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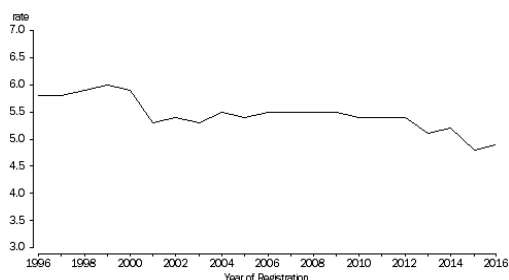
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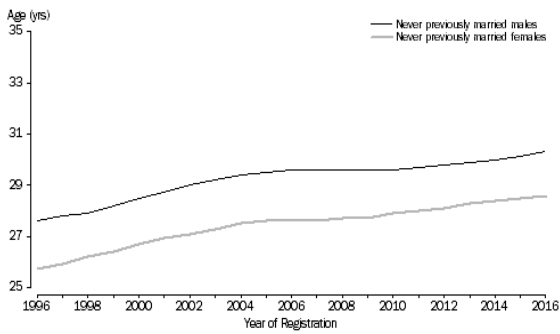
FAMILY LAW AND FAMILY LIFE IN AUSTRALIA

WHAT IS HAPPENING IN AUSTRALIAN FAMILIES?

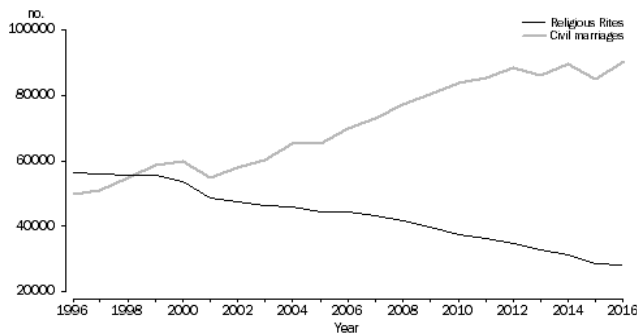
- In 2016, the crude marriage rate was 4.9 marriages per 1,000 estimated resident population, compared with 5.5 per 1,000 in 2006 and 5.8 in 1996. Highest crude marriage rate was 12.0 (in 1942).



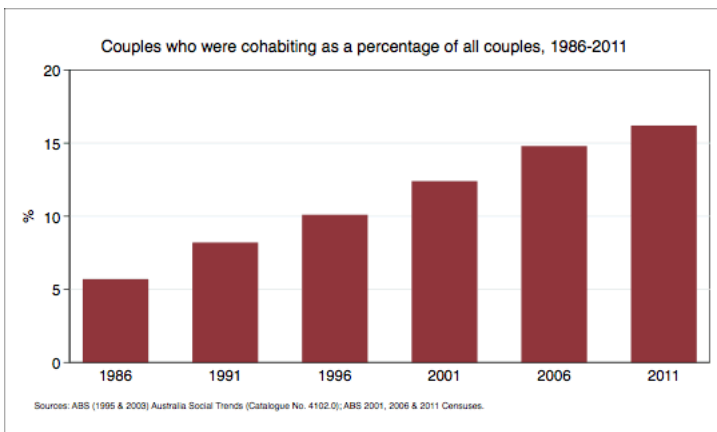
- The decline in marriage rates
 - Highest crude marriage rate was 12.0 (in 1942)
 - Lowest was 5.3 (in 2001). 2011 was 5.4
 - Remarriage rates (one or both parties to a marriage):
 - 1971: 14%
 - 1976: 29%
 - 2000: 33%
 - 2011: 29%
 - Why are there less marriages?
 - Cohabitation
 - Women have choices. About 2/3 of breakups are initiated by women.
 - Decline in religion.
- Rising age at first marriage
 - Why?
 - More people going to university, so postpone marriage
 - Women's choices
 - People moving out later
 - Cohabitation



- Marriage 2016
 - Age at first marriage 2016
 - Men: 30.3 yrs
 - Women: 28.7 yrs
 - In 72% of marriages, neither had previously been married. So about 28% were remarriages for one or both partners.
 - 45.5%: one or both partners were born outside Australia
 - Marriage becomes not the foundation stone of the relationship, but the capstone.
- Civil and religious marriages
 - Over 76% of marriages by civil celebrants (2016). 81% lived together before marriage.

