

# The Law Commission

(LAW COM. No. 170)

## FACING THE FUTURE A DISCUSSION PAPER ON THE GROUND FOR DIVORCE

*Laid before Parliament by the Lord High Chancellor pursuant to section 3(2)  
of the Law Commissions Act 1965*

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The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting reform of the law.

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# FACING THE FUTURE

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# THE LAW COMMISSION

## Item XIX of the Second Programme

### FACING THE FUTURE

#### A DISCUSSION PAPER ON THE GROUND FOR DIVORCE

*To the Right Honourable the Lord Mackay of Clashfern, Lord High Chancellor  
of Great Britain*

#### PART I

#### INTRODUCTION

##### The need for this review

1.1 The Law Commission has since its inception, in 1965, been concerned with this area of law. One of our very first Reports was Reform of the Grounds of Divorce—The Field of Choice,<sup>1</sup> which formed the basis of the last major change in substantive divorce law.<sup>2</sup> Thus, the Commission has a particular interest in monitoring the operation of present law, in addition to its general duty “to keep under review all the law . . . with a view to its systematic development and reform”.<sup>3</sup> Accordingly, we decided some time ago to review whether the present substantive law of divorce was working satisfactorily and how, if at all, it might be improved.<sup>4</sup>

1.2 The need to conduct such a review has been emphasised by the increasingly critical comments which have been made about the present system in recent years. In particular, there have been calls for reform from The Law Society,<sup>5</sup> Members of Parliament,<sup>6</sup> academic writers<sup>7</sup> and others. In 1985, the Booth Committee on Procedure in Matrimonial Causes<sup>8</sup> observed that there have also been important changes in divorce procedure and developments in other areas which have radically affected the way in which the substantive law operates in practice.<sup>9</sup> The “general consensus of feeling” expressed to the Committee was that:

divorce should be truly and not merely artificially based upon a no-fault ground and that the concepts of guilt and innocence which have ruled our divorce laws, and consequently our divorce procedures, since 1857 should no longer have any part to play.<sup>10</sup>

##### Purpose of a Law Commission paper on the ground for divorce

1.3 In 1966, the Commission described its function as follows:

to assist the Legislature and the general public in considering these questions by pointing out the implications of various possible courses of action. Perhaps the most useful service that we can perform at this stage is to mark out the boundaries of the field of choice.<sup>11</sup>

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<sup>1</sup>(1966), Law Com. No. 6; Cmnd. 3123.

<sup>2</sup>By the Divorce Reform Act 1969. See paras. 2.3–2.5 below.

<sup>3</sup>Law Commissions Act 1965, s.3(1). Under Item XIX of our Second Programme of Law Reform (1968), Law Com. No. 14, we are to undertake a comprehensive examination of family law with a view to its systematic reform and eventual codification.

<sup>4</sup>Fourteenth Annual Report 1978–1979, Law Com. No. 97, para. 2.24; Fifteenth Annual Report 1979–1980, Law Com. No. 107, para. 2.23; Sixteenth Annual Report 1980–1981, Law Com. No. 113, para. 2.48; Seventeenth Annual Report 1981–1982, Law Com. No. 119, para. 2.43; Eighteenth Annual Report 1982–1983, Law Com. No. 131, para. 2.35; Nineteenth Annual Report 1983–1984, Law Com. No. 140, para. 2.30; Twentieth Annual Report 1984–1985, Law Com. No. 155, para. 2.22; Twenty-First Annual Report 1985–1986, Law Com. No. 159, para. 2.29.

<sup>5</sup>The Law Society, Family Law Sub-Committee, *A Better Way Out* (1979).

<sup>6</sup>e.g., from Mr. Leo Abse, in the Matrimonial and Family Proceedings Bill debate, *Hansard* (H.C.), 13 June 1984, vol. 61, col. 963.

<sup>7</sup>J. Eekelaar, “Divorce English Style—A New Way Forward?”, [1986] J.S.W.L. 226; G. Davis and M. Murch, “The Implications of the Special Procedure in Divorce”, (1977) 7 Fam. Law 71; G. Davis and M. Murch, “The 1969 Legislation in Practice—Cause for Concern?”, paper prepared for a Seminar on Reform of the Ground for Divorce held at the University of Bristol, 6 December 1985; G. Davis and M. Murch, *Grounds for Divorce*, forthcoming in 1988.

<sup>8</sup>Report of the Matrimonial Causes Procedure Committee (Chairman: The Hon. Mrs. Justice Booth, D.B.E.) (1985).

<sup>9</sup>*Ibid.*, para. 1.4. See also paras. 2.6 *et seq.* below.

<sup>10</sup>*Ibid.*, para. 2.9.

<sup>11</sup>The Field of Choice (1966), Law Com. No. 6, para. 2.

Twenty-two years later the function of the Commission would seem to be very much the same. As was the case in 1966, there has already been considerable public discussion of the present law and possible reforms. Thus, the purpose of this paper is to pull together the various views which have been expressed and to suggest some possible ways forward. Like its predecessor, it is published for information and comment and we hope that there will be a substantial response. At the same time, we shall be making a study of the role of the courts in relation to the ground for divorce. We plan to report on both in due course, so that a firm foundation can be laid for any legislative changes to be decided.

### **Acknowledgments**

1.4 We are grateful for all the help which we have already received with this project. A valuable seminar was held at the University of Bristol in 1985, chaired by Sir John Arnold, President of the Family Division.<sup>12</sup> Among the speakers were Mervyn Murch and Gwynn Davis, of the University of Bristol Socio-Legal Centre for Family Studies, who have allowed us advance access to their forthcoming book on *Grounds for Divorce*.<sup>13</sup> Richard Ingleby, now of the University of Melbourne, wrote a special paper for us on the findings of his research into solicitors' conduct of matrimonial cases which were relevant to the ground for divorce.<sup>14</sup> We have also been able to refer to some of the findings of a study of the financial consequences of divorce, conducted by the Office of Population Censuses and Surveys for the Lord Chancellor's Department.<sup>15</sup> Above all, Rhona Schuz, of the London School of Economics and Political Science, has given us invaluable help in preparing this paper. The views expressed are, however, our own.

### **Structure of this paper**

1.5 Part II gives a general background both as to the origin of the present law and the developments which have taken place since its enactment in 1969. Part III sets out the deficiencies in the operation of the present law, thus presenting the case for reform. Part IV provides a broad analysis of the various alternative models of divorce law available, by reference to those in operation abroad. Part V examines the new "Field of Choice" and ends with the outline of a possible new system. Part VI provides a brief conclusion.

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<sup>12</sup>A list of the speakers and those who attended is given in Appendix C.

<sup>13</sup>(1988), *op. cit.*, n.7.

<sup>14</sup>R. Ingleby, *The Ground for Divorce*, (1986). Copies of this paper are available from the Law Commission on request.

<sup>15</sup>Further analysis, particularly of questions relevant to the ground for divorce, which were included at our request, should be available later.

## PART II

### BACKGROUND

#### Origin of the present law

2.1 Before the Divorce Reform Act 1969, a divorce could only be obtained by proving that the respondent had committed a matrimonial offence<sup>1</sup> (the only material offences were adultery, cruelty and desertion for three years). A petitioner who was himself guilty of such an offence, or had somehow contributed to the offence of the other, or had condoned it, might be refused relief. No divorce could be granted within three years of marriage, unless special leave was given on the ground that the petitioner would suffer exceptional hardship or that the respondent was guilty of exceptional depravity.

2.2 Since the 1950s there had been increasing disillusionment with the operation of the fault-based law. It was clear that there was no real barrier to consensual divorce where both parties wanted it and one was prepared to commit, or perhaps appear to commit, a matrimonial offence to supply the necessary ground.<sup>2</sup> On the other hand, where parties were not prepared to resort to such expedients, there was often no remedy, even though the marriage had irretrievably broken down.<sup>3</sup> It was argued by the proponents of reform that the court was in no position to allocate blame; that in many cases both parties were at fault, and that matrimonial offences were often merely symptomatic of the breakdown of the marriage rather than the cause.<sup>4</sup> However, the majority of the Royal Commission on Marriage and Divorce (the Morton Commission of 1956) affirmed the matrimonial offence as the sole basis of divorce because they saw this as the only means to ensure the stability of the institution of marriage. Three attempts, in Private Members' Bills,<sup>5</sup> to introduce a provision allowing for divorce after long periods of separation were unsuccessful. Finally, the publication in 1966 of the report of the Archbishop of Canterbury's Group, entitled *Putting Asunder—A Divorce Law for Contemporary Society*,<sup>6</sup> paved the way for reform. The report found that the existing law concentrated exclusively on making findings of past delinquencies, whilst ignoring the current viability of the marriage. It therefore recommended that the matrimonial offence be abolished and be replaced by the principle of breakdown as the sole ground for divorce. It was envisaged that the court would determine whether the marriage had broken down after considering all the evidence.

2.3 The Lord Chancellor referred *Putting Asunder* to the Law Commission, whose response was published later in the same year, entitled *Reform of the Grounds of Divorce—The Field of Choice*.<sup>7</sup> The Commission agreed with the Archbishop's Group's criticisms of the existing law. In particular, it found that the need to prove a matrimonial offence caused unnecessary bitterness and distress to the parties and their children.<sup>8</sup> The law did not accord with social reality, in that many spouses who could not obtain a divorce simply left the "empty shells" of their marriages and set up "stable illicit unions" with new partners. The Commission also agreed that where both parties wanted to end the marriage, divorce was easily available if they were prepared to commit or appear to commit a matrimonial offence. The Commission considered the objectives for a good divorce law to be:

- (i) To buttress, rather than to undermine, the stability of marriage; and
- (ii) When, regrettably, a marriage has irretrievably broken down, to enable the empty legal shell to be destroyed with the maximum fairness, and the minimum bitterness, distress and humiliation.<sup>9</sup>

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<sup>1</sup>Except in the case of incurable unsoundness of mind; Matrimonial Causes Act 1965, ss.1(1)(a)(iv), (3) and (4).

<sup>2</sup>See Report of the Royal Commission on Marriage and Divorce (Chairman: Baron Morton of Henryton) (1956), Cmd. 9678, para. 70(v); see also para. 3.7 below. Technically, of course, collusion was an absolute bar to divorce until 1963.

<sup>3</sup>*Ibid.*, para. 70(v).

<sup>4</sup>*Ibid.*, para. 70(vii) and (xi).

<sup>5</sup>Mrs. E. White's 1951 Bill would have introduced 7 years' separation with no prospect of reconciliation as an additional ground for divorce. The 1963 Bill sponsored by Mr. L. Abse would have allowed for divorce after 7 years' separation, where either spouse had committed a matrimonial offence, or where there was consent. Mr. J. Parker's 1964 Bill would have introduced 5 years' separation, with no likelihood of reconciliation, as a ground for divorce.

<sup>6</sup>Report of a Group appointed by the Archbishop of Canterbury in January 1964 (Chairman: The Rt. Rev. R. C. Mortimer, Lord Bishop of Exeter) (1966), S.P.C.K.

<sup>7</sup>The Field of Choice (1966), Law Com. No. 6, Cmnd. 3123.

<sup>8</sup>*Ibid.*, para. 27.

<sup>9</sup>*Ibid.*, para. 15.

These will be considered in detail in Part III of this paper.

2.4 Thus, both bodies agreed that the fault principle was unsatisfactory and that the law should be reformed to allow marriages which had irretrievably broken down to be dissolved in a humane fashion. The difficulty, of course, was how to identify those marriages which had irretrievably broken down. The Law Commission did not favour the solution advocated by the Archbishop's Group. First, it considered the proposed inquest impracticable<sup>10</sup> partly because breakdown was not a justiciable issue.<sup>11</sup> Secondly, it was concerned that such an inquest into the conduct of the parties in order to determine breakdown would cause unnecessary bitterness and humiliation and prevent the marital ties being dissolved with decency and dignity. After consultations between the various interested bodies, a compromise solution was reached whereby breakdown would become the sole ground for divorce, but would be inferred from the existence of one of a number of facts rather than by judicial inquest. This solution was enacted in the Divorce Reform Act 1969.

2.5 The 1969 Act abolished the matrimonial offence principle and with it the bars to relief (of connivance, condonation, collusion and the like). Instead, the sole ground for divorce became irretrievable breakdown of the marriage. However, this breakdown could only be proved by one of five facts, now set out in the Matrimonial Causes Act 1973, section 1(2)(a) to (e). These are:

- (a) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;
- (b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;
- (c) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;
- (d) that the parties of the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition... and the respondent consents to a decree being granted;
- (e) that the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition.

In facts (c), (d) and (e), interruptions to the period of desertion or separation can be ignored if they total no more than six months and the parties have in fact been apart for the requisite period.<sup>12</sup> The parties are "living apart" if they are not living with each other in the same household<sup>13</sup> but it is possible to have completely separate households under the same roof.<sup>14</sup> If one of these facts is proved, then a decree will be granted unless the court is satisfied that the marriage has not broken down irretrievably.<sup>15</sup> Conversely, if none of the five facts is proved, no decree can be granted despite clear evidence of irretrievable breakdown.<sup>16</sup> The three-year bar was retained intact by the 1969 Act, but has since been replaced by a one-year absolute bar.<sup>17</sup> There is no distinction made in law whether the wife or husband petitions but, for convenience, it will be assumed that the wife is the petitioner unless otherwise stated. The proportion of decrees granted to women has increased from 61 per cent in 1970 (the year before the 1969 Act came into operation) to 72 per cent in 1986. This trend, together with the changes in the use of each of the five facts, is illustrated by the tables set out in Appendix B.

### Procedure

2.6 The 1969 Act did not alter the procedure by which a divorce was obtained. No divorce could be granted without a court hearing and the statutory duty of the divorce court to inquire

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<sup>10</sup>*Ibid.*, paras. 59 *et seq.*

<sup>11</sup>*Ibid.*, para. 71. See also Ormrod J. in *Pheasant v. Pheasant* [1972] Fam. 202 and Law Reform Commission of Canada, Divorce, (1975), Working Paper 13, p. 36.

<sup>12</sup>Matrimonial Causes Act 1973, s.2(5).

<sup>13</sup>*Ibid.*, s.2(6).

<sup>14</sup>*Hopes v. Hopes* [1949] P. 227; *Naylor v. Naylor* [1962] P. 253; *Mouncer v. Mouncer* [1972] 1 W.L.R. 321; see also *Fuller v. Fuller* [1973] 1 W.L.R. 730; *Savage v. Savage* [1982] Fam. 100; *Mitchell v. Mitchell* [1984] Fam. 1.

<sup>15</sup>Matrimonial Causes Act 1973, s.1(4).

<sup>16</sup>e.g. *Richards v. Richards* [1972] 1 W.L.R. 1073 and *Mouncer v. Mouncer* [1972] 1 W.L.R. 321; *Dowden v. Dowden* (1977) 8 Fam. Law 106 (an undefended petition); *Welfare v. Welfare* (1977) 8 Fam. Law 55; *Buffery v. Buffery*, *The Times*, 10 December 1987.

<sup>17</sup>Matrimonial and Family Proceedings Act 1984, s.1, implementing the recommendation of the Law Commission's Report on Time Restrictions on Presentation of Divorce and Nullity Petitions (1982), Law Com. No. 116.



into the facts alleged<sup>18</sup> was retained. Research in the early 1970s<sup>19</sup> showed that in undefended cases such judicial hearings, which rarely took more than ten minutes and often less, served little purpose in that the decree was never refused; they were often unnerving and humiliating for the petitioner; and there was considerable consumer dissatisfaction with the existing procedure.<sup>20</sup> The rise in the divorce rate and the increase in women petitioners, who were more likely to be legally aided, led to a rapid escalation in legal aid expenditure on divorce. In response to this increased cost and to the criticisms of divorce proceedings, the so-called "special procedure",<sup>21</sup> under which divorces could be obtained without a court hearing, was extended to all undefended divorces in 1977. At the same time, legal aid was withdrawn from the process of obtaining a decree under the new procedure, although legal advice and assistance are available under the green form scheme and full legal aid for contested ancillary proceedings about children, finance and property. Since 1977, nearly all undefended divorces have been obtained under the special procedure.<sup>22</sup> This involves the perusal by the registrar of the petition and a supporting affidavit. If he is satisfied that the contents of the petition have been sufficiently proved and that the petitioner is entitled to a decree, the registrar will make and file a certificate to that effect.<sup>23</sup> The decree nisi is then formally pronounced at a later date by a judge in open court after a list of the case numbers has been read out.

2.7 The savings in legal aid expenditure have not been as great as expected. There has been an increase in legal aid certificates for ancillary proceedings<sup>24</sup> and a shift of expenditure from legal aid to green form scheme.<sup>25</sup> Although parties are technically litigants in person in relation to the divorce, in practice most petitioners and many respondents are advised by solicitors throughout. Clearly, the costs to both public and private resources of returning to a system of divorce by judicial hearing in undefended cases would be very considerable. Nor does the experience of the previous system suggest that there would be any real advantage in doing so. Hence, the Booth Committee on Procedure in Matrimonial Causes took the view that "it is neither desirable nor practicable to try to put the clock back and to revert to former practices".<sup>26</sup>

2.8 The introduction of the special procedure has undoubtedly had an effect upon the way in which the substantive law operates. The Booth Committee found that:

... the ability of the court to carry out its statutory duty to inquire into the facts alleged is greatly circumscribed. In the great majority of cases the court is quite simply in no position to make findings of fact or, in a case based on behaviour, to evaluate the effect of the respondent's behaviour on the petitioner. In reality, the registrar can do no more than read the few documents before him.<sup>27</sup>

This conclusion would seem to support the view that registrars act as little more than "rubber stamps".<sup>28</sup> However, there is a dearth of statistical or other information about the progress of cases through the special procedure; the number of cases in which the registrar refuses his

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<sup>18</sup>This special duty in divorce cases places on the court an inquisitorial role, whereas in other civil cases the court merely has to be satisfied on the evidence before it. The special duty can be traced back to the Divorce and Matrimonial Causes Act 1857 and the earlier approach of the ecclesiastical courts.

