do show reasonable similarities between the three sets of calculations.

What proportion of the total costs are referable to sections 48 and 55A? The amount of court time spent on any particular activity is not a straightforward calculation.²⁴ McKenzie and Horwill calculated that the court sat for five and a half hours per day, for 195 days of the year, to suggest a cost per court hour of \$209 for 1977/78.²⁵ Given an estimated five minutes of court time to process a decree,²⁶ the average cost per case was \$17.42. Index-linking their figures would produce a cost of approximately \$42.50 for a five minute hearing in the 1988-89 financial year. Since 40,792 applications were filed in 1988,²⁷ the costs of providing the judicial and court-room resources for the present system could be set at \$1,734,587.

However, empirical investigation of the day-to-day operation of the Family Court would be necessary before calculations could be based on five minutes as a realistic estimate of the amount of time spent on such hearings. A further difficulty with such calculations is the possibility that dissolution proceedings, which occupy only a few minutes of the court's time, incur a disproportionate amount of administrative costs compared to longer proceedings, such as contest-

²⁰ *Ibid.*

²¹ McKenzie, D. J., and Horwill, F. M., *A Study in the Costs of Procedures: Findings and Methodology* (1979) 27.

²² Barnard, A., and Withers, G., *Financing the Australian Courts* (1989) 47.

²³ Attorney-General's Department, *Annual Report 1988-89* 78.

²⁴ Cranston, R., *et. al. Delays and Efficiency in Civil Litigation* (1985) 172 ff.

²⁵ McKenzie, D. J., and Horwill, F. M., *op. cit.* 7, 55.

²⁶ *Ibid.* 36.

²⁷ Family Law Council, *Annual Report 1988-89* 39.

Table 1 Comparison of Estimates of Nett Cost of Family Court

<i>Year</i>	<i>McKenzie & Horwill</i>	<i>Barnard & Withers</i>	<i>Attorney-General's</i>
1977-78	9,443,000	9,787,077	10,617,477
1978-79	10,218,631	10,590,969	11,489,578
1979-80	11,252,806	11,662,827	12,652,378
1980-81	12,311,604	12,760,204	13,842,865
1981-82	13,592,010	14,087,265	15,282,523
1982-83	15,155,584	15,707,811	17,040,567
1983-84	16,202,070	16,792,429	18,217,210
1984-85	16,891,520	17,507,000	18,992,410
1985-86	18,307,355	18,974,423	20,584,340
1986-87	20,018,668	20,748,092	22,508,498
1987-88	21,483,748	22,266,556	24,155,799
1988-89	23,035,010	23,874,342	25,900,000
1989-90	24,918,686	25,826,653	28,017,958

ed property or custody issues. Rather than calculate the cost of an hour in court, one might estimate the proportion of the court's energies which are used in the processing of divorce proceedings.

Another problem in comparing the costs of the present procedure with possible alternatives is that the processing costs are marginal. Judges would still be paid and their court-rooms would still be furnished if there were no section 48 or section 55A. Would the time spent on dissolution proceedings be 'saved' for contested financial matters, to produce the benefit of reduced backlogs? Or would the time spent on other issues increase to fill the greater time available?²⁸

The options of banning divorce or of removing all regulation of the termination of marital status would save processing costs most effectively, if this could be done without forcing such disputes into other fora. But these options would probably be politically unacceptable. The first might be thought to be retrogressive and an infringement on civil liberties and the second an abrogation of responsibility to the family. The administrative model might be slightly preferable to the present system in terms of costs, and might be capable of being introduced without the political fall-out of the other two options. The Attorney-General's preferences might therefore be 1) administrative model; 2) *status quo*; 3) divorce on demand; 4) abolition of divorce.