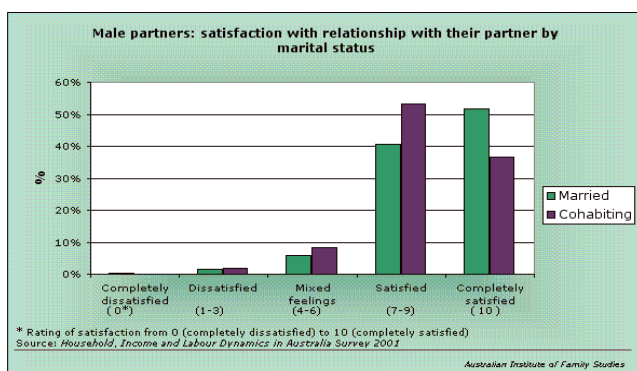


- Marriage, cohabitation and singleness 2016
 - People aged 15 and over
 - Married 47.7% (49.2% in 2011)
 - De Facto 10.4% (9.5% in 2011)
 - Not married 41.9% (41.3% in 2011)
- Proportion of cohabittees 1986-2011

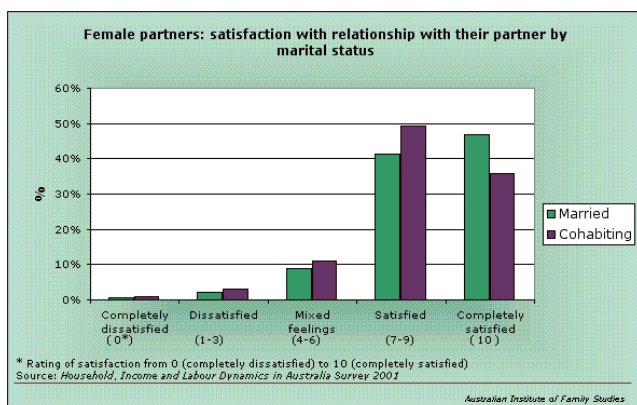


- Age-specific trends in cohabitation
 - Partnered men in a cohabiting relationship in 2011:
 - 47% who were their late 20s (up from 29% in 1996);
 - 27% of those in their early 30s (up from 16% in 1996); and
 - 19% of those in their late 30s (up from 11% in 1996).

- Partnered women in 2011:
 - 39% of those who were their late 20s (up from 22% in 1996);
 - 22% of those in their early 30s (up from 13% in 1996); and
 - 17% of those in their late 30s (up from 9% in 1996).
- Cohabitation typology
 - Premarital cohabiters: 40% (540) – living together as a transitional period before marriage. In a sense, this has replaced engagement.
 - Long-term cohabiters: 27% (361) – not looking towards marriage as the capstone of their commitment, just continuing on w/o any particular goal of marriage.
 - Marriage-renouncing cohabiters: 19% (251) – people who have had weddings and broken up. The response to this is that they don't need to do this again.
 - Marriage-idealising cohabiters: 14% (184) – people for whom marriage is so important that they don't want to marry the person they're living with, or not yet.
- Odds of cohabiting couple with children breaking up
 - More than seven times as high as a married couple who had not lived together before marriage
 - More than four times as high as those who had lived together but went on to marry.
 - Butterworth et al, (ANU, 2008)
- Satisfaction with partners: men