<sup>19</sup>E. Elston, J. Fuller and M. Murch, "Judicial Hearings of Undefended Divorce Petitions", (1975) 38 M.L.R. 609.

<sup>20</sup>J.M. Westcott, "The Special Procedure—One Year Later—A Practitioner's View", (1978) 8 Fam. Law 209.

<sup>21</sup>This was first introduced in 1973 for cases under s.1(2)(d), where there were no children and all other matters were agreed. Previously, consent might be given on the understanding that no costs would be sought from the respondent, leaving the whole expense to be borne by the legal aid fund; see *Beales v. Beales* [1972] Fam. 210.

<sup>22</sup>Which was therefore described as "a complete misnomer" by Ormrod L.J. in *Day v. Day* [1980] Fam. 29, 32.

<sup>23</sup>Matrimonial Causes Rules 1977, r.48.

<sup>24</sup>In 1977-78 there were 73,020 accepted offers of legal aid for ancillary proceedings. This figure had risen to 89,444 by 1981-82 and to 105,022 by 1985-86 (Law Society Annual Reports).

<sup>25</sup>In 1977-78 a total number of 88,650 legal aid certificates were granted for matrimonial proceedings. By 1981-82 this figure had risen to 104,592 and by 1985-86 to 114,126 (Law Society Annual Reports). At the same time there has been a change in the distribution of type of case on which legal advice and assistance is sought; in 1973-74 (the first year the scheme was in operation) three fifths of cases involved marriage or family matters and only a tenth related to criminal affairs, but by 1983-84 these proportions had changed to less than a half and a quarter respectively (Central Statistical Office, Social Trends 16, (1986)).

<sup>26</sup>Booth Report, *op. cit.*, Part I, n.8, para. 2.8. See also D.C. Bradley, "Realism in Divorce Law", (1976) 126 N.L.J. 1204.

<sup>27</sup>Booth Report, *op. cit.*, Part I, n.8, para. 2.17. The Committee was appointed by the Lord Chancellor in 1982 with the following terms of reference (para. 1.1):

To examine the procedure and practice of the High Court and county courts in respect of proceedings under the Matrimonial Causes Act 1973, and to recommend reforms which might be made—(a) to mitigate the intensity of disputes; (b) to encourage settlements; and (c) to provide further for the welfare of the children of the family, having regard to the desirability of achieving greater simplification and saving of costs.

<sup>28</sup>See, e.g., Law Commission, Time Restrictions on Presentation of Divorce and Nullity Petitions (1980), Working Paper No. 76, para. 26 and J.M. Westcott, *op. cit.*, n.20, p. 212.

certificate on the basis that he is not satisfied that the petitioner has sufficiently proved the contents of the petition and is entitled to a decree; the number of cases in which the registrar asks for further particulars and which then go before him more than once; or the number of cases which the registrar adjourns to be heard by a judge in open court. A recent small-scale study of solicitors' files<sup>29</sup> suggests that there may be more double handling of cases by registrars than the "rubber stamp" image might suggest, but that the registrars' queries are more concerned with technical<sup>30</sup> than substantive matters and thus only operate to delay decrees. If this is the case, then such queries and hearings would seem to serve little purpose and their expense difficult to justify. Hence the Booth Committee has recommended that the special duty of inquiry on a divorce court should be removed and the court should merely be required to be satisfied on the evidence, as in other civil cases.<sup>31</sup>

2.9 In the view of some commentators, the procedural changes of the 1970s were "more radical departures than was the introduction of irretrievable breakdown as the sole ground of divorce".<sup>32</sup> In practice, the ability of the court to conduct a proper inquiry in the course of an oral hearing in an undefended case has always been strictly limited. The close interrelationship between substance and procedure in divorce law was stressed in the Booth Report. The Committee clearly felt that the present law, by retaining the fault element, made it more difficult for them to make procedural proposals which would mitigate the intensity of disputes and encourage settlements (as they had been asked to do) and that early review of the ground for divorce would be welcome. Nonetheless, many of their recommendations,<sup>33</sup> if implemented, would have a profound effect on the operation of the substantive law. These will be referred to in this paper as they arise.

#### Use of the five facts

2.10 Since the beginning of 1971, when the 1969 Act came into force, the number of divorces each year has more than doubled.<sup>34</sup> In the early years after the reform, this was largely accounted for by reliance on the new separation provisions,<sup>35</sup> which enabled marriages which had broken down many years earlier to be dissolved. However, by 1986 74 per cent of all decrees were based on adultery or behaviour.<sup>36</sup> Studies by Gwynn Davis and Mervyn Murch, of the Socio-Legal Centre for Family Studies at the University of Bristol, and by John Haskey, of the Office of Population Censuses and Surveys, into the use of these facts have provided important evidence about the operation of divorce law in practice.

2.11 Perhaps the most marked trend discernible from the statistics is the increased use of the behaviour fact. Although this trend is apparent among both men and women petitioners, behaviour is predominantly used by women. In 1986, 89 per cent of behaviour decrees were granted to wives, compared to 72 per cent of all decrees; almost half the divorces granted to women were based on behaviour, compared to approximately a quarter on adultery and a quarter on separation. Haskey's study has shown that the behaviour fact is more likely to be used by those in lower socio-economic classes whereas adultery and separation are more frequently used among the middle classes.<sup>37</sup> A correlation has also been found between the

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<sup>29</sup>R. Ingleby, *op. cit.*, Part I, n.14, paras. 4.3, 4.5, and 4.8.

<sup>30</sup>*Ibid.*, paras. 4.3, 4.5 and 4.8. See also J.M. Westcott, *op. cit.*, n.20.

<sup>31</sup>Booth Report, *op. cit.*, Part I, n.8, para. 2.18.

<sup>32</sup>M.D.A. Freeman, "Divorce Without Legal Aid", (1976) 6 *Fam. Law* 255, 259. See also J. Eekelaar, *Family Law and Social Policy* 2nd ed., (1984), p. 53.

<sup>33</sup>e.g., to dispense with the requirement that details of behaviour should be included in the petition, Booth Report, *op. cit.*, Part I, n.8, paras. 4.22 *et seq.*

<sup>34</sup>The trend in the numbers and rates of divorce per 1,000 married couples can be seen from the table set out in Appendix A.

<sup>35</sup>In 1972, these accounted for 40% of all divorces.

<sup>36</sup>The general trend in the use of each of the five facts can be seen from the tables set out in Appendix B.

<sup>37</sup>In J. Haskey's study, "Grounds for Divorce in England and Wales—A Social and Demographic Analysis", (1986) 18 *J. Biosoc. Sci.* 127, 137, for example, only 25% of decrees granted to women against husbands in Social Class I were on "behaviour" compared with 67% in Social Class V. Conversely 38% of Social Class I wives relied on 2 years' separation compared to 13% of Class V wives. Similarly adultery was more popular among Class I wives (25%) than Class V wives (15%). The pattern among decrees granted to husbands is similar. Thus, in this sample, no Class I husbands relied on behaviour compared to 11% of Class V husbands, 33% of Class I husbands used 2 years' separation compared with 25% of Class V husbands and 46% of Class I husbands petitioned on adultery compared with 32% of Class V men. In considering these figures it should be borne in mind that the disproportion between men and women petitioners is much less marked at the top of the social scale. Thus, in J. Haskey's sample, in Class I 57% of decrees were granted to wives compared to 81% in Class V. J. Haskey's findings are mirrored in G. Davis and M. Murch's rather smaller sample in *Grounds for Divorce* (1988), *op. cit.*, Part I, n.7.

age at divorce and fact used. Thus, those using five years' separation tend to be the oldest and those using two years' separation the youngest.<sup>38</sup> However, among those with dependent children behaviour is dominant among "young" divorces.<sup>39</sup> Generally, those with dependent children are more likely to use the behaviour and adultery facts.<sup>40</sup>

2.12 Those researchers<sup>41</sup> who have interviewed parties or looked at solicitors' files have concluded that these phenomena do not necessarily indicate that particular types of marital misconduct are more prevalent among particular groups. Rather, the evidence suggests that behaviour and adultery are frequently used because of the need to obtain a quick divorce.<sup>42</sup> In particular, it is noteworthy that the separation grounds are least used by those petitioners who are least able to effect a separation—women, in lower social classes, and particularly those with dependent children. Davis and Murch found that 28 per cent of those petitioning on the basis of behaviour and 7 per cent of those petitioning on the basis of adultery were still living together when the petition was filed. These same groups are also most likely to need to have ancillary issues relating to custody, maintenance and housing determined quickly.<sup>43</sup> This is most likely to occur once the petition has been filed.

2.13 The choice between adultery and behaviour seems to depend on social mores and on the state of the relations between the parties, as much as upon their marital history.<sup>44</sup> Thus, adultery would seem to carry less stigma particularly among the middle classes and is more likely to be employed than behaviour where the parting was consensual or at least amicable.<sup>45</sup> Behaviour petitions seem much less likely to have been discussed between the parties or their solicitors in advance and sometimes take respondents completely by surprise.<sup>46</sup>

#### The relevance of divorce rates

2.14 It is tempting to blame the large increase in the number of divorces upon the reform of the divorce law by the 1969 Act and to suggest that it has fundamentally weakened the institutions of marriage and the family. For several reasons such suggestions are unlikely to be well-founded. First, it is important always to bear in mind the distinction between marital separation and divorce. An increase in the number of divorces does not necessarily indicate a proportionate increase in marriage breakdown. Secondly, research findings indicate that the increase in marital breakdown must largely be explained by factors other than the liberalisation of divorce law. Thirdly, the increase in the divorce rate has not been matched by a wholesale abandonment of marriage and does not necessarily indicate any diminution in the respect in which marriage and the family are held, but rather reflects changed attitudes and expectations. Each of these points will be considered in turn.

2.15 Although it is clear that both the numbers and proportions of marriages breaking down during the parties' lifetimes have increased, it is equally clear that the increase has taken place over a long period and cannot be measured in such a way as to give an obvious explanation of its causes. There are a number of factors which would support the view that the increase in the divorce rate after the implementation of the 1969 Act does not indicate a

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<sup>38</sup>J. Haskey, (1986), *op. cit.*, n.37.

<sup>39</sup>G. Davis and M. Murch, (1988), *op. cit.*, Part I, n.7.

<sup>40</sup>J. Haskey, (1986), *op. cit.*, n.37. J. Haskey also found that childless couples are more than twice as likely as couples with dependent children to petition on the basis of 2 years' separation.

<sup>41</sup>G. Davis and M. Murch, (1988), *op. cit.*, Part I, n.7, and R. Ingleby, (1986), *op. cit.*, Part I, n.14, para. 3.9.

<sup>42</sup>G. Davis and M. Murch, (1988), *op. cit.*, Part I, n.7; see also J. Eckelaar and E. Clive, *Custody After Divorce* (1977), para. 1.6. It is noteworthy that in other countries with mixed systems (e.g., France and Switzerland) the percentage of divorces based on fault has been decreasing in favour of divorce by consent and divorce on the basis of breakdown, neither of which require any separation period; see J.M. Grossen, "The Ground for Divorce: A European Perspective", paper presented at the Bristol Seminar on Reform of the Ground for Divorce, 1985.

<sup>43</sup>G. Davis and M. Murch, (1988), *op. cit.*, Part I, n.7. They found that 72% of those using the adultery and behaviour facts had been separated for less than 6 months at this date.

<sup>44</sup>See paras. 3.8 and 3.19 below.

<sup>45</sup>G. Davis and M. Murch, (1988), *op. cit.*, Part I, n.7. R. Ingleby, *op. cit.*, Part I, n.14, paras. 2.3, 3.1 *et seq.*, refers to this group of cases as "agreement-adultery" cases. He found that in the absence of the necessary separation periods the adultery fact was invariably suggested by the solicitor; that the respondent was more likely to agree to adultery if it was alleged to have taken place after the separation and that where there was no evidence of adultery and no agreement to an adultery petition, behaviour was often used as a "last resort".

<sup>46</sup>*Ibid.*, para. 2.4; R. Ingleby found that respondents in behaviour cases were less likely to be represented when the petition was served.

similar increase in the rate of marriage breakdown. First, there has been a reduction in the use of the magistrates' domestic jurisdiction.<sup>47</sup> Previously, many cases of marital breakdown were dealt with by the magistrates without ever being legally ended by divorce, although they were in fact permanently broken.<sup>48</sup> Today, those same marriages would end in divorce. This is as much due to procedural changes and legal aid, which have brought divorce within the financial reach of all sections of society, as it is to changes in the substantive law.<sup>49</sup> Secondly, as was recognised in *The Field of Choice*, many cases of marital breakdown did not come before the courts at all,<sup>50</sup> perhaps because no matrimonial offence had been established or because the potential petitioner could not face the ordeal of proving one.<sup>51</sup> The new law allowed many such marriages to be dissolved. Thus, apart from the phenomenon of satisfying pent-up demand for divorce in the early years after the implementation of the new law, divorce figures since 1971 are bound to include cases which would not previously have appeared in any judicial statistics, although the marriages had in fact irretrievably broken down. One obvious effect, and indeed object, of the new law was to make it much more likely that all cases of marriage breakdown would eventually end in divorce. Nonetheless, there is little doubt that there has been an increase in marital breakdown, even if this increase is not as dramatic as the divorce figures would suggest. What are the possible reasons for this?

2.16 Divorce laws as such are incapable of preventing couples from separating by consent, or a spouse who has the means to do so from leaving without consent. It is therefore difficult to ascribe an increase in separation to any liberalisation of the divorce law. The upward trend in the divorce rate started before the implementation of a new law<sup>52</sup> and has been paralleled<sup>53</sup> by similar increases in divorce rates throughout Europe.<sup>54</sup> Even in Ireland, where there is no divorce, the incidence of marital breakdown has increased.<sup>55</sup> There is also empirical evidence from abroad which shows that liberal divorce laws do not necessarily result in a higher rate of marital breakdown.<sup>56</sup> In particular, the adoption of no-fault divorce in many of the States of the U.S.A. does not appear to have had a significant effect on the divorce rate.<sup>57</sup>

2.17 This is not to say that divorce law has no influence on the rate of marital breakdown. Indeed it seems likely that divorce law does have some bearing on the social climate.<sup>58</sup> It may be that less restrictive divorce laws contribute to "an increasing disposition to regard divorce, not as the last resort, but as the obvious way out when things begin to go wrong".<sup>59</sup> If so, they may have contributed to some extent to the increased rate of marital breakdown. Nevertheless, since it is quite clear that the phenomenon of increased marital breakdown has been widespread and independent of changes in divorce laws, it must largely be explained by reference to other factors, principally the demographic, socio-economic and attitudinal changes which have taken place throughout Western society during this century. As we examine these, it will be apparent that although some may be matters of regret, many of them are not. It is equally apparent that none of them can be affected by the substance of the divorce law as such.

<sup>47</sup>Magistrates' powers to make orders for separation, maintenance and custody in matrimonial cases began in 1878 as an adjunct to their criminal jurisdiction, but soon developed as an independent civil jurisdiction used almost exclusively by the lower socio-economic groups; see O.R. McGregor, L. Blom-Cooper and C. Gibson, *Separated Spouses* (1970), and Report of the Committee on One-Parent Families (Chairman: The Hon. Sir Morris Finer) (1974), Cmnd. 5629, vol. 1, paras. 4.69 *et seq.*

<sup>48</sup>J.A. Priest, "Buttressing Marriage", (1983) 13 Fam. Law 40.

<sup>49</sup>J. Eekelaar, (1984), *op. cit.*, n.32, pp. 11 *et seq.*

<sup>50</sup>*The Field of Choice* (1966), Law Com. No.6, para. 25(h).

<sup>51</sup>Booth Report, *op. cit.*, Part I, n.8, para. 2.12.

<sup>52</sup>R. Leete, *Changing Patterns of Family Formation and Dissolution in England and Wales 1964-76*, (1979), p.91; K. Kiernan, *The structure of families today: continuity or change?* (1983), p.27.

<sup>53</sup>See R. Chester (ed.), *Divorce in Europe* (1977), pp.292 *et seq.* where it is shown that the trends in divorce over the past 50 years have been very similar throughout Europe despite short term fluctuations and variations. In particular all of the countries studied "have seen a constantly upward trend in divorce from some point around 1960 or just after", p.302.

<sup>54</sup>Although the increase in the divorce rate (per 1,000 population) between 1960 and 1984 was rather higher in the U.K. than elsewhere in Europe (U.K. 460%; Netherlands 380%; Belgium 280%; Luxembourg 240%; France 200%; Germany 133%; the 12 countries of the E.E.C. 225%) in the period since the implementation of the Divorce Reform Act (1970-80) the increase in the U.K. divorce rate has been smaller than in a number of other European countries (U.K. 155%; Netherlands 200%; Luxembourg 183%; Belgium 171%; France 125%; Germany 62%), although some of these have also witnessed legislative reforms.

<sup>55</sup>W. Duncan, "Supporting the Institution of Marriage in the Republic of Ireland", in J. Eekelaar and S. Katz (eds.), *Marriage and Cohabitation in Contemporary Societies* (1980), pp.82 *et seq.*

<sup>56</sup>See studies quoted in M. Rheinstein, *Marriage Stability, Divorce and the Law* (1972), p.289; H. Sepler, "Measuring the Effects of No-Fault Divorce Laws Across Fifty States: Quantifying a Zeitgeist", (1981) 15 F.L.Q. 65.

<sup>57</sup>H. Sepler, *op. cit.*, n.56.

<sup>58</sup>G. Davis and M. Murch, (1988), *op. cit.*, Part I, n.7.

<sup>59</sup>Morton Commission, *op. cit.*, n.2, para. 47, and see J.A. Priest, (1983), *op. cit.*, n.48.