Producers 2: the judiciary

It was suggested earlier that the judiciary's main interest was maintaining control over the rules governing the termination of marital status without having to spend too much time in the actual enforcement of the rules. Under the present

²⁸ Other researchers have noted that court backlogs are as much a matter of local judicial culture as they are of case-management and other such devices: Gillespie, R. W., 'The Production of Court Services: An Analysis of Scale Effects and other Factors' (1976) 5 *Journal of Legal Studies* 243, 264.

procedure judges (on the basis of the Law List published daily in the 'Age') deal with between five and ten dissolution hearings per day. On the estimate of five minutes per hearing this means that each judge could expend up to an hour a day on sections 48 and 55A. The banning of divorce would remove this workload, but this would probably be politically unacceptable to the majority of the judiciary, especially those who were themselves divorced. The unrestricted availability of divorce would remove the process completely from their control, and this might be regarded as a decrease in influence. If the process was regulated by lower ranking officers, the actions of such people could, according to principles of administrative law, be capable of being reviewed where necessary. The supremacy of the judiciary would be maintained and the actual impositions on the judiciary would be reduced. They would no longer have to busy themselves with the quasi-administrative task of regulating the termination of marriages. On this analysis the judiciary's rankings would be the same as those of the Attorney-General's Department: 1) administrative model; 2) *status quo*; 3) divorce on demand; 4) abolition of divorce.

Producers 3: the legal profession

The legal profession's interest in matrimonial law is the rapid turnover of non-contentiously negotiated cases.²⁹ The banning of divorce would be in danger of creating less cases to process. Divorce on demand would remove the lawyer from the field and have a similar impact to the withdrawal of the conveyancing monopoly. But the present system involves considerable amounts of time being expended in waiting for court hearings, as a lawyer can never be sure exactly when their case will be called from the list of those before the relevant judge. Administrative processing would seem preferable since there would still be a need for the legal profession to fulfil the clerkship duties of completing the forms. Arguably, profits could be generated more quickly from such a process. If this proposition is accepted, the third group of producers emerges with the same preferences as the previous two groups: 1) administrative model; 2) *status quo*; 3) divorce on demand; 4) abolition of divorce.

Consumers 1: initiators

Initiators' cost/benefit analysis will contain items which can be commodified with varying levels of artificiality. The cost of legal services is reasonably straightforward. The Family Law Rules prescribe a 'basic composite amount' that solicitors may charge for undefended divorce proceedings.³⁰ Under alternative regulatory schemes where the decree were not obtained in open court, some costs would be incurred if divorcing parties used lawyers to prepare the documents for the administrative model. Another cost to initiators is their

²⁹ Ingleby, R., 'Divorce Mediation by Lawyers', paper presented to the Law and Society Conference, University of California (Berkeley) 1 June 1990.

³⁰ Order 38 Rule 4. Note, however, that in 1988, 17,197 applicants appeared in person, so only 23,595 were represented by a lawyer for the proceedings: Family Law Council, *op. cit.* 41.

attendance at court.³¹ McKenzie and Horwill used a day's wages to estimate the litigant cost of an average court action, and half a day's wages for a counselling interview.³² They also stated that items such as travel and babysitting would have to be added into the equation.

There are other costs and benefits which are less easily quantifiable. It might be argued that there are emotional costs of a possibly traumatic court hearing. Against this, however, it could be said that the present system legitimizes initiators' actions, by permitting them to dissolve the marriage without having to prove anything other than that the parties have separated. The initiator's decision to separate is sanctioned by a judge. Obviously, a ban on divorce would be the least favoured option. The preferability of divorce on demand over the administrative model and the latter over the status quo would depend on whether, as is argued to be the case here, the absence of control was regarded as more attractive than the legitimization which flows from the current system of a relatively lax control. So the initiators' preferences emerge as: 1) divorce on demand; 2) administrative model; 3) status quo; 4) abolition of divorce.

Consumers 2: partners

Partners' financial costs of processing the termination of marital status would involve similar considerations to those of initiators. But the non-quantifiable elements would be ranked differently. The precise ranking would depend on how serious was the disparity between the initiator and partner's attitudes to the breakdown. Some partners never come to terms with the breakdown of the relationship; these would put the abolition of divorce as the preferable solution. Others, who (especially with the passage of time) accept the breakdown but want retribution, receive short shrift from the present system. At least the publicity of the proceeding accords some respect to the termination of their relationship. Partners' shrift would be even shorter with the posited alternatives. Partners' preferences, at least in the immediate aftermath of the breakdown emerge as: 1) abolition of divorce; 2) *status quo*; 3) administrative model; 4) divorce on demand.