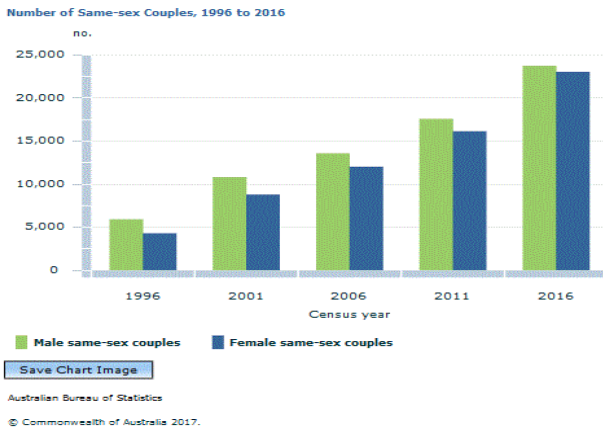


- Satisfaction with partners: women



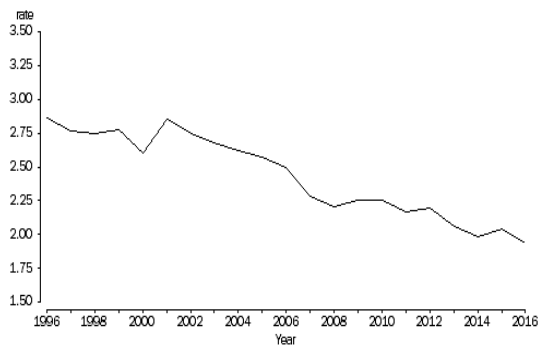
- Instability of cohabitation: overseas' evidence
 - Fragile Families study (US): parental separation by the time child was 3, over 2.5 times greater for children born to cohabiting than married parents after controlling for ethnicity, socio-economic status etc.
 - Millennium study (UK) 2 to 2.5 times more likely to split up by time child is 5 compared to their married counterparts, across all income groups.
 - Kiernan (1999) – study of 11 European countries – similar results.
 - Not just selection effects – marriage makes a difference.
- Same-sex relationships
 - Less than 1% of couples, but rising quite rapidly. 46,800 same-sex couples in 2016 – slightly more male (approx. 23,700) than female (approx. 23,000).
 - 2016 census: 0.9% of all couples (up from 0.47% in 2001).
 - In the 20 years to 2016, the reported number of same-sex couples has more than quadrupled.

- Big increases in the 20-39 age group.
- In 2016, one quarter (25%) of female couples had children (approx. 9000 children), compared with 4.5% of male couples (approx. 1500 children).

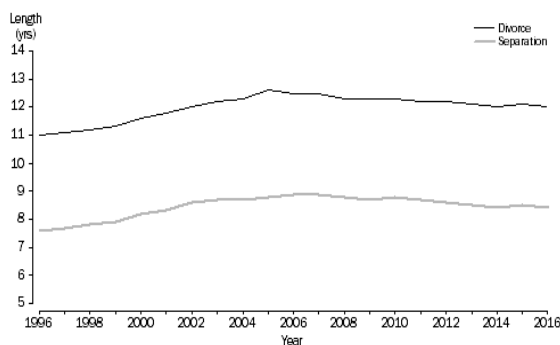


Source(s): ABS Census of Population and Housing, 1996 - 2016.

- Demographic data on same-sex couples
 - Partners in same-sex couples (compared to partners in opposite-sex couples) were more likely in 2016 to:
 - have no religion (57% for same-sex couples compared with 28% for opposite-sex couples)
 - have a Bachelor degree or higher (45% compared with 29%)
 - be employed (84 per cent compared with 67%)
 - have higher personal incomes (median weekly income of \$1,175 compared with \$843)
 - Live in the inner cities. E.g. Male couples are 17.5% of couples in Darlinghurst and 16.5% of couples in Elizabeth Bay.
- Divorce per 1000 population
 - NB: the divorce rate is dropping dramatically b/c marriage is dropping dramatically.



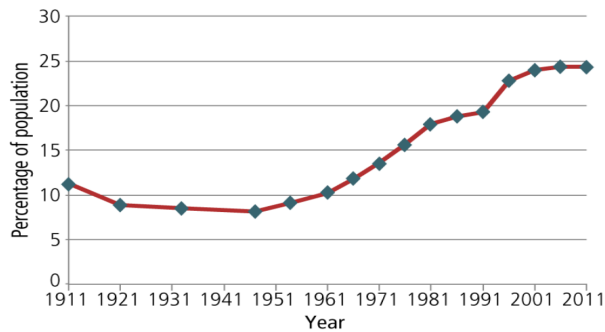
- The 8.4-year itch
 - NB: there's often a big gulf b/w separation and divorce. Divorce is a licence to remarry, not a licence to separate (can sort out the property and kids before divorce).