2.18 Three main demographic changes are relevant to changes in divorce rates. First, there is no longer, as there was a century ago, a large surplus of women in the marrying age groups, but rather a small surplus of men.<sup>60</sup> This, allied to increased prosperity, has enabled almost all of those who wish to marry to do so.<sup>61</sup> Secondly, the reduction in the major causes of premature death for both men and women, coupled with generally greater longevity,<sup>62</sup> has meant that these marriages are "at risk" for longer.<sup>63</sup> The modern rate of premature termination by divorce does not compare very unfavourably with earlier rates of premature termination by death or divorce.<sup>64</sup> Thirdly, the widespread availability of contraception has led to smaller, more consciously planned families, leaving a much longer period of active life after child-bearing and child-rearing.<sup>65</sup>

2.19 Socio-economic developments seem to have led to a change in the nature of marriage in Western society. What has been called "institutional" marriage, which largely entails economic functions and the provision of domestic services, has been replaced by what may be called "companionate" marriage, which requires a continuing successful emotional relationship.<sup>66</sup> The latter is obviously far more difficult to sustain than the former.<sup>67</sup> A number of factors have been identified which may have contributed to this changed view of marriage. First, the values of society generally have changed, with greater emphasis on pursuit of individual success and happiness and less on religious and ethical doctrines.<sup>68</sup> Secondly, income and wealth today depend upon trade and employment rather than inherited property.<sup>69</sup> This has emancipated more young people from their parents' control.<sup>70</sup> Combined with increased prosperity it has enabled couples to marry, or set up home together, as soon as they please, and even (it has been suggested) to apply consumer society's "throwaway attitude" to marriage.<sup>71</sup> Thirdly, the "emancipation" of women has changed women's expectations of what marriage should provide for them. Interviews with divorcing couples reveal that often the spouses had widely differing conceptions both of what marriage meant and of what their own marriage had been like.<sup>72</sup> This lends some support for Bernard's view that "his" marriage is generally better than "hers".<sup>73</sup> The other side of the coin may be that the "emancipation" of women has also emancipated men from the traditional responsibility generated by the dependence and vulnerability of their wives.<sup>74</sup>

2.20 The increased vulnerability of marriage would seem to be exacerbated by various other socio-economic causes, such as unemployment<sup>75</sup> and greater social isolation caused by urban living,<sup>76</sup> which create stresses in the marriage. Just as important as the factors which have increased the vulnerability of marriages are those developments which have provided increased opportunities for people, particularly women, who are disillusioned with their marriages to break away. Thus, greater educational and employment opportunities for women have meant that they are more likely to have or be able to achieve financial and social independence.<sup>77</sup> Allied to this is the trend towards smaller, more consciously planned families already mentioned. The provision by the Welfare State of supplementary benefit, local

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<sup>60</sup>M. Britton and N. Edison, "The changing balance of the sexes in England and Wales, 1951-2001", (1986) *Population Trends* 46, p.22.

<sup>61</sup>Finer Report, *op. cit.*, n.47, paras. 3.3 *et seq.*

<sup>62</sup>See, e.g., A. Thatcher, "Centenarians", (1981) *Population Trends* 25, p.11; J. Craig, "The growth of the elderly population", (1983) *Population Trends* 32, p.28 and M. Alderson and F. Ashwood, "Projection of mortality rates for the elderly", (1985) *Population Trends* 42, p.22.

<sup>63</sup>Finer Report, *op. cit.*, n.47, para. 3.18.

<sup>64</sup>*Ibid.*, para. 3.32.

<sup>65</sup>*Ibid.*, para. 3.13. See also J. Thompson, "The age at which childbearing starts: a generation perspective", (1980) *Population Trends* 21, p. 10.

<sup>66</sup>M.A. Glendon, *The New Family and the New Property* (1981), pp.17 *et seq.* See also G. Davis and M. Murch (1988), *op. cit.*, Part I, n.7.

<sup>67</sup>See M. Rheinstein, *op. cit.*, n.56, p.274, and S.M. Cretney, *Principles of Family Law* 4th ed., (1984), p.209.

<sup>68</sup>Morton Commission, *op. cit.*, n.2, para. 46.

<sup>69</sup>M.A. Glendon, *op. cit.*, n.66.

<sup>70</sup>W.J. Goode, "The Resistance of Family Forces to Industrialization", in J. Eekelaar and S. Katz, *op. cit.*, n.55, p. ix.

<sup>71</sup>R.N. Rapoport and R. Rapoport, *Work and the Family*, Melbourne Institute of Family Studies, Discussion Paper No.3, (1981).

<sup>72</sup>G. Davis and M. Murch, (1988), *op. cit.*, Part I, n.7.

<sup>73</sup>J. Bernard, *The Future of Marriage*, (1972).

<sup>74</sup>See e.g., the studies discussed in H. Land, *Parity Begins at Home*, (1981), pp. 12 and 13.

<sup>75</sup>See J. Haskey, (1986), *op. cit.*, n.37, pp. 136 and 150.

<sup>76</sup>There is some evidence that marital breakdown and divorce are more prevalent in urban than rural areas. See M. Rheinstein, *op. cit.*, n.56, p. 307.

<sup>77</sup>N. Hart, *When Marriage Ends: A Study in Status Passage*, (1976) and G. Sanctuary and C. Whitehead, *Divorce and After* (1970), claim that for many women the termination of a broken marriage provides the impetus to continue with or start a career which they would not have otherwise contemplated.

authority housing (with priority given to child-carers) and legal aid and advice has given many women the means, previously only available to men, to end their marriages.<sup>78</sup> The higher divorce rate itself may have a catalyst effect by making divorce more familiar and removing the extra-legal deterrents.<sup>79</sup> Thus, for example, divorce has carried less stigma and there are more social outlets for divorcees including an increased possibility of remarriage.<sup>80</sup>

2.21 Lastly, although there has been a reduction in the rate of marriage over the past two decades and non-marital cohabitation and the rearing of children outside marriage have increased in incidence<sup>81</sup> and social acceptability,<sup>82</sup> there is no reason to suppose that marriage and the family are declining in popularity or significance. Indeed, it has been suggested that high divorce rates indicate that the institution of marriage is as healthy as ever, for two reasons. First, as discussed above,<sup>83</sup> people tend to divorce “not because they are turned off marriage but, rather, because their expectations of marriage are so high that they will not settle for unsatisfactory approximations”.<sup>84</sup> Thus, it has been suggested that divorce “is mainly a backhanded compliment to the ideal of modern marriage, as well as a testimony to its difficulties”.<sup>85</sup> Secondly, people often divorce in order to remarry. Haskey found that in a sample of couples getting a divorce between 1979–81 34 per cent of the men and 33 per cent of the women had remarried within two and a half years of their divorce.<sup>86</sup> Burgoyne and Clark’s study of step-families also suggests that those remarrying retain their commitment to marriage as a permanent union.<sup>87</sup> It would, therefore, seem that the following view expressed in *Putting Asunder* retains its validity:

Divorce statistics can mislead if the greater life-expectancy of marriage is forgotten, and the fact that the termination of marriage is now in all classes *de jure* and not just a *de facto* rupture unremarked by law. Alarm about divorce as a social phenomenon seems therefore singularly ill-based . . . every relevant social investigation seems to validate further the enormous strength and growing solidity of marriage as an institution ramifying into every other sphere of life.<sup>88</sup>

In *An Honourable Estate*, the recent Report of a Working Party established by the Standing Committee of the General Synod of the Church of England, this view was supported:

Marriage is not about to disappear. We live in an age where marriage is popular and where there are high expectations of it; marriages are also expected to last much longer than in previous ages. The essential Christian value of marriage, as a lasting union between a man and a woman where children may be brought up in a healthy and secure environment, is not being seriously challenged.<sup>89</sup>

Thus, what has changed is not the respect for marriage and the family, but people’s expectations, attitudes and behaviour. These changes mean that ironically divorce often reflects the continued value attached by people to marriage.

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<sup>78</sup>G. Davis and M. Murch, (1988), *op. cit.*, Part I, n.7.

<sup>79</sup>K. Kiernan, *op. cit.*, n.52, p. 33; R. Leete, (1979), *op. cit.*, n.52, p. 82. This increases what R. Chester (ed.), (1977), *op. cit.*, n.53, refers to as the “normative availability” of divorce.

<sup>80</sup>J. Gorecki, “Moral Premises of Contemporary Divorce Laws: Western and Eastern Europe and the United States”, in J. Eekelaar and S. Katz (eds.), *op. cit.*, n.55, p. 124. In 1985, over 21% of all who married were divorcees compared with 5% in 1960. J. Haskey, (1986), *op. cit.*, n.37, found that 37% of petitioners and 32.5% of respondents had remarried within 2.5 years of their 1979 divorce. D. Winn, *Men on Divorce* (1986) claims that a third of divorced men remarry within a year.

<sup>81</sup>One indicator of the proportion of children born to non-marital stable unions is the proportion of illegitimate births registered on the joint application of both parents. During the past 30 years there has been an increase in the proportion of illegitimate births registered by both parents, from 38% of illegitimate births in 1961 to 66% in 1986. These figures also suggest that at least half of the children born outside marriage in 1986 had parents who were living together and were likely to be bringing up the child within a stable union. In about three quarters of these cases in 1986 the parents gave the same address of usual residence; Central Statistical Office, *Social Trends* 18, (1988).

<sup>82</sup>As evidenced, e.g., by the Family Law Reform Act 1987 which removes, so far as possible, the legal disadvantages of being born to parents who are not married to each other.

<sup>83</sup>See para. 2.19 above.

<sup>84</sup>B. Berger and P. Berger, *The War over the Family: Capturing the Middle Ground* (1983), p. 181.

<sup>85</sup>*Ibid.*

<sup>86</sup>J. Haskey (1986), *op. cit.*, n.37, p. 145. See also R. Leete and S. Anthony, “Divorce and Remarriage: a Record Linkage Study”, (1979) *Population Trends* 16, found that over half of their sample of people divorced in 1973 had remarried within 4.5 years. D. Winn, *op. cit.*, n.80, claims that a third of divorced men remarry within a year.

<sup>87</sup>J. Burgoyne and D. Clark, *Making a Go of It—A Study of Stepfamilies in Sheffield* (1984). Nevertheless, remarriages are more likely to end in divorce than first marriages, J. Haskey, (1986), *op. cit.*, n.37.

<sup>88</sup>*Op. cit.*, n.6, Appendix F, para. 3.

<sup>89</sup>(1988), para. 151.

2.22 Before going on to look at the case for reform, it is worth noting that although the increase in the number of divorces does not, as is sometimes alleged, indicate any fundamental weakening of the fabric of society, it does mean that many more people are going through the process of divorce than in 1969. This is relevant in two ways. First, law and practice can no longer be founded on the assumption that the people affected by divorce are a small and deviant proportion of the population. Secondly, the "consumer interest" in both the substantive and procedural aspects of divorce law is proportionately that much greater and must be taken into account in any evaluation of the present law or proposals for reform.

## PART III

### THE CASE FOR REFORM

#### Objectives of the present divorce law

3.1 The objectives of a good divorce law as stated by the Law Commission in 1966<sup>1</sup> have already been set out:<sup>2</sup> put another way, they include “the support of marriages which have a chance of survival”, but “the decent burial with the minimum of embarrassment, humiliation and bitterness of those that are indubitably dead”.<sup>3</sup> We shall call these the Field of Choice criteria. At the time, they seem to have been novel, although the breakdown principle had been advocated previously by Lord Walker in the minority report of the Morton Commission<sup>4</sup> and by the Archbishop of Canterbury’s Group in *Putting Asunder*.<sup>5</sup> As well as forming the basis of the Divorce Reform Act 1969,<sup>6</sup> these objectives have been frequently cited in discussions of divorce law in Parliament,<sup>7</sup> in the reports of official bodies<sup>8</sup> and by the courts.<sup>9</sup> Considerable emphasis was placed upon them in the discussion leading to the recent reform of the time restriction on petitioning for divorce.<sup>10</sup> Two aspects of the policy embodied in the Field of Choice criteria have been particularly emphasised in recent years.

3.2 First, following the reform of the grounds for divorce in 1969, the focus of attention for those involved with the reform of divorce law and procedure has been the promotion of agreement between the parties about the consequences of divorce, primarily through conciliation.<sup>11</sup> This was emphasised in the terms of reference of the Booth Committee, which was asked to make recommendations “(a) to mitigate the intensity of disputes; (b) to encourage settlements; and (c) to provide further for the welfare of the children of the family”.<sup>12</sup> It has become clear that if solutions can be agreed between the parties rather than imposed by the court, the traumatic effect<sup>13</sup> of marital breakdown on the spouses and their children<sup>14</sup> may be reduced. The best way in which divorce law can promote this aim is to ensure that the legal process of dissolving a marriage does not require steps to be taken which are likely to provoke conflict between the parties.

3.3 Secondly, the objective of enabling a dead marriage to be buried decently can be seen as part of an approach which might be regarded as forward-looking rather than retrospective.<sup>15</sup> To quote Lord Scarman,<sup>16</sup> “An object of the modern law is to encourage each to put the past behind them and to begin a new life which is not overshadowed by the relationship which has broken down”. Similarly, the Commission has recently argued that the law<sup>17</sup> should “encourage the parties to look to the future rather than to dwell in the past”,<sup>18</sup> and that investigation into the conduct of the parties in financial provision proceedings would not be “helpful in encouraging them to come to terms with their new

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<sup>1</sup>The Field of Choice (1966), Law Com. No. 6, para. 15.

<sup>2</sup>See para. 2.3. above.

<sup>3</sup>The Field of Choice (1966), Law Com. No. 6, para. 120(1).

<sup>4</sup>Morton Commission, *op. cit.*, Part II, n.2, pp. 340-1.

<sup>5</sup>*Op. cit.*, Part II, n.6.

<sup>6</sup>See, e.g. Divorce Reform Bill debate, *Hansard* (H.C.), 6 December 1968, vol. 774, col. 2036.

<sup>7</sup>e.g. by Lord Elwyn-Jones in the Matrimonial and Family Proceedings Bill debate, *Hansard* (H.L.), 21 November 1983, vol. 445, col. 42.

<sup>8</sup>e.g. Report on Time Restrictions on Presentation of Divorce and Nullity Petitions (1982), Law Com. No. 116; *Finer Report*, *op. cit.*, Part II, n.47, para. 4.39; *A Better Way Out*, *op. cit.*, Part I, n.5, para. 11.

<sup>9</sup>e.g. Scarman L.J. in *Minton v. Minton* [1979] A.C. 593, 608; Denning L.J. in *Wachtel v. Wachtel* [1973] Fam. 72; Ormrod L.J. in *Rukat v. Rukat* [1975] Fam. 63, 74; *De Lasala v. De Lasala* [1980] A.C. 546.

<sup>10</sup>See, e.g., Lord Hailsham in the Matrimonial and Family Proceedings Bill debate, *Hansard* (H.L.), 21 November 1983, vol. 445, col. 32.

<sup>11</sup>As evidenced, e.g., by the Report of the Inter-departmental Committee on Conciliation (1983) and the setting up by the Lord Chancellor’s Department of the Conciliation Research Unit at the University of Newcastle.

<sup>12</sup>*Op. cit.*, Part I, n.8, para. 1.1.

<sup>13</sup>See e.g. Inter-departmental Committee on Conciliation (1983), *op. cit.*, n.11, para. 3.2; M. Murch, *Justice and Welfare in Divorce* (1980); L. Parkinson, *Conciliation in Separation and Divorce* (1986).

<sup>14</sup>*Ibid.*, and see also M.P. Richards and M. Dyson, *Separation, Divorce and the Development of Children: a review*, D.H.S.S. (1982) and see paras. 3.37 *et seq.* below.

<sup>15</sup>G. Davis and M. Murch, (1988), *op. cit.*, Part I, n.7, see the introduction of the special procedure as part of this change of emphasis.

<sup>16</sup>*Minton v. Minton* [1979] A.C. 593, 608.

<sup>17</sup>In that case relating to financial provision on divorce.

<sup>18</sup>The Financial Consequences of Divorce: The Basic Policy. A Discussion Paper (1980), Law Com. No. 103; Cmnd. 8041, para. 24.



situation”.<sup>19</sup> It must be remembered that for the parties divorce is a process and not an event.<sup>20</sup> Although divorce law focusses on the single question of whether the marriage is to be dissolved, it should not be framed without consideration of its effect on the post-divorce adjustment of the parties and their children.

#### Does the present law satisfy those objectives?

3.4 In the light of the general and continued acceptance of the Field of Choice criteria an appropriate starting point for a critique of the present law is an examination of its operation when judged against those objectives. For convenience, these will be considered under the following headings:

- (a) Does the law buttress the stability of marriages?
- (b) Does the law enable the “empty legal shell” of a dead marriage to be destroyed?
- (c) Does the law promote “maximum fairness”?
- (d) Does the law promote “minimum bitterness, distress and humiliation”?

The Field of Choice also identified two further problems which required solution:

- (e) Does the law avoid injustice to an economically weak spouse, usually the wife?<sup>21</sup>
- (f) Does the law adequately protect the interests of the children of failed marriages?<sup>22</sup>

The final important requirement was identified thus:

- (g) Is the law understandable and respected?<sup>23</sup>

3.5 By discussing the criteria in this order we do not mean to suggest any particular priority among them. Nowadays, for example, many people might give higher priority to the interests of children than to any other consideration or question whether the State has any interest in buttressing the stability of marriage other than to protect the interests of the weaker parties and the children. We recognise that these are value judgments upon which individual views will differ. Our object is simply to examine the operation of the present law in the light of the objectives which were set for it.

#### (a) Does the law buttress the stability of marriages?

3.6 The need to buttress the stability of marriage has traditionally been given as a rationale for restrictive divorce laws.<sup>24</sup> A majority of the Morton Commission considered that the institution of marriage could best be protected by the doctrine of the matrimonial offence.<sup>25</sup> It was argued that this would set a moral standard for behaviour within marriage and would deter the setting up of extra-marital unions because there was no certainty that they or their offspring could ever be regularised.<sup>26</sup> There are several objections to this line of argument. Moral pressure of this sort can only operate effectively upon those who accept the moral system upon which it is based. As the Church group accepted in *Putting Asunder*,<sup>27</sup> in today’s plural and secular society, many people will respect the value of family life without subscribing to the Christian system of morality which formed the basis of the earlier law. In any event, divorce laws as such can *never* prevent spouses who have the means to do so from leaving home or couples who wish to do so from separating by consent.