Consumers 3: children of divorcing parents

Children are deemed to be one of the beneficiaries of section 55A of the Family Law Act and so the benefits of the process might be calculated in terms of the purported purpose of the section. The origins of section 55A can be traced back to the Royal Commission on Marriage and Divorce, the Morton Commission.³³ The provision was enthusiastically adopted by the Australian legislators

³¹ Not all divorcing parties choose to witness the dissolution proceedings. 4,988 of the 41,007 dissolutions granted in 1988 were determined in the absence of both the parties and their legal representatives: *ibid.* 40.

³² McKenzie, D. J., and Horwill, F. M., *op. cit.* 8-9.

³³ Royal Commission on Marriage and Divorce *Report of the Royal Commission on Marriage and Divorce* (1956) Cmnd 9678. This was established in England as a reaction to concern about the consequences of the perceived breakdown in the institution of marriage following the social dislocations of the Second World War.

in the process leading to the Matrimonial Causes Act 1959. In the House of Representatives, Sir Garfield Barwick used the image of the court being 'saddled' with the duty of satisfying itself that the welfare of the children is secured.³⁴ Dr Evatt stated that 'the limitation on the decree absolute . . . is a very important factor.'³⁵ Others commented that there could be 'nothing more effective . . . in emphasizing the rights of children';³⁶ 'no married person will be able to get a divorce until proper inquiry has been made about the children';³⁷ the provision was 'a great departure from the law as it now stands and, therefore, . . . highly desirable';³⁸ it did 'everything that is possible by legislative action to see that a judge can make sure that the children are looked after.'³⁹

The Family Law Rules prescribe various aspects of child-care about which applicants are required to satisfy the Court. There is, therefore, an authoritative determination of what constitutes at least the minimum component of the children's interests.⁴⁰ The prescribed details relate to 'housing . . . other occupants of house . . . supervision . . . education . . . health . . . access . . . maintenance and financial support . . . other relevant facts . . . (and proposed) changes (*if any*) to the above arrangements.'⁴¹ Regarding maintenance and financial support, the benefits could be calculated as the maintenance which would not be paid in the absence of the provision. With the other factors the calculation would be slightly more artificial but not fanciful as a price can be put on the housing and health of a human being.

Although it would be possible to quantify the value of arrangements which divorcing parties make for their children, the question remains whether these benefits would accrue if the judicial function was not performed adequately, or was not performed at all. Divorcing parents might satisfy the requirements of section 55A irrespective of the need to satisfy the court of the arrangements, so that there is no link between the requirement and the required conduct. We do not know what arrangements parties would make in the absence of any supervisory jurisdiction in the court, although McDonald's survey of the economic consequences of family breakdown in Australia might make us wary of assuming too much altruism on the part of parties who occupy dominant economic positions within marriages.⁴²

And non- or mis-performance of the judicial duty under the models which contain less or no regulation would not necessarily mean that 'errors' would remain undetected. Other state agencies perform similar functions. The Department of Social Security has its mechanisms for ensuring that liable parents

³⁴ Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 14 May 1959, 2228.

³⁵ *Ibid.*, 13 August 1959, 240.

³⁶ Mr Turner, *ibid.* 255.

³⁷ Mr Bate, *ibid.* 18 August 1959.

³⁸ Mr Snedden, *ibid.* 12 November 1959.

³⁹ Mr Duthie, *ibid.* 17 November 1959.

⁴⁰ See *Opperman* (1978) F.L.C. 90-432 for discussion of the extent to which the Court can declare itself not satisfied.

⁴¹ Family Law Rules, Schedule 1, Form 7.

⁴² McDonald, P. (ed.) *Settling Up: Property and Income Distribution on Divorce in Australia* (1986).

provide for their children. State welfare agencies such as Community Services Victoria have their procedures for guaranteeing minimum standards of child welfare.