- Probability of divorce

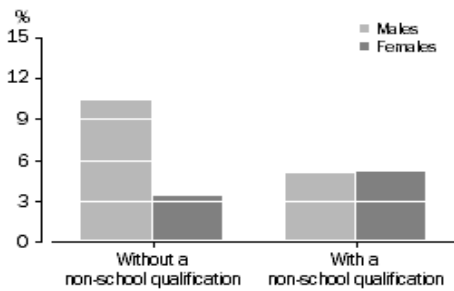
- Around 28% of marriages entered into in 1985–1987 could be expected to end in divorce.
- Around 33% of all marriages entered into in 2000–2002 could be expected to end in divorce.
- Divorce rates higher for remarriages
 - Why?
 - Children from previous marriages – step families can be quite complex.
 - A divorce the second time around might seem easier b/c have done it before.
 - Some people don't learn that the issues that caused the breakup in their first relationship will cause the breakup in their second. E.g. unfaithful, domestic violence, alcohol abuse.
 - No data on this b/c years ago, when you applied for a divorce, you ticked a box on whether or not this was your first divorce, but this box has been removed.
- Single person households

Figure 1: One-person households as percentage of population, Australia, 1911-2011



Source: ABS Census of Population and Housing (various years)

- Singleness and educational status: people never partnered aged 35-64



- For those w/o a non-school qualification, there's a massive difference b/w men and women who've never partnered. What's going on is that women won't partner with people who are below their educational status, but men don't mind. Women will choose a person who is able to provide a safe and secure environment in which to raise children.

- Living alone by educational status

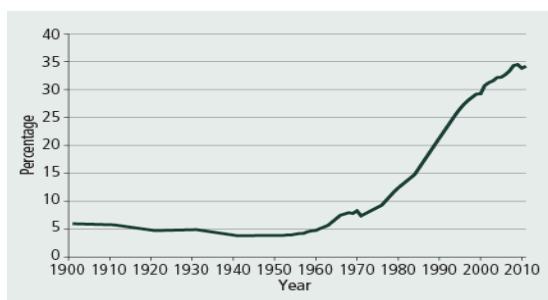
Table 6: Education by age and gender, and whether living alone, Australia, 2011

	Male (%)		Female (%)	
	Alone	Not alone	Alone	Not alone
20-39 years				
Degree or higher	26.4	25.2	44.6	32.8
Diploma/certificate	36.1	35.8	28.5	29.5
None	37.5	39.0	26.9	37.7
40-59 years				
Degree or higher	17.7	23.2	28.3	24.2
Diploma/certificate	36.3	40.0	28.3	28.1
None	46.0	36.8	43.4	47.6
60+ years				
Degree or higher	11.5	14.7	11.7	11.7
Diploma/certificate	33.5	36.2	14.8	16.5
None	54.9	49.1	73.6	71.8

Source: ABS Census of Population and Housing, 2011, using Table Builder Pro

- Ex-nuptial birth rate: Australia

- 2010: 34%. About 13% of all births to single mums – big increase b/w 1975 and 2000.
- This rate is a matter of concern – children will typically not do as well; those relationships that don't end up in marriage tend to be more fragile.



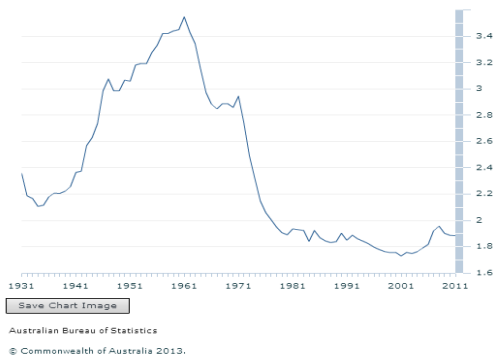
- Ex-nuptial birth rate: other countries
 - Britain:
 - Early 1970s, less than 10%
 - 1995: 34%
 - 2008: 45%.
 - USA: 41%
 - In Estonia, France, Iceland, Norway and Sweden, more than half of all births are ex-nuptial.
 - Really high in South America too. In Columbia, about 82%.
 - The proportion of first-born children who are ex-nuptial is much higher.
- Cumulative percent of children ever living in lone mother family: Australia