3.7 Moreover, in *Putting Asunder* the assumption that the stability of marriage could only be ensured by the matrimonial offence doctrine was questioned.<sup>28</sup> Both *Putting Asunder* and

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<sup>19</sup>The Financial Consequences of Divorce. The Response to the Law Commission’s Discussion Paper, and Recommendations on the Policy of the Law (1981), Law Com. No. 112, para. 37.

<sup>20</sup>Thus Lord Hailsham: “marriage may be dissoluble but divorce is only too often indissoluble and lasts, painfully, for the rest of the parties’ lives”, debate on the Matrimonial and Family Proceedings Bill, *Hansard* (H.L.), 21 November 1983, vol. 445, col. 95. See also S. Maidment, *Child Custody and Divorce* (1984), p. 173 and J.S. Wallerstein and J.B. Kelly, *Surviving the Breakup* (1980), p. 4.

<sup>21</sup>*The Field of Choice* (1966), Law Com. No. 6, paras. 38 *et seq.*

<sup>22</sup>*Ibid.*, paras. 47 *et seq.*

<sup>23</sup>*Ibid.*, para. 18.

<sup>24</sup>M. Rheinstein, *op. cit.*, Part II, n.56.

<sup>25</sup>Morton Commission, *op. cit.*, Part II, n.2, paras. 65 and 69, although 9 members favoured the introduction of 7 years’ separation with consent (para. 67).

<sup>26</sup>*Ibid.*, para. 69(xxxvii).

<sup>27</sup>*Op. cit.*, Part II, n.6, para. 17.

<sup>28</sup>*Ibid.*, para. 45.

The Field of Choice demonstrated that the existing law was failing to buttress the stability of marriage in two important respects. First, it was possible for couples who were prepared to carry out various steps to obtain a divorce effectively by consent and without real fault.<sup>29</sup> For example, evidence could be supplied from which adultery would be inferred<sup>30</sup> even though it had not actually taken place. Similarly, consensual separation could be “dressed up to look like desertion”.<sup>31</sup> Secondly, the law did not help in any way to encourage reconciliation and sometimes prejudiced any chances of it taking place.<sup>32</sup> The architects of the Divorce Reform Act 1969 hoped to promote the stability of marriage by remedying both these defects.<sup>33</sup>

3.8 As to the first point, it was argued<sup>34</sup> that the introduction of the breakdown principle would do more to buttress the stability of marriage than the previous law had done. The requirement of “intolerability” was added to the adultery fact with the intention of excluding reliance on a single isolated act of adultery which did not affect the marriage relationship.<sup>35</sup> The provision that no divorce could be granted where the marriage had not broken down irretrievably was thus seen as a method of preventing abuse. However, it is clear that the 1969 Act has been no more successful in preventing immediate consensual divorce than its predecessor. undefended divorces based on adultery or behaviour can be obtained relatively quickly<sup>36</sup> and apparently easily. The Law Society have suggested<sup>37</sup> that “virtually any spouse can assemble a list of events, which, taken out of context, can be presented as unreasonable behaviour sufficient on which to found a divorce petition”.<sup>38</sup> A petition based on adultery with an unnamed person is also considered an easy option, as the respondent’s admission is itself sufficient proof.<sup>39</sup> In two year separation cases, it may not be difficult to prove that there were two households under the same roof<sup>40</sup> for at least some of the time. Experience from abroad<sup>41</sup> together with that in this country<sup>42</sup> would tend to suggest that it is not possible to prevent parties obtaining immediate consensual divorce so long as immediate divorce is available upon fulfilment of certain requirements, because determined parties will succeed in satisfying the conditions.

3.9 Following recommendations of the Law Commission,<sup>43</sup> a number of provisions were included in the Divorce Reform Act 1969 with the aim of encouraging reconciliation. What is now section 6(1) of the Matrimonial Causes Act 1973 requires a solicitor to file a certificate stating whether he has discussed the possibility of reconciliation with his client. Section 6(2) provides that a court should not grant a decree if there is a chance of reconciliation, but should instead adjourn the proceedings for such an attempt to be made. In cases based on separation or desertion, reconciliation may also be facilitated by the provision<sup>44</sup> that a total of six months of living together during the period of separation can be disregarded provided that the parties have in fact been apart for the requisite time. Further, a period (or periods) of living together of up to six months after the adultery is known or the last incident of

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<sup>29</sup>Morton Commission, *op. cit.*, Part II, n.2, para. 70(v); *Putting Asunder, op. cit.*, Part II, n.6, para. 42; The Field of Choice (1966), Law Com. No. 6, para. 25(d). See also Divorce Reform Bill debate, *Hansard* (H.C.), 17 December 1968, vol. 775, col. 1119.

<sup>30</sup>As in the bogus “hotel” cases, see The Field of Choice (1966), Law Com. No. 6, para. 26.

<sup>31</sup>*Ibid.*, para. 25(d). See also *Putting Asunder, op. cit.*, Part II, n.6, para. 42.

<sup>32</sup>The Field of Choice (1966), Law Com. No. 6, paras. 29-32.

<sup>33</sup>The central objective set out in the long title to the Act was “to facilitate reconciliation in matrimonial causes”.

<sup>34</sup>See, e.g., Divorce Reform Bill debate, *Hansard* (H.C.), 17 December 1968, vol. 775, col. 1095, (Mr. Awdry); col. 1081 (Dame Joan Vickers) and col. 1062 (Mr. Weitzman).

<sup>35</sup>But see para. 3.17.

<sup>36</sup>In 1985, the median time for adultery petitions was 7.2 months and for behaviour petitions 8 months from petition to divorce (Marriage and Divorce Statistics, Review of the Registrar General on marriages and divorce in England and Wales, 1985, Series FM2 No. 12).

<sup>37</sup>*A Better Way Out, op. cit.*, Part I, n.5, para. 50.

<sup>38</sup>*Ibid.* See evidence from solicitors interviewed by G. Davis and M. Murch, (1985), *op. cit.*, Part I, n.7, that registrars will grant a certificate on the basis of “very mild allegations of behaviour”. See also J.M. Westcott, (1978), *op. cit.*, Part II, n.20, p. 212, who claims experience of behaviour petitions “containing the flimsiest of particulars”; and S.M. Cretney, *op. cit.*, Part II, n.67, p. 126. But no systematic research has been done on this topic and it seems likely that the practice of different registrars, and accordingly the advice given by solicitors, may vary widely.

<sup>39</sup>But see *Bradley v. Bradley* [1986] 1 F.L.R. 128 where a decree nisi was rescinded because the petitioner had sworn falsely that he did not know the name of the man with whom his wife had committed adultery. This has caused some problems in practice. See R. Ingleby, *op. cit.*, Part I, n.14, para. 4.3.

<sup>40</sup>See para. 2.5 above.

<sup>41</sup>See M. Rheinstein, *op. cit.*, Part II, n.56, p. 251, where it is claimed that “In the United States as elsewhere consent for divorce is freely available, in spite of the efforts of the official law to exclude or prevent it”.

<sup>42</sup>See Divorce Reform Bill debate, *Hansard* (H.C.), 17 December 1968, vol. 775, col. 1119 (Mr. Dewar).

<sup>43</sup>The Field of Choice (1966), Law Com. No. 6, paras. 31, 32 and 103.

<sup>44</sup>Matrimonial Causes Act 1973, s.2(5).

behaviour takes place is disregarded.<sup>45</sup> Although it is impossible to estimate the success of the "living together" provisions, the potential of section 6(1) and (2) seems to have been almost entirely removed by the extension of the special procedure.<sup>46</sup> A registrar will rarely be able to detect a chance of reconciliation simply from the documents in front of him. The duty in section 6(1) no longer applies in the common situation where petitioners act as litigants in person and only receive green form legal advice from their solicitor. In any event, as the Booth Committee observed,<sup>47</sup> solicitors can simply certify that they have not discussed the possibility of reconciliation and there is no obligation on them to do otherwise. The Booth Committee has recommended the repeal of section 6(1) because it serves no useful purpose.<sup>48</sup>

3.10 The evidence does indeed show that solicitors often fail to explore prospects of reconciliation with their clients.<sup>49</sup> This reflects the generally accepted and often repeated view of solicitors and others that once one spouse visits a solicitor there is no hope of saving the marriage.<sup>50</sup> On the contrary, the solicitor's assumption that the client wants a divorce may be a determining factor for a vacillating party.<sup>51</sup> Davis and Murch<sup>52</sup> suggest that the conventional wisdom may be rather too dogmatic and that prospects for reconciliation following the seeking of legal advice are greater than has previously been thought.<sup>53</sup> Also, the fall-off rates between petition and decree absolute (approximately 15 per cent for the years 1980-85)<sup>54</sup> and between decree nisi and decree absolute (estimated to be 2.5 per cent for years 1980-85)<sup>55</sup> would appear to evidence some post-petition reconciliation<sup>56</sup> and possibly an element of precipitate petitioning.<sup>57</sup> But it must not be forgotten that in the majority of cases, petitioners do not take a sudden decision to divorce and may put up with "an extraordinary amount to keep their marriage and family together".<sup>58</sup>

3.11 Although the extent to which the divorce law can encourage reconciliation or discourage precipitate petitioning may be limited, it can ensure that the legal process of divorce does not deter the parties from attempting reconciliation or diminish any chance, however small, of its success. Yet it would seem that in a number of respects the present system may do just this. First, the need to prove a fact, particularly if behaviour is used, can force the petitioner into an entrenched and hostile position from the outset. If the marriage has not broken down already, the allegations made may alienate the respondent to such an extent that irretrievable breakdown then occurs.<sup>59</sup> Secondly, once the petition is filed the divorce may be obtained relatively quickly with little opportunity for reflection.<sup>60</sup> Although

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<sup>45</sup>*Ibid.*, s.2(2) and (3); in adultery cases, however, a longer period is fatal to the petition, whereas in behaviour cases it is not.

<sup>46</sup>Some had thought the provisions inadequate from the start; see, e.g., M. Freeman, "The Search for a Rational Divorce Law", (1971) Current Legal Problems 178, who described them as a "sham".

<sup>47</sup>Booth Report, *op. cit.*, Part I, n.8, para. 4.42.

<sup>48</sup>*Ibid.*, paras. 4.42-4.43. Lord Simon of Glaisdale has described the reconciliation provisions of the 1969 Act as "mere futility and absurdity", Matrimonial and Family Proceedings Bill debate, *Hansard* (H.L.), 24 January 1984, vol. 447, col. 146.

<sup>49</sup>See G. Davis, A. Macleod and M. Murch, "Special Procedure in Divorce and the Solicitor's Role", (1982) 12 Fam. Law 39, 43 and also N. Tyndall, "Helping Troubled Marriages: A Comment on the Work of the National Marriage Guidance Council", (1982) 12 Fam. Law 76. It may be questioned whether solicitors have the necessary training and skills to identify potential reconciliation cases.

<sup>50</sup>See, e.g., *A Better Way Out*, *op. cit.*, Part I, n.5, para. 178; Finer Report, *op. cit.*, Part II, n.47, paras. 4.298-4.300; M. Murch, (1980), *op. cit.*, n.13, pp. 14 and 150.

<sup>51</sup>M.P. Richards and M. Dyson, *op. cit.*, n.14, p. 78.

<sup>52</sup>G. Davis and M. Murch, (1988), *op. cit.*, Part I, n.7, found that 22% of divorce petitioners (and 39% of respondents) would prefer to have remained married to their former partner.

<sup>53</sup>Some spouses may visit a solicitor to seek information to help them make their decisions, M. P. Richards and M. Dyson, *op. cit.*, n.14, p. 78.

<sup>54</sup>See Appendix A. And see Lord Hailsham in the Matrimonial and Family Proceedings Bill debate, *Hansard* (H.L.), 21 November 1983, vol. 445, col. 95 and R. Ingleby, *op. cit.*, Part I, n.14, para. 1.13.

<sup>55</sup>S.M. Cretney, *op. cit.*, Part II, n.67, p. 188.

<sup>56</sup>Although the fall-off rate before decree nisi is to some extent accounted for by double petitioning and other factors.

<sup>57</sup>See also The Law Society, Family Law Standing Committee, *A Better Way out Reviewed*, (1982), para. 27. For evidence of parties using litigation to work out their marital difficulties, see G. Davis and M. Murch, (1985), *op. cit.*, Part I, n.7, p. 8.

<sup>58</sup>G. Davis and M. Murch, (1988), *op. cit.*, Part I, n.7. See also J. Dominian, *Marital Breakdown*, (1986), p. 105 and B. Mortlock, *The Inside of Divorce*, (1974), p. 13 and J.S. Wallerstein and J.B. Kelly, *op. cit.*, n.20, p. 11; R. Ingleby, *op. cit.*, Part I, n.14, para. 4.2.

<sup>59</sup>M.P. Richards and M. Dyson, *op. cit.*, n.14, p. 78.

<sup>60</sup>G. Davis and M. Murch (1988), *op. cit.*, Part I, n.7, p. 79 *et seq.* and J. Eekelaar, "The Place of Divorce in Family Law's New Role", (1975) 38 M.L.R. 241, 251.

the progress of the litigation is largely within the petitioner's control, once the respondent has acknowledged service of the petition and does not defend,<sup>61</sup> it has been argued that the proceedings can develop a momentum of their own.<sup>62</sup> Thirdly, some spouses may be unable to find alternative accommodation or rearrange the occupation of their existing home unless they are divorced.<sup>63</sup> Some, perhaps especially wives, may therefore be driven to divorce simply in order to achieve a separation. Any chance, however small, of reconciliation after a cooling-off period is lost. Finally, any time limit on the period during which the parties may live together after a fact has arisen can cause difficulties for a spouse who is genuinely ambivalent about ending the marriage.

(b) *Does the law enable the "empty shell" of the marriage to be destroyed?*

3.12 Every spouse is able to terminate his or her marriage after five years' separation<sup>64</sup> subject to the unlikely event of the respondent being able to satisfy the court that the divorce would cause financial or other hardship to the respondent and that it would in all the circumstances be wrong to dissolve the marriage.<sup>65</sup> However, it is clear that where a marriage has irretrievably broken down, most spouses find that five years is too long to wait<sup>66</sup> to obtain a divorce and attendant ancillary relief.<sup>67</sup> As will be shown below, whether a spouse can succeed in ending a marriage without waiting may well depend on a wholly arbitrary range of factors,<sup>68</sup> unrelated to whether the marriage has irretrievably broken down or which of them is more to blame for the fact that it has done so.

(c) *Does the law ensure that marriages are dissolved with maximum fairness?*

3.13 One of the criticisms of the old law was that it was unfair for the respondent to be "branded as guilty in law though not the more blameworthy in fact".<sup>69</sup> Despite the replacement of the matrimonial offence by irretrievable breakdown as the sole ground for divorce, the original matrimonial offences have been retained in modified form as the first three of the five facts<sup>70</sup> which evidence breakdown. These each appear to involve findings of fault.<sup>71</sup> Thus, in reality we now have a dual system with fault-based divorce alongside the no-fault separation facts and "the clear concept of the no-fault irretrievable breakdown of marriage as the only ground for divorce has not been achieved".<sup>72</sup> This is highlighted by the cases where a decree nisi has been refused even though there is no dispute that the marriage has irretrievably broken down.<sup>73</sup>

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<sup>61</sup>R. Ingleby, *op. cit.*, Part I, n.14, para. 4.2.

<sup>62</sup>G. Davis and M. Murch, (1988), *op. cit.*, Part I, n.7, p. 79.

<sup>63</sup>See para. 3.36 below.

<sup>64</sup>Between 1971 and 1985 this provision was used by 197,614 petitioners, of whom 51.3% were women; how many of the men were "Casanovas" who took advantage of this "charter" as feared (see, e.g. Divorce Reform Bill debate, *Hansard* (H.C.), 12 June 1969, vol. 784, col. 2034) is not known.

<sup>65</sup>See para. 3.29 below.

<sup>66</sup>This is no doubt why the proportion of divorces based on 5 years' separation is relatively small.

<sup>67</sup>Property adjustment orders can be made on divorce. All other forms of ancillary relief are available prior to divorce.

<sup>68</sup>e.g., whether the respondent has the resources to defend a petition on one of the fault-based facts or whether the spouse wanting the divorce can persuade the other spouse to petition on one of those facts. See R. Ingleby, *op. cit.*, Part I, n.14.

<sup>69</sup>The Field of Choice (1966), Law Com. No. 6, para. 28.

<sup>70</sup>These have been said to have been intended to "circumscribe the discretion of the court" because "grave uncertainty might be introduced if each judge could operate on his own 'hunch' as to breakdown or no breakdown", Divorce Reform Bill debate, *Hansard* (H.C.), 6 December 1968, vol. 774, col. 2038 (Mr. A. Jones).

<sup>71</sup>Responses in G. Davis and M. Murch's interviews (1985), *op. cit.*, Part I, n.7, suggest that behaviour is invariably considered to be fault-based. This is illustrated by the fact that only 12% of behaviour petitions are agreed by parties in advance compared with 58% of adultery petitions and 77% of 2 years' separations.

<sup>72</sup>Booth Report, *op. cit.*, Part I, n.8, para. 2.9. See also H. Finlay, "Reluctant But Inevitable: The Retreat of Matrimonial Fault", (1975) 38 M.L.R. 153; and Lord Simon of Glaisdale, "it is quite unreal to say that, in any but a formal sense, we have banished the matrimonial offence and that we now have divorce based on the breakdown of marriage", Matrimonial and Family Proceedings Bill debate, *Hansard* (H.L.), 24 January 1984, vol. 447, col. 177.