Some further questions about the present system are provoked by previous studies of section 55A and its equivalents.⁴³ How can the court investigate the veracity of the statements which parties put before them? We do not know the extent to which documents supplied to the court are accurate statements of the arrangements which the parties have made in relation to their children, but Eekelaar's research detected 'frequent and serious inaccuracies . . . regarding statements made about the residence of the parties and other adults'.⁴⁴ The system rests on the judge accepting the affidavit evidence tendered to the court by the parties. Although it has been reported that 'judges of the Family Court . . . were satisfied with the evidence presented in the papers' in about 70 per cent of cases,⁴⁵ we do not know how they came to this decision. There is little room to check on evidence in relation to the present, and even less to presume as to its permanence through the future. How can the court be sure that parties will actually enforce the terms which they set out in the statement of arrangements, even if it orders supervision by the counselling service?⁴⁶ Further, the decree is only one stage in the child's development. Problems which arise after the decree will not be the subject-matter of the court's jurisdiction.

The discussion above illustrates that the cost/benefit calculations are hampered by lack of knowledge of how the *status quo* operates, and the general indeterminacy of policy issues concerning children. One particular problem which has not yet been resolved is whether children would prefer their parents to stay together rather than to separate.⁴⁷ Discussing the question in this manner suggests that 'children' is probably too broad a category of consumers. Perhaps different sorts of children could have been identified. However, despite the shortcomings of section 55A, it does seem fair to conclude that at least there is a greater chance of children being protected with more control over the process of terminating their parent's status. Children's preferences would probably come out close to those of partners: 1) abolition of divorce; 2) *status quo*; 3) administrative model; 4) divorce on demand.

Consumers 4: the Church

The Church's interests were earlier defined as protecting the indissolubility of, or at least respect for, the institution of marriage. Obviously, the Church can only be treated as 'a' consumer by ignoring the doctrinal divisions which were

⁴³ Eekelaar, J., 'Children in Divorce: Some Further Data' (1982) 2 *Oxford Journal of Legal Studies* 63; Davis, G., McLeod, A., and Murch, M., 'Undefended Divorce: Should Section 41 of the Matrimonial Causes Act 1973 be Repealed?' (1983) 46 *Modern Law Review* 121; Ingleby, R. 'Rhetoric and Reality: regulation of out-of-court activity in matrimonial proceedings' (1989) 9 *Oxford Journal of Legal Studies* 230.

⁴⁴ Eekelaar, J., *op. cit.* 70.

⁴⁵ Family Law Council, *Annual Report 1982-83*, 19.

⁴⁶ As it is empowered to do by section 64(5) of the Family Law Act.

⁴⁷ Whether the banning of divorce would actually make parents stay together is another question.

founded on precisely the difference between indissolubility and respect. But at least the latter position is vindicated in the Family Law Act by sections 43(a) and (b), which provide that the Family Court should have regard to,

- (a) the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life;
- (b) the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society, particularly when it is responsible for the care and education of dependent children.

The amount of value accorded to the preservation of marriage would probably lead to a ranking of preferences similar to those of the two groups of consumers previously noted: 1) abolition of divorce; 2) *status quo*; 3) administrative model; 4) divorce on demand.

Consumers 5: The Department of Social Security

The Department of Social Security's main interest is the reduction of the cost of Supporting Parents Benefit, which has been calculated at \$1,900,000,000.⁴⁸ But although it could be argued that there are costs in the breakdown of families, there is a difference between family breakdown and divorce. Marriages broke up and down long before divorce was available to ratify the fact. In calculating the costs and benefits of removing the power of the court to terminate marital status, one would have to separate the liberality of divorce law from other factors which influence the rate of family breakdown.⁴⁹ But at least the current procedure, which permits divorce, brings divorcing parties before the Court so that their arrangements can be scrutinized. A ban on divorce might prevent people coming to the attention of the court if they separated without changing their status. The question which would determine the ranking of preferences for the Department of Social Security is whether the savings from marriages which did not lead to separations because of the indissolubility of the institution would be greater than those from the enforcement of obligations by the scrutiny of arrangements under section 55A. If the latter were the case than the preferences would be: 1) *status quo*; 2) administrative model; 3) abolition of divorce; 4) divorce on demand.