Birth cohort	By age 15	At birth	Due to parental separation
1946-55	8.9	2.6	6.3
1956-62	11.0	3.2	7.8
1963-75	18.0	3.0	15.0
1976-80	22.2	3.8	18.4
1981-85	24.9	6.5	18.4

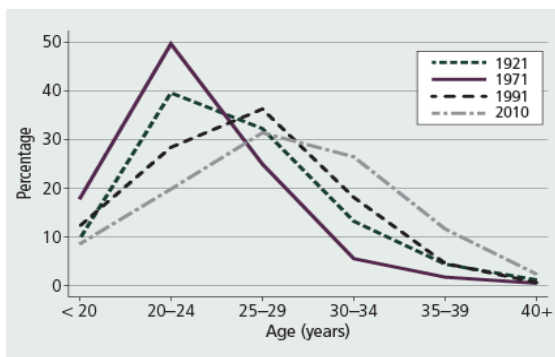
- Divorce, cohabitation and single parenthood
 - Increase not particularly due to rise in divorce
 - Australia: modest rise in divorce rate since the 1980s (from 28% to 33% of marriages expected to end in divorce) but proportion of divorcees with children falling
 - Two main drivers of demographic change
 - a) Children born to cohabitantes
 - b) Children born outside of any cohabiting relationship
- Family stability as a social inclusion issue
 - “Over the past decade, evidence on the benefits of marriage for the well-being of children has continued to mount. Children residing in two-biological-parent married families tend to enjoy better outcomes than do their counterparts raised in other family forms. The differential is modest but consistent and persists across several domains of well-being. Children living with two biological married parents experience better educational, social, cognitive, and behavioral outcomes than do other children, on average. ...The benefits associated with marriage not only are evident in the short-term but also endure through adulthood.” Prof. Susan Brown
 - Differences remain even after taking account of selection effects
 - Family instability affects the life chances of children
- Births in Australia
 - 1960s: introduction of the pill.
 - Mid 2000s: baby bonus – lump sum payment for every baby born (then made into a fortnightly payment). It's actually credited for raising the birth rate.
 - When the birth rate drops down to 1.7, the impact on the population is dramatic. If 2.1, the population can replace itself and stay at a steady level.
 - Fertility rates very low in Italy, Korea and many parts of Europe. This is a really significant problem from a policy point of view. Japan problem – ageing population; low birth rates for many years; not a great country for immigration (Japanese difficult to learn).

- To support the very large baby boomer population, need to have a large enough working age population. If the birth rate is falling at a below replacement level, then over time, the population is shrinking and immigration is needed to keep it up.

Total Fertility Rate (a), Australia - 1931 to 2011



- Age at first birth



- Age of mothers giving birth
 - The median age of all women who registered a birth in 2000 was 29.8 years.
 - Now 30.7 years (2010 data)
 - Fertility of women in their 20s declining over 3 decades
 - Since 2000, women aged 30-34 years have recorded the highest fertility rate of all age groups.
 - Since 2003 the fertility rate for women aged 35-39 years has exceeded that of women aged 20-24 years.
- The preciousness of children
 - Fatherhood, children and repartnering
 - When people had larger families and had them younger, men replaced their children with new children. E.g. man might have a child at 24 and 26, then divorces at 28, finds a new wife who's a bit younger and who doesn't have children, and has children with her. Men would lose touch with the children of their first family b/c they fell out with their wives. A high percentage of men weren't seeing their children – problem of the disappearing dad. Now, as child birth gets later, and children become more precious, the opportunity to get over an old relationship changes.
 - German sociologists: when all relationships are fragile, the relationship b/w the parent and the child is the last stable thing.
 - Not only are the parents deeply attached to the children, the children are also deeply attached to *both* parents.
 - The indissolubility of parenthood
 - Marriage may be easily dissoluble, but parenthood isn't.
 - The law has changed over time to accommodate this. In the past, mothers got custody, and fathers got access (we didn't even bother to define it; it was reasonable time with dad). There's a whole bunch of research now about the importance of both parents to children's lives.
 - Issues in relocation cases
 - If children are irreplaceable, mobility becomes a huge issue. E.g. father's life in Sydney, and mother meets someone in Darwin. This can cause enormous conflict where we want to give equal rights to both parents.
 - The need for migration
 - Family law and multiculturalism