<sup>73</sup>*Richards v. Richards* [1972] 1 W.L.R. 1073; *Mouncer v. Mouncer* [1972] 1 W.L.R. 321 and *Dowden v. Dowden* (1977) 8 Fam. Law 106. See also *Davy-Chiesman v. Davy-Chiesman* [1984] Fam. 48 where it appears that the wife's petition had been dismissed because her own infatuation with another man rather than her husband's behaviour had been the major cause of the breakdown and *Galan v. Galan* [1985] F.L.R. 905 where a behaviour petition was dismissed even though there had been a number of exclusion orders against the respondent and he had been committed to prison for breach. The most recent example is *Buffery v. Buffery*, *The Times*, 10 December 1987, in which it was not disputed that the marriage had irretrievably broken down, but "In truth, what has happened in this marriage is the fault of neither party; they have just grown apart. They cannot communicate. They have nothing in common...". And yet their marriage could not be dissolved on the basis that one could not reasonably be expected to live with the other.

3.14 In *Putting Asunder* the Archbishop's Group argued strongly that the breakdown principle was incompatible with the old matrimonial offences.<sup>74</sup> If the law was, as at that time, "based on the assumption that divorce ought to be seen as just relief for an innocent spouse against whom an offence has been committed by the other spouse", then it would be unjust to allow "a guilty spouse to petition successfully against the will of an innocent". Conversely, if the law were based on irretrievable breakdown, there could be no justification in retaining grounds which "depended on the commission of specific offences, on which only injured parties might petition . . ." Thus, the Group specifically rejected the idea of a dual system of fault and irretrievable breakdown (as evidenced by a period of separation). It was predicted that such a "small but virulent dose of incompatible principle" would not actually reform the law because the no-fault grounds would simply become alternative verbal formulae, the satisfaction of which would be a ticket to a divorce, and that the old attitudes and procedures would be applied to the new grounds without any real test of breakdown.<sup>75</sup> However, the Law Commission took the view that "One principle can serve the case of the spouse who has suffered serious offence. The other can serve those spouses in respect of whom no glaring misconduct can be identified, and those who seek divorce against the will of a relatively innocent partner".<sup>76</sup> The apparent success of the then Australian<sup>77</sup> and New Zealand<sup>78</sup> examples of systems with mixed fault and separation grounds was cited in support. Thus, when the Archbishop's Group's recommendation of a single ground of breakdown with inquest was rejected as impractical,<sup>79</sup> the resulting compromise<sup>80</sup> apparently introduced the breakdown principle but in reality created just the sort of dual system deprecated in *Putting Asunder*.<sup>81</sup>

3.15 Experience since the implementation of the 1969 Act has borne out the predictions made by the Archbishop's Group. The radical theoretical shift from the offence principle to the breakdown principle has not become apparent in practice. The law tells the parties, on the one hand, that the sole ground for divorce is irretrievable breakdown and, on the other hand, that unless they are able to wait for at least two years after separation, a divorce can only be obtained by proving fault. Not surprisingly, the subtlety that the facts are not grounds for divorce, but merely evidence of breakdown, is seldom grasped. The first three facts are still regarded as matrimonial offences,<sup>82</sup> and the separation facts as last resort grounds for those who cannot prove fault or prefer to wait for a less acrimonious divorce.<sup>83</sup>

3.16 We are therefore left with much of the unfairness of the old fault-based system. In petitions based on facts (a), (b) and (c),<sup>84</sup> the parties "at the outset of proceedings are required to think in terms of wrongdoing and blameworthiness in a way which perpetuates the images of the innocent and guilty party".<sup>85</sup> The fact specified in the petition is seen as the cause of the breakdown for which the respondent is responsible. Yet the evidence suggests that the fact relied on is usually rather a symptom of the breakdown<sup>86</sup> which has been caused by the deterioration in the relationship of the parties for a wide variety of reasons. In most divorces the spouses will both be "at fault" in varying degrees<sup>87</sup> and it will be impossible to apportion

<sup>74</sup>*Op. cit.*, Part II, n.6, para. 69.

<sup>75</sup>*Ibid.*

<sup>76</sup>The Field of Choice (1966), Law Com. No. 6, para. 105, quoting Professor M. Paulsen in a review of "Putting Asunder" in *New Society*, 4 August 1966.

<sup>77</sup>The (Commonwealth) Matrimonial Causes Act 1959 introduced 5 years' separation as an addition to "offence" grounds. This has now been replaced by a single 1 year separation ground by the Australian Family Law Act 1975.

<sup>78</sup>The New Zealand Matrimonial Proceedings Act 1963 (which amended previous similar legislation) combined separation grounds with fault-based grounds. Now, the Family Proceedings Act 1980 as amended by the Family Proceedings Amendment (No. 2) Act 1985 provides 2 years' separation as the sole ground for divorce.

<sup>79</sup>See The Field of Choice (1966), Law Com. No. 6, para. 71.

<sup>80</sup>See Divorce Reform Bill debate, *Hansard* (H.C.), 17 December 1968, vol. 775, col. 1125 (Mr. Leo Abse). The compromise has been described variously as "somewhat uneasy" (H. Finlay, (1975), *op. cit.*, n.72), and "bungling" (M. Freeman, "When Marriage Fails—Some Legal Responses to Marriage Breakdown", (1978) *Current Legal Problems* 109).

<sup>81</sup>H. Finlay, *op. cit.*, n.72, p. 155.

<sup>82</sup>Even though, as a result of changing social attitudes, adultery is often regarded as an "offence" to which little or no moral blame or stigma attaches, G. Davis and M. Murch, (1988), *op. cit.*, Part I, n.7.

<sup>83</sup>G. Davis and M. Murch, (1988), *op. cit.*, Part I, n.7.

<sup>84</sup>In 1986 72.1 per cent of decrees were based on one of these facts (see Appendix B, Tables 1, 2 and 3).

<sup>85</sup>Booth Report, *op. cit.*, Part I, n.8, para. 2.9.

<sup>86</sup>J. Haskey, (1986), *op. cit.*, Part II, n.37. See also G. Davis and M. Murch, (1985), *op. cit.*, Part I, n.7, finding that only 31 per cent of petitioners to adultery petitions cited their spouse's involvement with someone else as leading them to take divorce proceedings.

<sup>87</sup>Booth Report, *op. cit.*, Part I, n.8, para. 2.9. Also Ormrod J. in *Wachtel v. Wachtel* [1973] Fam. 72, 79 and Divorce Reform Bill debate, *Hansard* (H.C.), 12 June 1969, vol. 784, col. 2057 (Mr. Emery).

responsibility for the breakdown.<sup>88</sup> 42 per cent of divorcees interviewed in Davis' study of conciliation recognised that responsibility for the breakdown was shared; 7 per cent thought themselves responsible and 46 per cent held their spouses totally or primarily responsible.<sup>89</sup> Thus, the respondent may be stigmatised as guilty under facts (a), (b) or (c) even where the spouses themselves do not take such a simplistic view. There is evidence that many respondents resent having to accept this construction in order to obtain a divorce without waiting for one of the separation periods to elapse.<sup>90</sup>

3.17 The unfairness caused by this often unjustified stigmatisation of the respondent is exacerbated by several factors. First, the adultery and behaviour facts as formulated in the legislation and interpreted by the courts do not necessarily involve the absolute fault that is suggested by these labels. Behaviour need not be caused by the fault of the respondent at all, as it may be the result of physical or mental illness or injury, even to the extent of being involuntary.<sup>91</sup> Further, the common practice of referring to it as "unreasonable behaviour" is a complete misnomer<sup>92</sup> and dangerously misleading. What is required is behaviour on the part of the respondent which makes it unreasonable for the petitioner to be expected to live with the respondent. The courts have held that this test involves a subjective element.<sup>93</sup> That is, it might not be reasonable to expect one petitioner to put up with behaviour which it would be reasonable to expect another petitioner to tolerate.<sup>94</sup> This will depend on the sensitivity and disposition of the petitioner. Thus, a finding that the behaviour ground is fulfilled is not necessarily a finding of fault on the part of the respondent, but rather a finding of the petitioner's inability to withstand this behaviour and hence of the incompatibility of the parties. While in many cases reliance will be placed on behaviour which is generally thought wrong, in others the allegations will reflect the differing values and expectations of the parties on matters such as social life, finance or sexual activities. Similarly, the adultery fact involves not only a finding that the respondent has committed adultery, but also that the petitioner finds it intolerable to live with the respondent. Again, this requires some finding of incompatibility, although in this case the test is entirely subjective. However, it has been held that there need be no causal link between the two requirements.<sup>95</sup> Thus, the petitioner may find it intolerable to live with the respondent for any reason, not necessarily because he has committed adultery.<sup>96</sup> The court or the registrar is in no position to gainsay the petitioner<sup>97</sup> and there is no requirement that her attitude be reasonable. This could well mean that the petitioner's own behaviour has been much worse than that of the respondent, but the respondent who has admittedly committed adultery has no defence. The old bars of connivance and conduct conducing to the adultery were abolished in the 1969 Act. In any case, if the divorce is undefended, the respondent's apparent fault is generally allowed to form the basis of the divorce without receiving any real judicial scrutiny.<sup>98</sup>

3.18 Secondly, it will often be impracticable for the respondent to challenge the allegations made in the petition, whether or not<sup>99</sup> he is content for the marriage to be ended. The costs of

<sup>88</sup>See, e.g., *The Field of Choice* (1966), Law Com. No. 6, para. 58(i); *The Financial Consequences of Divorce* (1981), Law Com. No. 112, paras. 37-9; and *Wachtel v. Wachtel* [1973] Fam. 72.

<sup>89</sup>G. Davis and M. Murch, (1988) *op. cit.*, Part I, n.7.

<sup>90</sup>*Ibid.*

<sup>91</sup>See *Thurlow v. Thurlow* [1976] Fam. 32, where a decree based on behaviour was awarded against the respondent wife who suffered from epilepsy and as a result of a deterioration in her condition was incapable of looking after herself. The strain thus imposed on the petitioner damaged his health (cf. *Smith v. Smith* [1970] 1 W.L.R. 155). This result seems to have been intended by Parliament. See Divorce Reform Bill debate, *Hansard* (H.C.), 12 June 1969, vol. 784, col. 1916 (Mr. Leo Abse).

<sup>92</sup>*Bannister v. Bannister* (1980) 10 Fam. Law 240.

<sup>93</sup>*Livingstone-Stallard v. Livingstone-Stallard* [1974] Fam. 47, but the question of what is reasonable is determined objectively; *O'Neill v. O'Neill* [1975] 1 W.L.R. 1118; *Buffery v. Buffery*, *The Times*, 10 December 1987.

<sup>94</sup>This is illustrated by the well-known quotation of Bagnall J. in *Ash v. Ash* [1972] Fam. 135, 140,

A violent petitioner can reasonably be expected to live with a violent respondent; a petitioner who is addicted to drink can reasonably be expected to live with a respondent similarly addicted; a taciturn and morose spouse can reasonably be expected to live with a taciturn and morose petitioner; a flirtatious husband can reasonably be expected to live with a wife who is equally susceptible to the attractions of the other sex; and if each is equally bad, at any rate in similar respects, each can reasonably be expected to live with the other.

<sup>95</sup>*Cleary v. Cleary and Hutton* [1974] 1 W.L.R. 73, 75; *Goodrich v. Goodrich* [1971] 1 W.L.R. 1142; *Anderson v. Anderson* (1972) 117 S.J. 33; *Carr (M.) v. Carr (A.K.)* [1974] 1 W.L.R. 1534.

<sup>96</sup>Thus the original intention of Parliament to make adultery more difficult to rely on by providing that an "act of adultery alone, which may have no effect at all on the relationship between the parties, should not suffice to establish breakdown" (Divorce Reform Bill debate, *Hansard* (H.C.), 6 December 1968, vol. 774, col. 2039 and 17 December 1968, vol. 775, col. 1095) has not been fulfilled.

<sup>97</sup>*Goodrich v. Goodrich* [1971] 1 W.L.R. 1142; cf. *Cleary v. Cleary and Hutton* [1974] 1 W.L.R. 73.

<sup>98</sup>See para. 2.8. above.

<sup>99</sup>G. Davis and M. Murch, (1988) *op. cit.*, Part I, n.7, found in their sample of conciliation cases that of the 51% of respondents who claimed that their marriage had not broken down when the petition was filed only 52.5% filed an answer. See also J.M. Westcott, "The Doctrine of Irretrievable Breakdown", (1981) 11 Fam. Law 5.

defending are usually prohibitive<sup>100</sup> and legal aid is not generally available for the respondent to defend the petition if it is clear that the marriage has broken down irretrievably.<sup>101</sup> Yet it is thought to be unfair that derogatory allegations made against the respondent should be allowed to form the basis of the divorce without his being given a chance to set the record straight.<sup>102</sup>

3.19 Thirdly, the juxtaposition of fault and no-fault grounds suggests that respondents to petitions based on facts (a), (b) and (c) are at fault whereas respondents in separation cases are blameless. The implication from the existence of statutory safeguards<sup>103</sup> to protect the financial position of the respondent in separation cases *only* is that the respondents in non-separation cases are blameworthy and do not deserve such protection.<sup>104</sup> Yet the correlation between marital history and fact chosen is not so clear-cut. For example, in one of Davis and Murch's studies 32 per cent of parties to two years' separation petitions claimed that there had been incidents of physical violence in the marriage compared with 35 per cent of adultery petitioners and 55 per cent of behaviour petitioners. A fault-based fact is often chosen simply because there is a need or desire for a quick divorce.<sup>105</sup>

3.20 The fault-based facts may also work capriciously between the parties.<sup>106</sup> A spouse who can present an immediate petition because the other's conduct falls within facts (a) or (b) is in a strong bargaining position if the respondent wants an immediate divorce but has no fact upon which to rely. Similarly, where the parties have been separated for two years, the one who does not need a divorce is afforded a bargaining advantage by having the power to refuse consent. It is unfair that the law should distribute the "bargaining chips"<sup>107</sup> in this way, when as we have seen, the respondent is not necessarily more blameworthy than the petitioner. This distortion in the relative bargaining power of the parties can affect the negotiations about money and children.<sup>108</sup> The respondent may be prepared to yield in these matters because he wants a divorce. Although all discussions about post-divorce arrangements are conducted in "the shadow of the law" only *relevant* law should be allowed to influence the parties' decisions.<sup>109</sup>

3.21 Finally, fault is usually not relevant in ancillary matters and where it is, this will be determined in the trial of those matters and not in reliance on the particulars pleaded in the petition.<sup>110</sup> But this is not generally understood and petitioners may choose to use the behaviour fact to cite particular allegations of behaviour specifically because they think that this will help them in proceedings relating to children and financial provision.<sup>111</sup> Similarly, respondents may be induced to defend adultery or behaviour petitions because they are worried that the allegations are damaging to their chances in such proceedings.<sup>112</sup>

(d) *Does the law promote minimum bitterness, distress and humiliation?*

3.22 In *The Field of Choice*, the Commission clearly recognised the "embarrassment and bitterness" caused by the need to prove a matrimonial offence under the old law and

<sup>100</sup>See Booth Report, *op. cit.*, Part I, n.8, para. 2.16; G Davis, A. Macleod and M. Murch, *op. cit.*, n.49, and G. Davis and M. Murch, (1988), *op. cit.*, Part I, n.7, pp. 28-9.

<sup>101</sup>Booth Report, *op. cit.*, Part I, n.8, para. 2.16 and J.M. Westcott, *op. cit.*, Part II, n.20. *The Legal Aid Handbook* (1986) prepared by the Law Society, (Notes for Guidance) simply states that legal aid will only be granted where the case cannot be disposed of as an undefended suit without detriment to the interests of either party. This practice is inconsistent with the requirement of the legislation that a divorce cannot be granted where none of the five facts can be proven to evidence the breakdown (paras. 2.3-2.4 above) and see *McCarney v. McCarney* [1986] 1 F.L.R. 312 where Sir John Donaldson M.R. thought that a respondent should be entitled to contest a serious allegation even if it would have no direct effect on the result of the proceedings.

<sup>102</sup>G. Davis, A. Macleod and M. Murch, (1982), *op. cit.*, n.49, p. 42; G. Davis and M. Murch, (1988), *op. cit.*, Part I, n.7. In practice, the record may often be put straight as between the parties by an exchange of solicitors' letters.

<sup>103</sup>Matrimonial Causes Act 1973, ss.5 and 10, and see para. 3.29 below.

<sup>104</sup>See J. Eekelaar, (1984), *op. cit.*, Part II, n.32, p. 41. The safeguard now in s.5 was to be applicable to all respondents (see Divorce Reform Bill debate, *Hansard* (H.C.), 12 June 1969, vol. 784, col. 1973, Mr. Leo Abse) but this was changed as a result of a Lords amendment (*Hansard* (H.C.), 17 October 1969, vol. 788, cols. 106 *et seq.*).

<sup>105</sup>(1988), *op. cit.*, Part I, n.7. See also para. 2.12 above.

<sup>106</sup>See R. Ingleby, *op. cit.*, Part I, n.14.

<sup>107</sup>J. Eekelaar, (1975), *op. cit.*, n.60.

<sup>108</sup>See R. Ingleby, *op. cit.*, Part I, n.14, para. 2.3.

<sup>109</sup>See R. Mnookin, "Bargaining in the Shadow of the Law: The Case of Divorce", (1979) *Current Legal Problems* 65.

<sup>110</sup>The contents of the divorce petition and pleadings are not *res judicata* in subsequent proceedings for maintenance or custody. *Tumath v. Tumath* [1970] 2 W.L.R. 169; *Porter v. Porter* [1971] P. 282; *Rowe v. Rowe* [1980] Fam. 47. An issue estoppel will only arise in respect of the ground upon which the decree is pronounced and express findings of fact of a trial judge in a defended case, *Porter v. Porter* (above) and it is questionable whether the principle of estoppel applies to custody cases at all, *In re F. (An Infant)*, *F. v. F.* [1969] 2 Ch. 239.

<sup>111</sup>G. Davis and M. Murch, (1985), *op. cit.*, Part I, n.7, p. 21.