Consumers 6: Legal Aid Commission

The costs to the Legal Aid Commission of family law proceedings have been estimated at \$53,326,000.⁵⁰ Only a very small percentage of this could be directly attributed to sections 48 and 55A since legal aid is not generally provided for dissolution proceedings. However, the importance of sections 48 and 55A to the Legal Aid Commission would lie in the extent to which they or their alternatives might increase the number of matrimonial disputes and therefore the costs of servicing them. To this extent, the preferences of the Legal Aid Commission would emerge as similar to those of the Church: 1) abolition of divorce; 2) *status quo*; 3) administrative model; 4) divorce on demand.

⁴⁸ Wolcott, I., and Glezer, H., *Marriage Counselling in Australia: An Evaluation* (1989) 146.

⁴⁹ See for example the discussion in Eekelaar, J., *Family Law and Social Policy* (1984) 12-14.

⁵⁰ Wolcott, I., and Glezer, H., *op. cit.*

Table 2 Orders of Preference among Producers and Consumers of Divorce

	<i>REGULATION OPTIONS</i>			
	<i>Status Quo</i>	<i>Ban on Divorce</i>	<i>Divorce on Demand</i>	<i>Administrative Model</i>
PRODUCERS				
Attorney-General's Department	2	4	3	1
Judiciary	2	4	3	1
Legal profession	2	4	3	1
CONSUMERS				
Initiators	3	4	1	2
Partners	2	1	4	3
Children	2	1	4	3
The Church	2	1	4	3
Department of Social Security	1	3	4	2
Legal Aid Commission	2	1	4	3
Community Services Victoria	2	1	4	3
TOTAL	20	24	34	22

Consumers 7: Community Services Victoria

Assuming, for the sake of argument, that there was a causal link between marriage breakdown and susceptibility to need for services offered by state welfare agencies, those agencies' interests would lie in whatever regulatory options protected the indissolubility of the family unit. Community Services Victoria's preferences are therefore the same as other state consumers of the divorce process: 1) abolition of divorce; 2) *status quo*; 3) administrative model; 4) divorce on demand.

Weighting of preferences

The exercise above has seen the identification of the possible preferences of ten difference constituencies involved in the divorce process. If the preferences are collated, the above table might be constructed.

The status quo emerges as the preferential model from this analysis, answering the question posed at the start of the paper in terms of sections 48 and 55A being preferable to the alternatives. The table reveals the obvious weakness of the approach in weighting the ten different constituencies equally.⁵¹ However, the advantages of the planning balance sheet approach over cost/benefit analysis in

⁵¹ Alexander, I., *op. cit.* 51.

this context have been that the various interests have been identified more clearly because there has been no presumption of a single collective interest and some weight has been able to be given to factors which cannot be quantified without considerable artificiality.

Implications for future research

What are the implications of the above? Two seem particularly important. First, the discussion is on a slightly more detailed and systematic level to that of the law reform bodies in England and Australia who have come to different conclusions about the future of section 55A.⁵² Policy has been made in both countries without extended examination of the questions for which it might be thought necessary to have answers.

Second, there are gaps in the available knowledge which have been shown to prevent a completely satisfactory treatment of the issues. These gaps present some sort of agenda for future research. They also reveal that although economic analysis of law is often presented as a 'hard' discipline counterposed to the soft quasi-discipline of empirical socio-legal study, in this context (and one suspects in others) there is much to be gained from research studies which are informed by both perspectives.

⁵² See the English Law Commission's (1988: 16) recommendation that the Court examine the children's arrangements not to consider whether they are satisfactory, but 'in order to decide whether to exercise any of its powers under this legislation': Law Commission, *Family Law Review of child Law: Guardianship and Custody* (1988). Compare this with the approach of the Family Law Council, which led to the retention of the procedure: *Fifth Annual Report of the Family Law Council 1980-81* 42-3, *Annual Report 1982-83* 19.