- AU family law is incredibly mono-cultural – it comes out of Western values. Hasn't adapted to the demands of multiculturalism.
- Policy implications
 - Can see that at least many of those who cohabit do so b/c they don't want to be married.
 - In Australia, once you've lived together for 2 years, you're treated in law exactly as if you were married for any purpose (in all law – state, federal and territory).
 - So on the one hand we have marriage traditionally being a public thing, and on the other hand, just by living together, the state says you're married.

MARRIAGE, DIVORCE AND OTHER RELATIONSHIPS

LAW AND THE REGULATION OF FAMILY RELATIONSHIPS

CONSTITUTIONAL ASPECTS OF FAMILY REGULATION

- The constitutional placita
 - (xxi) marriage
 - (xxii) divorce and matrimonial causes, and in relation thereto, the custody and guardianship of infants
 - Other placita may also apply to family law issues
 - Referral of legislative power from the States
- **The divorce and matrimonial causes power**
 - NB: at time constitution drafted, 'infant' meant any child under age of 21.
 - [Lansell v Lansell](#)
 - Case concerning the power to divide property under the *Matrimonial Causes Act 1959*
 - Two judges said it was a matrimonial cause, three said it was within implied incidental power
 - The importance of central meaning and the penumbra. Menzies J:
 - "It is right, in construing a grant of power, to ascertain as a starting point at least what the words used in the Constitution meant in 1901 when the Constitution was enacted, but it is quite another thing to attempt to confine the legislative power of the Parliament to making the kind of laws then in existence."
 - Matrimonial causes: the meaning in 1900
 - Divorce
 - Judicial Separation – court order dealing with the separation w/o divorcing. This was if e.g. you had a religious objection to divorce.
 - Nullity – declaration that the marriage never existed. There are a few cultures in which divorce is really shameful. Some people have been deceived in entering into a marriage.
 - Restitution of Conjugal Rights – if you wanted a divorce, and someone deserted you, you could get an order for the restitution of conjugal rights. When the other partner disobeyed the order, you could say that, from that date onwards, when they deserted, they had abandoned that marriage.
 - Jactitation of marriage – there were financial consequences of claiming to be married to someone when you actually weren't.
- **The marriage power**
 - [AG for Victoria v the Commonwealth \(the Marriage Act case\)](#)
 - Issues about illegitimacy and bigamy
 - Victoria argued this was an invasion of state power
 - High Court said marriage extends beyond formalities for getting married to the consequences of marital status. All the sections in the *Marriage Act* upheld.
 - Included the parent-child relationship of married couples.
 - Comments: The consequences of marital status could mean property. Now the division of property comfortably flows from the consequences of marital status.
 - Redefining marriage
 - Could the states enact a same sex marriage law?
 - The same-sex marriage debate rested on the idea that the Cth had the power to change marriage for same-sex couples. This was far from clear until 2013.
 - In 1900, homosexuality was a criminal offence. It didn't become decriminalised until the 60s and 70s. In Tas, it wasn't formally decriminalised until 1997. There's absolutely no doubt about what marriage meant in 1900, b/c we had a definition in common law in which it was very well established that marriage was the union of a man and a woman for life to the exclusion of all others.
 - B/c there was so much doubt about this and resistance at the federal level, there were various attempts to introduce same-sex marriage at the state level. The argument was that the states could pass these laws b/c it was outside Cth power. This came to a head with *Cth v ACT*.
 - [The Commonwealth v Australian Capital Territory \[2013\] HCA 55](#)