<sup>112</sup>See G. Davis and M. Murch, (1985), *op. cit.*, Part I, n.7, pp. 27 and 29 and R. Ingleby, *op. cit.*, Part I, n.14, para. 4.4.

expressed the hope that parties would prefer to wait to use the separation periods, if introduced, as this would produce less acrimony.<sup>113</sup> Indeed, 693,676<sup>114</sup> couples, some of whom could no doubt have proven one of the fault-based facts, have done just this.<sup>115</sup> However, the high hopes of the Commission have not been realised and 71 per cent of petitions filed in 1985 relied on one of the fault-based facts.<sup>116</sup> The avoidance of bitterness and hostility between the parties seems even more important today in the light of the modern emphasis on promoting agreement between the parties about the consequences of divorce<sup>117</sup> and the evidence<sup>118</sup> that good post-divorce relations between the parties and between the children and both parents tend to reduce the problems experienced by children as a result of marital breakdown. It must, of course, be remembered that "it would be unrealistic to expect that such feelings [bitterness and resentment], which are often implicit in the distress which accompanies divorce, could ever wholly be eradicated".<sup>119</sup> It is unfortunate, however, if the legal process itself is such as to provoke or exacerbate unnecessary antagonism between the parties.

3.23 It has been suggested that much of the bitterness created between parties to fault-based petitions is attributable to the lack of fairness, actual or perceived.<sup>120</sup> A respondent to a fault-based petition will often resent the fact that he is being held responsible for the breakdown, when in his own mind he is no more to blame than the petitioner.<sup>121</sup> This feeling may encourage him either to defend the petition, even if he wants a divorce, simply in order to set the record straight, or at least to be uncooperative in relation to the divorce and any ancillary proceedings. Davis and Murch have called this "a clear example of the law itself generating conflict: the legal equivalent of what, in medicine, is termed 'iatrogenesis'".<sup>122</sup> If a respondent who disputes the allegations in the petition ultimately decides not to defend,<sup>123</sup> his bitterness may be intensified by a feeling of frustration at having to accept the construction in the petition simply to obtain an inexpensive divorce without waiting for two years.<sup>124</sup> One way of venting his anger is to contest proceedings relating to children and finance.<sup>125</sup> It seems almost paradoxical that the contents of the petition should cause such negative feelings in undefended divorces, when, as we have seen, they are not properly scrutinised and their only relevance to the divorce process is in satisfying the formula required by the legislation.

3.24 The legal process is particularly likely to induce conflict where the parties are still in the matrimonial home and cannot agree upon which should leave. In order to obtain a pre-divorce injunction the petitioner may find it necessary to make more damaging allegations<sup>126</sup> against the respondent than might be sufficient to obtain a decree. So, whatever fact is ultimately relied on, the injunction proceedings themselves will force the parties to adopt hostile and entrenched positions.

3.25 There is evidence<sup>127</sup> that bitterness and hostility between the parties is particularly

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<sup>113</sup>The Field of Choice (1966), Law Com. No. 6, paras. 92-3. See also Divorce Reform Bill debate, *Hansard* (H.C.), 6 December 1968, vol. 774, col. 2039.

<sup>114</sup>O.P.C.S. figures 1971-86 inclusive. 495,050 of these relied on 2 years' separation with consent.

<sup>115</sup>J. Haskey, (1986), *op. cit.*, Part II, n.37, pp. 133, 136 and 137, shows that separation grounds are used more by those in the higher social classes and those without dependent children.

<sup>116</sup>J. Eekelaar, (1975) *op. cit.*, n.60, suggested that the 1969 Act had only been 50% successful because in 1971-73 only 50% of petitioners relied on separation grounds. Today it could be suggested that the Act was only 30% successful!

<sup>117</sup>See para. 3.2 above.

<sup>118</sup>See para. 3.39 below.

<sup>119</sup>The Financial Consequences of Divorce: The Basic Policy (1980), Law Com. No. 103, para. 29.

<sup>120</sup>See paras. 3.16-3.17 above. In P. Ambrose, J. Harper and R. Pemberton, *Surviving Divorce*, (1983), 75% of the sample of divorced men considered that the divorce laws favoured women. The percentage was higher (89%) among men who were respondents.

<sup>121</sup>*A Better Way Out*, *op. cit.*, Part I, n.5, para. 12.

<sup>122</sup>"Iatrogenesis": the creation of additional problems or complications resulting from treatment by a doctor or surgeon.

<sup>123</sup>See G. Davis, A. Macleod and M. Murch, (1982), *op. cit.*, n.49, who found that most respondents had been persuaded by their solicitors that the contents of the petition would have no bearing on other issues and that defending would be a costly and futile exercise. See also R. Ingleby, (1986), *op. cit.*, Part I, n.14, para. 3.2.

<sup>124</sup>Booth Report, *op. cit.*, Part I, n.8, para. 4.25 and G. Davis and M. Murch, (1985), *op. cit.*, Part I, n.7, p. 17.

<sup>125</sup>J. Eekelaar and E. Clive, *op. cit.*, Part II, n.42, para. 13.3. The respondent is much more likely to be able to obtain legal aid to defend ancillary matters than the actual decree itself, cf. paras. 2.7 and 3.18 above.

<sup>126</sup>It may be more difficult to obtain an injunction than a s.1(2)(b) divorce since *Richards v. Richards* [1984] A.C. 174. See *Summers v. Summers* [1986] 1 F.L.R. 343.

<sup>127</sup>Booth Report, *op. cit.*, Part I, n.8, para. 2.10; J. Eekelaar and E. Clive, *op. cit.*, Part II, n.42, paras. 1.4-1.5.



prevalent in behaviour petitions.<sup>128</sup> Davis and Murch suggest that behaviour is the real fault-based ground today.<sup>129</sup> Although some adultery petitions are prompted by anger at the other's infidelity, overall they seem to carry less stigma and are more likely to involve agreement between the parties.<sup>130</sup> Eekelaar and Clive found that custody or access was more likely to be contested in behaviour cases.<sup>131</sup> Similarly, voluntary support arrangements were less likely to be made in behaviour cases.<sup>132</sup>

3.26 This correlation between hostility and behaviour petitions may be thought simply to reflect the fact that there is more likely to be animosity between the parties already in such cases, either because of the conduct of the respondent, particularly where it has been violent, or because the parties are still living together.<sup>133</sup> However, there is evidence to suggest that the very presentation of a behaviour petition either creates hostility or exacerbates pre-existing antagonism between the parties. Respondents to behaviour petitions are more likely to be "upset" or "shocked" when they receive the petition<sup>134</sup> and are more likely to feel that the divorce has been more difficult for them because they are respondents.<sup>135</sup> The Booth Report commented that "Great hostility and resentment may be generated by the recital in the petition of allegations of behaviour, often exaggerated and sometimes stretching back over many years, to the extent that no discussion can take place between the parties or any agreement be reached on any matter relating to their marriage or to their children".<sup>136</sup> To mitigate this problem, the Committee recommended that incidents of behaviour should not be recited in petitions.<sup>137</sup>

3.27 Respondents to behaviour petitions seem to fall into three broad categories: first, those who have agreed with the petitioner that the marriage has broken down and have allowed this fact to be used as a contrivance for obtaining a speedy divorce;<sup>138</sup> secondly, those who had no idea that anything was wrong and for whom the petition had arrived "out of the blue";<sup>139</sup> thirdly, those who have been guilty of violence or other forms of serious misconduct.<sup>140</sup> For those in the first two categories, unnecessary hostility and conflict may well be generated by the very use of the behaviour fact. The effect of requiring the petitioner to produce "behaviour" allegations is to encourage her to dwell on everything in the marriage and about the respondent which is bad and therefore to encourage a resentful and uncompromising attitude. A respondent in the second category is likely to react bitterly and antagonistically to the surprise petition and this will reduce the chances of saving the marriage even if he denies that it has broken down. A respondent in the first category may not be able to view the allegations against him with indifference despite his consent to the use of the behaviour fact. Where the respondent is in the third category, and undeserving of sympathy, the behaviour allegations may not exacerbate conflict but will certainly not reduce it. In all cases the seeds of post-divorce ill-feeling and difficulties have been sown by what has been called "ritualized hostility".<sup>141</sup> This is particularly important in view of the findings,

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<sup>128</sup>40% of decrees in 1985 (provisional) were based on behaviour.

<sup>129</sup>G. Davis and M. Murch, (1988), *op. cit.*, Part I, n.7. See also S.M. Cretney, *op. cit.*, Part II, n.67, p. 124 and J. Eekelaar, (1984), *op. cit.*, Part II, n.32, p. 48.

<sup>130</sup>Davis found that 43% of parties in adultery cases were in agreement as opposed to 21% in behaviour cases (G. Davis and M. Murch, (1988), *op. cit.*, Part I, n.7). See also R. Ingleby, *op. cit.*, Part I, n.14, para. 3.2.

<sup>131</sup>J. Eekelaar and E. Clive, *op. cit.*, Part II, n.42, para. 1.5. 51.1% of the contested cases were in behaviour petitions, although only 30.9% of the total sample were behaviour cases (Table 6).

<sup>132</sup>In only 20.3% of cases compared with 42.9% of adultery cases and 43.1% of 2 year separations, see J. Eekelaar and E. Clive, *op. cit.*, Part II, n.42, Table 3.

<sup>133</sup>In G. Davis and M. Murch, (1985), *op. cit.*, Part I, n.7, 28% compared to 7% of parties to adultery petitions. This may reflect the fact that "behaviour" is used more by the working classes and "adultery" by the middle classes; see J. Haskey, (1986), *op. cit.*, Part II, n.37 and G. Davis and M. Murch, (1988), *op. cit.*, Part I, n.7.

<sup>134</sup>67% compared with 24% in adultery cases and 18% in 2 years' separations, G. Davis and M. Murch, (1988), *op. cit.*, Part I, n.7.

<sup>135</sup>50% compared to 31% of respondents to adultery petitions, *ibid.*

<sup>136</sup>Para. 2.10. See also R. Ingleby, *op. cit.*, Part I, n.14, para. 4.4.

<sup>137</sup>Paras. 4.17, 4.25 and 4.26. G. Davis and M. Murch, (1988), *op. cit.*, Part I, n.7, report that "even some petitioners came to recognise the damage done in terms of ill-feeling between themselves and their spouse" and wished that their solicitors had advised restraint in listing allegations of behaviour. For the view that solicitors induce conflict and hostility, see e.g. C. Smart, *The Ties That Bind*, (1984); R. Ingleby, *op. cit.*, Part I, n.14, para. 4.4.

<sup>138</sup>G. Davis and M. Murch, (1985), *op. cit.*, Part I, n.7, p. 17.

<sup>139</sup>*Ibid.*, p. 18; these are likely to be cases where the parties are still living together and the allegations of behaviour relatively "mild".

<sup>140</sup>40% of the recently divorced people interviewed for the Bristol special procedure research project reported that there had been violence in the marriage; 20% of women petitioners had used violence to support a behaviour petition: a further 20%, rather more middle class, claimed that there had been violence, but based their petition on a different fact; see M. Borkowski, M. Murch and V. Walker, *Marital Violence*, (1983), p. 26.

<sup>141</sup>J. Eekelaar, (1984), *op. cit.*, Part II, n.32, p. 46.

discussed below,<sup>142</sup> that post-divorce relationships are crucial to the adjustment of the children to the breakdown of their parents' marriage. On the other hand, the recent research seems to have focussed particularly on the feelings of respondents. It is also possible that, where there has been serious misbehaviour, the petitioner may feel just as bitter if the process does not recognise this fact.

(e) *Does the law avoid injustice to an economically weak spouse?*

3.28 One of the major problems discussed in *The Field of Choice* was "injustice to wives":<sup>143</sup> this reflected a widely held view, voiced many times during the debates on the 1969 Bill,<sup>144</sup> that to abandon the fault principle would prejudice the middle-aged dependent housewife. However blameless she had been, she might be divorced against her will, left destitute and outcast, while her husband married a younger woman and started a new family. The concern at the time was so strong that three measures were taken in response to it.

3.29 First, a petition based on five years' separation can be dismissed where the divorce would cause grave financial or other hardship to the respondent and it would in all the circumstances be wrong to dissolve the marriage.<sup>145</sup> This was recommended by the Commission<sup>146</sup> to meet the small number of cases in which the divorce itself would cause more hardship than the marital breakdown had already done.<sup>147</sup> In practice, financial hardship is confined to the loss of the expectation of an occupational widow's pension for which the husband is unable to compensate.<sup>148</sup> The bar is very rarely invoked and even more rarely successful.<sup>149</sup> This does not mean that it is ineffective. The prospect of having to wait five years before petitioning for divorce, and thus running the risk that grave hardship can by that time be shown, will have an effect upon the earlier bargaining of the parties. The weaker spouse may achieve a better settlement in return for agreeing to petition than she would have obtained had the waiting time been shorter or the hardship bar not existed.

3.30 The same is true of the second safeguard. This enables the respondent in all separation cases to have the decree absolute postponed until the court is satisfied either that the petitioner should not make financial provision for the respondent or that provision has actually been made which is reasonable and fair or the best that can be made in the circumstances.<sup>150</sup> Unlike the hardship bar, it does not prevent the divorce altogether where the best that can be made is still not enough,<sup>151</sup> but it does ensure that this is done before the divorce goes through.

3.31 The objection which can be taken to both these safeguards is that they apply only in separation cases. As we have already seen, there is no guarantee at all that the apparently fault-based facts accurately represent the true responsibility for the breakdown of the

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<sup>142</sup>See para. 3.39 below.

<sup>143</sup>*The Field of Choice* (1966), Law Com. No. 6, paras. 38–46.

<sup>144</sup>See e.g. Divorce Reform Bill debate, *Hansard* (H.C.), 12 June 1969, vol. 784, cols. 1955–63 (Mrs. Knight) and cols. 2034–7 (Mr. Mahon), but cf. col. 2054 (Mrs. Jeger).

<sup>145</sup>Matrimonial Causes Act 1973, s.5.

<sup>146</sup>*The Field of Choice* (1966), Law Com. No. 6, para. 41; *Putting Asunder*, *op. cit.*, Part II, n.6, para. 64, recommended an absolute bar.

<sup>147</sup>In most cases it is the separation rather than the divorce which causes financial hardship. See, e.g., *Talbot v. Talbot* (1971) 115 S.J. 870 and Divorce Reform Bill debate, *Hansard* (H.C.), 12 June 1969, vol. 784, col. 2055 (Mrs. Jeger).

<sup>148</sup>Cf. *Julian v. Julian* (1972) 116 S.J. 763 and *Johnson v. Johnson* (1981) 12 Fam. Law 116 with *Le Marchant v. Le Marchant* [1977] 1 W.L.R. 559; *The Financial Consequences of Divorce* (1981), Law Com. No. 112, paras. 31–3. The loss of a National Insurance widow's allowance will not entail significant loss if supplementary benefit may be claimed instead, *Reiterbund v. Reiterbund* [1975] Fam. 99. There was considerable concern about loss of widows' pensions during the debate in Parliament. See, e.g., *Hansard* (H.C.), 12 June 1969, vol. 784, cols. 2009–10; 2033; 2043; and 2064; 17 October 1969, vol. 788, cols. 709–13.

<sup>149</sup>The only reported cases when financial hardship has succeeded are *Julian* and *Johnson*, above. The meaning of "other hardship" has been considered in cases where divorce is contrary to the religious beliefs of the respondent or would cause great social stigma in the community where the respondent lives (see, e.g., *Rukat v. Rukat* [1975] Fam. 63 and *Banik v. Banik* [1973] 1 W.L.R. 860), but in no case has a decree yet been refused on this basis. *Lee v. Lee* (1973) 117 S.J. 616 is the only reported case where "other hardship" has led to a decree being refused, but after a change of circumstances the decision was reversed on appeal ((1974) 5 Fam. Law 48). This is perhaps surprising in view of the strength of the "religious belief" lobby in Parliament. See, e.g., Divorce Reform Bill debate, *Hansard* (H.C.), 12 June 1969, vol. 784, cols. 1925–51.

<sup>150</sup>Matrimonial Causes Act 1973, s.10(2)–(4).

<sup>151</sup>In *The Field of Choice* (1966), Law Com. No. 6, para. 40, it was pointed out that this discriminated against poor men while the rich could buy themselves out.

marriage.<sup>152</sup> More importantly, that responsibility is now only thought relevant to financial provision where there has been such a gross disparity between the parties that to ignore it would be inequitable.<sup>153</sup> That issue is now determined in the ancillary proceedings themselves and not on the decree.

3.32 The third safeguard, introduced at the same time as the Divorce Reform Act 1969,<sup>154</sup> was the courts' greatly improved powers to award financial provision and property adjustment, taking all the circumstances of both parties into account.<sup>155</sup> These apply irrespective of who petitions and which fact is used. A divorce (or at least a judicial separation) may therefore improve the economic position of a separated wife if a property adjustment order is made.<sup>156</sup> However, the courts still have no power to reallocate occupational retirement or widows' pensions,<sup>157</sup> which may be the parties' most important long-term asset, especially as they grow older.

3.33 Hence the financial position of divorced wives has been helped by the courts' increased powers. Lone parents (who are usually wives) have also benefited from changes in social security legislation<sup>158</sup> since 1966.<sup>159</sup> But it would be wrong to assume that all the problems have been solved. Many spouses still have great difficulty in coping financially after separation. Moreover, for some, domestic responsibilities and other barriers to financial independence mean that it is only with extreme difficulty that a separation can be attempted. This effectively limits access to the separation facts for certain sections of the population.<sup>160</sup>

3.34 It is clear that marriage breakdown often results in financial hardship, particularly where there are children.<sup>161</sup> Most of the hardship arises at the time of separation since maintaining two separate households is much more expensive than maintaining one. The effect of separation on the income of women is particularly marked,<sup>162</sup> and they experience greater difficulties than men in finding work which provides them with sufficient resources to maintain a separate household or provide an adequate supplement to maintenance payments. Although the post-war period in England has witnessed a sustained growth in women's participation in the labour force, women still tend to have lesser job prospects than men.<sup>163</sup> Not only is female labour concentrated predominantly in a few poorly paid occupations in the service sector, but women are also less likely than men to hold supervisory or managerial posts.<sup>164</sup>

3.35 These problems are compounded where the women are also mothers since their ability to participate in the paid labour market depends crucially on the demands of, and their

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<sup>152</sup>See paras. 3.16 *et seq.* above.

<sup>153</sup>Matrimonial Causes Act 1973, s.25(2)(g); see *Kyte v. Kyte* [1987] 3 W.L.R. 1114.

<sup>154</sup>The Matrimonial Proceedings and Property Act 1970, which came into force with the 1969 Act on 1 January 1971, implemented the recommendations of Financial Provision in Matrimonial Proceedings (1969), Law Com. No. 25; the second reading given to Mr. Bishop's Matrimonial Property Bill on 24 January 1969 made it clear that divorce reform would not get through without some reform of the spouses' property claims.

<sup>155</sup>Matrimonial Causes Act 1973, ss. 23–25A, as amended by the Matrimonial Homes and Property Act 1981 and by the Matrimonial and Family Proceedings Act 1984.

<sup>156</sup>Without a divorce or judicial separation only periodical payments and lump sum orders are available under the 1973 Act, s.27, or the Domestic Proceedings and Magistrates' Court Act 1978.

<sup>157</sup>See *The Financial Consequences of Divorce* (1981), Law Com. No. 112, para. 31; Lord Chancellor's Department, *Occupational Pension Rights on Divorce* (1985); J. Masson, "Pensions, Dependency and Divorce", [1986] J.S.W.L. 343.

<sup>158</sup>e.g., the introduction by the Child Benefit Act 1975 of child benefit as a cash benefit, rather than a tax allowance, is of great help, particularly to mothers whose incomes are below the tax threshold; similarly, the introduction (in 1976) of the earnings disregard for the heads of one parent families in calculating supplementary benefit.

<sup>159</sup>The need for these was pressed in the debates on the 1969 Act; see, e.g., *Divorce Reform Bill debate*, *Hansard* (H.C.), 12 June 1969, vol. 784, col. 2054.

<sup>160</sup>There is clear evidence that the use of the five facts varies with social status and sex; see para. 2.11 above.

<sup>161</sup>See J. Eekelaar and M. Maclean, *Maintenance after Divorce*, (1986). The O.P.C.S. survey of the consequences of divorce (see para. 1.4 above) has found that financial difficulties were particularly acute in the immediate aftermath of separation. During this period nearly two-thirds of divorcing women and a quarter of divorced men had a total income of less than £60. Overall about three times as many informants were receiving unemployment or supplementary benefit immediately after separation and twice as many were receiving some State benefit, usually family income supplement.

<sup>162</sup>The O.P.C.S. survey (see para. 1.4 above) revealed that the financial impact of separation on women was particularly great both immediately after separation and after decree. The proportion on both unemployment and supplementary benefit increased. *From 4% to 34%*.

<sup>163</sup>J. Martin and C. Roberts, *Women and Employment—A Lifetime Perspective*, Report of the 1980 D.E./O.P.C.S. Women and Employment Survey (1984); see also D. Collinson, *Barriers to Fair Selection*, Equal Opportunities Commission, Research Series (1988).

<sup>164</sup>J. Martin and C. Roberts, *op. cit.*, n.163, Ch. 3, "Women workers in the occupational structure".

involvement, in non-paid domestic work and care of dependants.<sup>165</sup> These commonly cause breaks in employment which can have a drastic effect upon career paths and potential earning power. The major interruption to most women's paid employment is at the birth of their first child<sup>166</sup> and participation in the job market is likely to continue to be minimal while they have a child under five years old or where there are three or more children in the family.<sup>167</sup> Whilst more women are returning to work after giving birth than ever before, they are only returning to work part-time hours which reflect the times when they are likely to have to collect children from school or child minders.<sup>168</sup> They are also likely to enjoy fewer work-related benefits and a lower hourly rate of payment than full-time workers.<sup>169</sup>

3.36 In addition, the economically weaker spouse is likely to have difficulty in finding alternative accommodation. Not only must it reflect her budget but in many cases it must also be suitable for children. Since separation can have a drastic effect on the income of both parties, owner occupation may no longer be a feasible option for either spouse<sup>170</sup> and private sector housing may be difficult to find. Qualifying for local authority housing may depend on whether the spouse can satisfy the criteria for homelessness and priority need laid down by the Housing Act 1985. Even if a spouse is in priority need, as for example when she has children, it has been suggested that many local authorities will not entertain an application for rehousing until they can be sure that the relationship is at an end.<sup>171</sup> If the couple have a secure local authority tenancy, the authority cannot intervene at an early stage after the breakdown of a relationship by determining one tenancy and creating a new tenancy for the "deserving" party. The security of tenure provisions are, of course, intended as an important safeguard for tenants generally, but problems arise, both for local authorities and for the parties, when the tenants' relationships breaks down. In some cases this means that one of the spouses will have to start divorce or ouster proceedings before a separation can be achieved. Whilst these difficulties exist, it is unrealistic to suggest that the five facts are equally open to all spouses to use. Some spouses may be driven to make accusations against the other which they would not otherwise wish to make and which can only exacerbate the tensions between them.<sup>172</sup>

(f) *Does the law protect the interests of the children?*

3.37 The need for the law to protect the interests of children whose security and stability is threatened by their parents' divorce has long been recognised. This was one of the reasons why the Morton Commission did not recommend relaxation of divorce laws.<sup>173</sup> However by the 1960s the "general orthodoxy" among social scientists was that "a bad marriage was worse for children than a divorce".<sup>174</sup> The Law Commission in *The Field of Choice* was careful to reject any generalisation on this point and to conclude that in some cases it would be better for the children if their parents were to stay together and in other cases if they were

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<sup>165</sup>L. Rimmer, "Paid Work" in *Inside the Family*, (1986), Family Policy Studies Centre, and J. Martin and C. Roberts, *op. cit.*, n.163. Successive studies have shown that it is the wife who is primarily responsible for domestic chores. It is not uncommon for these to include the looking after of a handicapped or elderly relative in addition to housework and child care. A study by A. Hunt, *Women and Work*, Government Social Survey (1965) concluded that one in five housewives aged between 35 and 49 had a disabled person or someone aged over 65 in the household. Among the 50 to 60 age group, one in four had an elderly relative or infirm person present.

<sup>166</sup>O.P.C.S. study (see para. 1.4 above) and J. Martin and C. Roberts, *op. cit.*, n.163. This is in contrast to the earlier position where the major interruption to women's paid employment came at marriage.

<sup>167</sup>L. Rimmer, *op. cit.*, n.165, found that 96% of childless women less than 30 years old are economically active compared to 31% of women with a youngest child of under five.

<sup>168</sup>Finding child minders may prove to be an insurmountable problem for many women. The O.P.C.S. study (see para. 1.4 above) found that many of the women with children who had been working part-time before separating from their spouse had had to give up work soon after. See also G. Davis, A. Macleod and M. Murch, "Divorce: Who Supports the Family?" (1983) 13 *Fam. Law* 217.

<sup>169</sup>L. Rimmer, *op. cit.*, n.165; J. Martin and C. Roberts, *op. cit.*, n.163.

<sup>170</sup>The National Dwelling and Housing Survey (1983) O.P.C.S. and the 1981 Labour Force Survey, O.P.C.S., showed that a lower proportion of divorced and separated men and women are owner occupiers and a higher proportion of women are tenants of public sector landlords.

<sup>171</sup>D. Pearl, "Public Housing Allocation and Domestic Disputes", in M.D.A. Freeman (ed.), *Essays in Family Law* (1985); see also F. Logan, *Homelessness and Relationship Breakdown*, (1986).

<sup>172</sup>The decision of the House of Lords in *Richards v. Richards* [1984] A.C. 174, in emphasising the relevance of marital conduct in determining the occupation of the matrimonial home, may have contributed to this difficulty.

<sup>173</sup>*Op. cit.*, Part II, n.2, para. 69(iii). The Morton Commission's concern for the children of divorce led to its recommendation that a decree absolute should not be granted until the court declares itself satisfied with the arrangements for the children (para. 373). This is now contained in Matrimonial Causes Act 1973, s.41; see the Law Commission's Review of Child Law: Custody (1986), Working Paper No. 96, paras. 4.4-4.16.

<sup>174</sup>M. P. Richards and M. Dyson, *op. cit.*, n.14, p. 77.

to divorce.<sup>175</sup> It was recognised, however, that restrictive divorce laws did not make the parents stay together and that it was the separation rather than the divorce which was usually damaging to the children.<sup>176</sup> So to prohibit or make divorce more difficult for those with children would serve little purpose and would cause resentment in the parents who would see the children as the obstacle to their divorce.<sup>177</sup> More recently, in two working papers,<sup>178</sup> the Commission has mentioned this question again but there is clearly little support for the idea that the availability of divorce should depend upon whether or not there are children. There must always be some cases, perhaps where physical or sexual abuse has occurred, when it will be better for the children if their parents are divorced and others in which it is impossible to tell which course will be best. Thus, restrictive grounds for divorce do not necessarily safeguard the interests of the children of the parties.

3.38 However, it may be possible to use the divorce process to do so. Since 1958, divorce courts have had to consider the arrangements made for the couple's children before the divorce can be made absolute. The 1969 Act added nothing<sup>179</sup> to this. Since then, the findings of a number of studies<sup>180</sup> and the huge increase<sup>181</sup> in the number of children who witness the divorce of their parents have focussed attention on the plight of the children of divorced parents. This increased concern for such children can be seen, for example, from the recent provision giving priority to their interests in financial provision proceedings between their parents.<sup>182</sup> Also, the report of the Booth Committee, whose terms of reference included making recommendations "to provide further for the welfare of the children of the family"<sup>183</sup> states at the outset that "The welfare of the children is a matter of the utmost concern. We do not think that it can be doubted that society generally has an interest in ensuring the security and stability of the minor children of divorcing or separating parents".<sup>184</sup> The difficulty is in identifying *how* the law can promote the interests of the children.

3.39 Several studies have indicated that most children whose parents have separated would have preferred them to have stayed together.<sup>185</sup> Children of parents who have separated are more likely to suffer from at least temporary social and behavioural problems during and in the aftermath of the separation.<sup>186</sup> Although the findings are less clear, research has also linked marital separation with various longer-term problems.<sup>187</sup> As marital separation frequently leads to downward social mobility and economic hardship<sup>188</sup> such findings are not surprising, but once again may be attributed to the consequences of separation rather than divorce as such. Perhaps the most significant research finding is that adjustment to separation depends on the quality of the relationships with and between both parents *after* the separation.<sup>189</sup> Thus good continuing relationships with both parents seem to be protective against the problems associated with children from broken marriages.<sup>190</sup>

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<sup>175</sup>(1966), Law Com. No. 6, para. 50.

<sup>176</sup>*Ibid.*, para. 49.

<sup>177</sup>*Ibid.*, para. 51. See also Divorce Reform Bill debate, *Hansard* (H.C.), 25 April 1969, vol. 782, col. 844, (Mr. Leo Abse).

<sup>178</sup>Time Restrictions on Presentation of Divorce and Nullity Petitions (1980), Working Paper No. 76, paras. 84-7; Review of Child Law: Custody (1986), Working Paper No. 96, para. 4.14.

<sup>179</sup>In Parliament, Mr. W. Wilkins considered it remarkable that there was no reference to welfare of the children of the first marriage, which he termed "the forgotten factor", *Hansard* (H.C.), 25 April 1969, vol. 782, col. 828.

<sup>180</sup>See M.P. Richards and M. Dyson, *op. cit.*, n.14, for a summary.

<sup>181</sup>In 1981, 159,000 children were involved in divorce; J. Haskey, "Children of Divorcing Couples", (1983) 31 *Population Trends* 20, has estimated that 1 in 5 children will see the divorce of their parents by the time they reach 16.

<sup>182</sup>Matrimonial and Family Proceedings Act 1984, s.3 substituting Matrimonial Causes Act 1973, s.25(1); it appears however that the adults' interest in a "clean break" can still prevail, *Suter v. Suter and Jones* [1987] Fam. 111.

<sup>183</sup>*Op. cit.*, Part I, n.8, para. 1(c).

<sup>184</sup>*Ibid.*, para. 2.22: see also J. Eekelaar, *op. cit.*, (1984), Part II, n.32, p. 34, advocating a "child-centred approach to the problems of family dissolution".

<sup>185</sup>J.S. Wallerstein and J.B. Kelly, *op. cit.*, n.20; A. Mitchell, *Children in the Middle*, (1985); Y. Walczak and S. Burns, *Divorce: the Child's Point of View*, (1984); G. McCredie and A. Horrox, *Voices in the Dark: Children and Divorce*, (1985).

<sup>186</sup>See M.P. Richards and M. Dyson, *op. cit.*, n.14, pp. 15-29 summarising the literature.

<sup>187</sup>Such as poor school attainment, E. Ferri, *Growing Up in a One-Parent Family*, (1976); bed-wetting in adolescent boys and teenage pregnancy, J.W.B. Douglas, "Broken families and child behaviour", (1970) J. Roy. Coll. Physicians Lond. 203-10; delinquency, M. Rutter and N. Madge, *Cycles of Disadvantage*, (1970); long-term emotional maladjustment, J.S. Wallerstein and J.B. Kelly, *op. cit.*, n.20.

<sup>188</sup>E. Ferri, *op. cit.*, n.187; J. Eekelaar and M. Maclean, *op. cit.*, n.161.

<sup>189</sup>J.S. Wallerstein and J.B. Kelly, *op. cit.*, n.20, p. 316. See also S. Maidment, *op. cit.*, n.20, p. 173.

<sup>190</sup>M.P. Richards and M. Dyson, *op. cit.*, n.14, p. 74; S. Maidment, *op. cit.*, n.20, p. 171. D. Luepnitz's American survey, *Child Custody*, (1982), found that most children desired more contact with the non-custodial parent. See also G. McCredie and A. Horrox, *op. cit.*, n.185. The length of the visits rather than frequency seems to improve adjustment, M.P. Richards and M. Dyson, *op. cit.*, n.14, p. 52. But irregularity of visits can be very disturbing for children, A. Macleod and M. Borkowski, *Access after Divorce: The Follow-up to the Special Procedure in Divorce Project*, (1985).

Conversely, post-divorce conflict between the parents is more damaging than marital conflict.<sup>191</sup>

3.40 The implications from this research are that, although divorce law is powerless to prevent prejudice to the children caused by marital breakdown, it can help to minimise that prejudice in two ways. First, since the children are most vulnerable in the immediate aftermath of the separation<sup>192</sup> which often coincides with the timing of the divorce process, nothing should be involved in that process which makes it more difficult for the children to cope with the separation. Secondly, every effort should be made to encourage good post-divorce relationships with both parents and between the parents themselves. The Booth Committee, expressing the view that divorcing or separating parents should be encouraged and advised to maintain their joint responsibility for the children and to co-operate in this respect, recommended that provision should be made for joint statement of arrangements to be filed.<sup>193</sup> Such co-operation may only be possible where there has not been irretrievable harm to the spouses' own relationship.

3.41 Unfortunately the present law would not seem to satisfy either of these requirements. First, the divorce process itself *is* likely to exacerbate the trauma of the parental separation for the children. Perceived lack of fairness and the exacerbation of bitterness and hostility will make the divorce more difficult for the children as well as the parents. The more stressful the divorce process is for the parents the less time and ability they will have to provide emotional support for the children.<sup>194</sup> If there is conflict between the parents, the children may be encouraged to take sides, which may be very distressing for them particularly if arrangements for their future are in issue. Contested custody proceedings increase uncertainty<sup>195</sup> and increase the insecurity felt by many children following marital breakdown.<sup>196</sup> Secondly, a likely effect of perceived unfairness and the conflict and hostility engendered by the system is to poison post-divorce relationships. Parents who have been further alienated from each other by the divorce process will be less likely to be able to exercise their parental responsibilities jointly. The non-custodial parent may feel so resentful that he wants to cut himself off entirely from what has happened and so loses contact with his children.<sup>197</sup> Where children have been encouraged to take sides, their relationship with both parents may be impaired as a result of the conflict of loyalties.<sup>198</sup>

3.42 Two other legal problems which often arise on separation are likely to exacerbate the prejudice to the children caused by the marital breakdown. First, access disputes are common in the immediate post-separation period.<sup>199</sup> This will often correspond with the timing of the divorce process<sup>200</sup> and parents often use access arrangements to exhibit their hostility and vent their feelings against the other party.<sup>201</sup> This may be particularly likely where one parent cannot accept that the marriage has broken down and seeks to put pressure on the other through their children. Problems with access have been found to be more likely where custody or access has been contested.<sup>202</sup> Parental conflict about access is deeply upsetting and

<sup>191</sup>M.P. Richards and M. Dyson, *op. cit.*, n.14, pp. 18-19, D Luepnitz, *op. cit.*, n.190; S. Maidment, *op. cit.*, n.20, suggests that "welfare of the family" rather than "welfare of the child" may be a more appropriate criterion for determining issues relating to children.

<sup>192</sup>J.S. Wallerstein and J.B. Kelly, *op. cit.*, n.20.

<sup>193</sup>*Op. cit.*, Part I, n.8, para. 4.36. See also Review of Child Law: Custody (1986), Working Paper No. 96, para. 4.58.

<sup>194</sup>Children often report feelings of isolation and loneliness and complain that their parents did not tell them what was happening or provide any comfort. A. Mitchell, *op. cit.*, n.185; G. McCredie and A. Horrox, *op. cit.*, n.185; and parents often admit that they have been too preoccupied with their own feelings to be aware that their children might be upset too, A. Mitchell, *op. cit.*, n.185; J.S. Wallerstein and J.B. Kelly, *op. cit.*, n.20, report a diminished capacity to parent during the critical immediate post-separation period.

<sup>195</sup>J. Goldstein, A. Freud and A. Solnit, *Beyond the Best Interests of the Child*, (1973) recommend that custody decisions should be made with a speed which reflects the child's sense of time (pp. 40-3); see also Care, Supervision and Interim Orders in Custody Proceedings (1987), Working Paper No. 100, where a fixed time-table in custody proceedings is canvassed (paras. 4.11 *et seq.*).

<sup>196</sup>For the association between behaviour petitions and contested custody and access disputes, see para. 3.23 above; J. Eekelaar and E. Clive, *op. cit.*, Part II, n.42.

<sup>197</sup>*Ibid.* J. Eekelaar and E. Clive also found that arrangements did not provide for access in 16.3% of behaviour cases compared to 7.1% of adultery cases and 10.9% of 2 year separation cases (Table 4); there may of course be other reasons for this.

<sup>198</sup>J. Goldstein, A. Freud and A. Solnit, *op. cit.*, n.195, p. 38; M.M. Rutter, *Helping Troubled Children* (1975); G. McCredie and A. Horrox, *op. cit.*, n.185.

<sup>199</sup>G. Davis, A. Macleod and M. Murch, "Undefended Divorce: Should Section 41 of the Matrimonial Causes Act 1973 be Repealed?", (1983) 46 M.L.R. 121, 129.

<sup>200</sup>G.M. Parmiter found that 79% of petitions relying on facts (a) and (b) had been filed while the parties were living together or had been separated for less than 6 months (G. Davis and M. Murch, (1985), *op. cit.*, Part I, n.7).

<sup>201</sup>J. Eekelaar and E. Clive, *op. cit.*, Part II, n.42, para. 13.3; A. Macleod and M. Borkowski, *op. cit.*, n.190.

<sup>202</sup>In J. Eekelaar and E. Clive's survey, *op. cit.*, Part II, n.42, access was not exercised because it was refused by the custodian in 13.3% of contested cases compared to 1.8% for uncontested cases, Table 12.

worrying for the children, particularly if this continues over a long period and may permanently jeopardise the quality of the child's relationship with both parents.<sup>203</sup> Eventually, the child may feel driven to reject one parent in order to reassure the other and secure a quiet life.

3.43 Secondly, the occupation of the home before divorce may pose particular problems where there are children since the mother will often not be in a position to find alternative accommodation for herself and the children.<sup>204</sup> If she cannot or does not wish to rely on adultery or behaviour, the only other possibility is "separation under one roof". Although this may have the advantage of allowing the children to retain contact with both parents, the prolonged uncertainty and tension within the home is unlikely to be in their interests. An alternative strategy, whatever fact is relied on, is for the mother to seek an ouster injunction against the father. But, in order to obtain this remedy, the mother will be encouraged to complain about the father's behaviour and to show that the father's presence in the home is detrimental to the children.<sup>205</sup> Such allegations, whether or not an injunction is granted, can only be deeply harmful to future relationships between the parents and between the parents and the children.

(g) *Is the divorce law understandable and respected?*

3.44 In 1966 both the Archbishop's Group and the Law Commission were concerned that the hypocrisy and sometimes perjury involved in the bogus hotel cases and the like brought the sanctity of marriage, the law of divorce and the administration of justice generally into disrepute.<sup>206</sup> In 1969, it was hoped that respect for the sanctity of marriage and the divorce law could be increased by ensuring that only marriages which had genuinely broken down could be dissolved.<sup>207</sup> It has already been explained<sup>208</sup> that, despite high divorce rates, respect for the institution of marriage has not declined, although attitudes and expectations have changed. However, it has also been seen<sup>209</sup> that in reality the 1969 Act did not introduce irremediable breakdown, which in any event is not a justiciable issue, as the sole ground for divorce and that divorce law is generally impotent to prevent a determined party from obtaining a divorce, whether or not the marriage has irremediably broken down.

3.45 Without real judicial scrutiny of petitions in undefended cases,<sup>210</sup> the requirement of proving a fact in order to evidence breakdown can become a meaningless formality. Petitioners who know that their allegations are not going to be questioned unless the divorce is defended, are encouraged to exaggerate and even to commit perjury.<sup>211</sup> Those who are not prepared to do this, but whose marriages may be just as irremediably broken, do not proceed. Although the sole ground for divorce is breakdown of marriage, the availability of divorce depends on the ability to prove one of the five facts irrespective of breakdown.<sup>212</sup> Dissolution of a marriage which has broken down may be refused; conversely a divorce may be granted where a marriage has not broken down provided that one of the five facts is proven.

3.46 Perhaps most important of all, the fact need bear no relationship to the real reason why the marriage broke down. Petitioners will choose a particular fact for practical reasons or on legal advice. Some cannot even remember which fact was used.<sup>213</sup> Thus, it is clear that the law in practice is quite different from the law on the statute book. This is not simply an academic problem because the inconsistency is apparent to and causes confusion to litigants. Davis and Murch refer to "the frustration—and indeed sheer bewilderment—which flows from a law founded on principle being circumvented by procedures based on expediency."<sup>214</sup>

<sup>203</sup>A. James and K. Wilson, "Towards a Natural History of Access Arrangements in Broken Marriages", in J. Eckelaar and S. Katz (eds.), *The Resolution of Family Conflict*, (1984), pp. 436 *et seq.*

<sup>204</sup>See para. 3.36 above.

<sup>205</sup>The criteria are set out in the Matrimonial Homes Act 1983, s.1(3); see para. 5.13 below.

<sup>206</sup>*Putting Asunder*, *op. cit.*, Part II, n.6, para. 45; *The Field of Choice* (1966), Law Com. No. 6, para. 25(d).

<sup>207</sup>See, e.g., *Hansard* (H.C.), 17 December 1968, vol. 775, col. 1095 (Mr. Awdry); cols. 1117-8 (Mr. Dewar).

<sup>208</sup>Para. 2.21 above.

<sup>209</sup>Paras. 2.5, 3.15 and 3.8 respectively.

<sup>210</sup>Para. 2.8 above.

<sup>211</sup>Booth Report, *op. cit.*, Part I, n.8, para. 2.10; *A Better Way Out*, *op. cit.*, Part I, n.5, para. 50 and see, e.g., *Newman v. Newman* [1984] F.L.R. 835. In the debate on the 1969 Act it was predicted that parties would commit perjury to obtain a divorce on fact (b) rather than wait for a separation period, *Hansard* (H.C.), 12 June 1969, vol. 784, col. 1905 (Mrs. J. Knight).

<sup>212</sup>Para. 2.5 above.

<sup>213</sup>The findings of the O.P.C.S. study of the consequences of divorce (see para. 1.4) support these statements.

<sup>214</sup>G. Davis and M. Murch, (1988), *op. cit.*, Part I, n.7, p. 110.

This clear divergence between law and practice can only bring the law of divorce and the administration of justice generally into disrepute.

### Conclusions

3.47 Despite the defects highlighted above, it must be remembered that the present law is a considerable improvement on the previous position. The enactment of irretrievable breakdown as the sole ground for divorce affirms the principle that the law should not require a dead marriage to be kept in existence. Further, the introduction of the two separation facts makes it possible, for all who are prepared to wait, to bury dead marriages with less "bitterness, distress and humiliation". Even in behaviour petitions, which are generally the most acrimonious, the bitterness is likely to be less than under a pre-1971 cruelty petition.

3.48 However, the present law falls well short of the objectives it set out to fulfil. It does not, nor could it reasonably be expected to, buttress the stability of marriage by preventing determined parties from obtaining a speedy divorce. Because of the compromise nature of the 1969 Act, the benefits referred to above have been bought at the price of incoherence and increased confusion for litigants. Thus the law is neither understandable nor respected and there is evidence of not inconsiderable consumer dissatisfaction.<sup>215</sup> Attaining the aims of maximum fairness and minimum bitterness has been rendered impossible by the retention of the fault element. The necessity of making allegations in the petition "draws the battle-lines" at the outset. The ensuing hostility makes the divorce more painful, not only for the parties but also for the children, and destroys any chance of reconciliation and may be detrimental to post-divorce relationships. Underlying all these defects is the fact that whether or not the marriage can be dissolved depends principally upon what the parties have done in the past. In petitions relying on fault-based facts, the petitioner is encouraged to "dwell on the past" and to recriminate.

3.49 At the same time, the present divorce process may not allow sufficient opportunity for the parties to come to terms with what is happening in their lives. A recent study of the process of "uncoupling" points out that one party has usually gone far down that path before the other one discovers this, by which time it may be too late.<sup>216</sup> Once the divorce process has been started it may have a "juggernaut" effect, providing insufficient opportunity for the parties to re-evaluate their positions. Thus, there is little or no scope for reconciliation, conciliation or renegotiation of the relationship. It is clear that both emotionally and financially it is much less costly if ancillary matters can be agreed between the parties. Where antagonism is created or exacerbated by the petition, or their respective bargaining power distorted, the atmosphere is not conducive to calm and sensible negotiations about the future needs of the parties and their children.

3.50 Above all, the present law fails to recognise that divorce is not a final product but part of a massive transition for the parties and their children. It is crucial in the interests of the children (as well as the parties) that the transition is as smooth as possible, since it is clear that their short and long-term adjustment depends to a large extent on their parents' adjustment and in particular on the quality of their post-divorce relationship with each parent. Although divorce law itself can do little actively to this end, it can and should ensure that the divorce process is not positively adverse to this adjustment. As Lord Hailsham has said,<sup>217</sup> "though the law could not alter the facts of life, it need not unnecessarily exaggerate the hardships inevitably involved". There seems little doubt that the present law is guilty of just this.

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<sup>215</sup>*Ibid.*

<sup>216</sup>D. Vaughan, *Uncoupling* (1987).

<sup>217</sup>In the context of the financial consequences of divorce, in the Matrimonial and Family Proceedings Bill debate, *Hansard* (H.L.), 21 November 1983, vol. 445, col. 31. See also "Report of the 1969 Divorce Reform Legislation" by the Californian Assembly Committee at 4 Cal. Assembly J. 8057.



## PART IV

### ALTERNATIVE MODELS OF DIVORCE LAWS

4.1 From a perusal of the divorce laws of other countries three broad categories of divorce law emerge: those based entirely on fault; those not based on fault at all; and systems in which divorce is available on the basis of either fault or no fault, that is, mixed systems. Significantly, many countries<sup>1</sup> which originally had a fault-based law have reformed this into a mixed system and a number have now abandoned the mixed system in favour of a no-fault law.<sup>2</sup> A broad analysis of the various grounds for divorce currently applied in different countries with particular emphasis on no-fault grounds is presented below.

#### Fault grounds

4.2 There do not seem to be any countries which still have an entirely fault-based system. In mixed systems, adultery and cruelty are the most common fault-based grounds. Other grounds include the commission of specific (usually sexually related) offences, imprisonment or alcohol or drug addiction.<sup>3</sup> French law does not specify particular forms of conduct, but allows divorce *pour faute* whenever the respondent's acts constitute a serious and repeated violation of the duties and obligations of the marriage and make the continuation of married life intolerable.<sup>4</sup>

4.3 The move away from pure fault systems seems to reflect an almost universal recognition by legislators that restricting divorce to cases where a particular fault-based ground has been satisfied does not buttress the stability of marriage<sup>5</sup> and does not ensure justice between the spouses,<sup>6</sup> as was originally thought. Thus, provision is made for divorce either on the ground of breakdown or separation in addition to fault-based grounds. The retention of fault-based grounds in the mixed systems would seem to reflect the view that the law must provide a moral framework for marriage. Principally, it is thought that an innocent spouse must always be able to obtain an immediate divorce against a guilty one on the basis of the offence. The fault-based grounds define what behaviour is acceptable and what is not. However, as has been shown above,<sup>7</sup> this view is based on the dubious assumptions that commission of a particular marital offence causes breakdown of marriage and that the victim of that offence is completely innocent. It is recognition that neither assumption is necessarily correct, together with the other problems caused by fault-based grounds demonstrated in Part III above, that has prompted a number of legal systems to remove the element of fault from their divorce laws entirely.

#### No-fault grounds

##### (a) Breakdown

4.4 In many mixed and no-fault systems divorce is available where the marriage has irretrievably broken down. This is sometimes expressed in different ways, for example, "irreconcilable differences which have caused the irremediable breakdown of the marriage" (California); "the rupture of community life" (France); "conjugal relations so profoundly damaged that the common life has become intolerable" (Switzerland); "estrangement due to marital difficulties with no prospect of reconciliation" (Pennsylvania); "where the marriage relationship has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between the parties" (South Africa). It is necessary to distinguish between systems where breakdown can only be proved by one or a number of "facts" and systems where breakdown can be established in any way. In relation to the first category of cases, the "facts" are in practice effectively the grounds for divorce, as in

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<sup>1</sup>e.g. with dates of reforms in brackets: England and Wales (1969); Australia (1959); New Zealand (1920); the Netherlands (1971); Germany (1938); France (1975) (although prior to the Code Napoléon divorce had been possible on the basis of mutual consent); and a number of the states of the U.S.A. (e.g., Alabama, Connecticut, Georgia, Indiana, Mississippi, Missouri, Pennsylvania and Wyoming).

<sup>2</sup>e.g. Australia (1975), New Zealand (1980), Sweden (1974) and a number of the states of the U.S.A. (e.g., Arizona, California, Colorado, Florida, Kentucky, Michigan, Minnesota, New York, Wisconsin).

<sup>3</sup>e.g. Finland.

<sup>4</sup>French Civil Code, art.242.

<sup>5</sup>See paras. 3.6 *et seq.* above.

<sup>6</sup>See para. 3.13 *et seq.* above.

<sup>7</sup>*Ibid.*

English law, with the proviso that a divorce may be refused where there is no breakdown. The facts required to prove the breakdown may be entirely no-fault<sup>8</sup> or may include fault-based facts.<sup>9</sup>

4.5 The countries in which breakdown may be proved to the court in any way include the Netherlands, Switzerland, West Germany, Russia (in contested cases) and a number of the States of the U.S.A. including California. In some countries, the right to obtain a divorce on the basis of breakdown is subject to a defence or limitation. For example, in both the Netherlands and Switzerland it is a defence that the breakdown is attributable to the conduct of the other party.<sup>10</sup> In West Germany, even where breakdown is proved by evidence, divorce will not be granted unless the spouses have lived apart for one year<sup>11</sup> unless this would lead to unreasonable hardship to the petitioner by reason of cause emanating from the other spouse's personality. In California,<sup>12</sup> the court retains a power to refuse dissolution, although it is not clear on what grounds this discretion will be exercised. Clearly, these provisions undermine the no-fault nature and purity of the breakdown principle and tend to be the result of legislative compromises.<sup>13</sup> In fact, any attempt to adjudicate on the question whether a marriage is broken down is likely to require evidence of the history of the marriage and intrusion into the privacy of the parties' relationship.<sup>14</sup> This risks the reintroduction of the bitterness and humiliation associated with fault-based facts.<sup>15</sup>

4.6 Logically, if the fact of breakdown is not susceptible to objective determination, the requirement of breakdown is adequately satisfied by the assertion of one party that the marriage cannot be saved. If the breakdown principle is applied in this way, then there is effectively divorce by unilateral demand. This is the position in practice in California.<sup>16</sup> Although the Civil Code provides that the court must be satisfied that there are irreconcilable differences which have caused the irremediable breakdown of the marriage,<sup>17</sup> in fact all the court can generally do is to hear the testimony of one spouse that the marriage cannot survive and if it detects any hesitation adjourn the case for conciliation.<sup>18</sup>

4.7 Thus, it would seem that although breakdown is a widely accepted *principle*, experience elsewhere bears out the Commission's earlier view that it is not a justiciable issue.<sup>19</sup> Any attempt at adjudication is likely to reintroduce an element of fault or at least of bitter recrimination. A logical application of the breakdown principle requires divorce on unilateral demand, at least if that demand is persisted in for any length of time. France, for example, allows divorce by unilateral demand provided this is accepted by the other, as part of a mixed system.<sup>20</sup> No doubt, divorce on immediate unilateral demand has not generally happened because the breakdown principle has been acceptable so long as it appears to retain some control for the State; legislatures have not been prepared to accept a total dejurification of divorce or to abandon any attempt to protect a non-consenting party.

#### (b) Separation

4.8 Separation grounds feature in most mixed systems. The period of separation required varies from one year<sup>21</sup> to ten years<sup>22</sup> and may depend upon whether there is consent.<sup>23</sup> Of

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<sup>8</sup>e.g. Australia, New Zealand, France.

<sup>9</sup>e.g. England and Wales, Canada.

<sup>10</sup>Although, at least in Switzerland, the court will no longer invoke this defence of its own motion; J.M. Grossen, *op. cit.*, Part II, n.42.

<sup>11</sup>Breakdown is conclusively proved by one year's separation with consent or 3 years' without consent.

<sup>12</sup>California Civil Code, s.4506.

<sup>13</sup>W. Müller-Freienfels, "The Marriage Law Reform of 1976 in the Federal Republic of Germany", (1979) 28 I.C.L.Q. 184.

<sup>14</sup>This is what seems to be required by the German legislation, except in the cases where there is a statutory presumption of breakdown. See *ibid.*

<sup>15</sup>*Ibid.* This was one of the Law Commission's objections to the recommendation of the Archbishop's Group in 1966: see *The Field of Choice* (1966), Law Com. No. 6, para. 59.

<sup>16</sup>In Switzerland, very little evidence is required to satisfy the court, provided that the action is undefended, J.M. Grossen, *op. cit.*, Part II, n.42.

<sup>17</sup>California Civil Code, s.4506.

<sup>18</sup>S.W. Reppy, "The End of Innocence: Elimination of Fault in Californian Divorce Laws", (1970) 17 U.C.L.A. L.R. 1306.

<sup>19</sup>*The Field of Choice* (1966), Law Com. No. 6, paras. 58(i) and 71 *et seq.*

<sup>20</sup>So complex that it has been described as divorce "à la carte", see J.M. Grossen, *op. cit.*, Part II, n.42.

<sup>21</sup>e.g. Canada.

<sup>22</sup>As in Belgium.

<sup>23</sup>As in England and Wales, Scotland and West Germany.

greater significance, however, is that a number of jurisdictions have now introduced a separation period as the sole ground for divorce<sup>24</sup> or as the sole method of proving breakdown.<sup>25</sup>

4.9 There are a number of obvious advantages to a sole separation ground.<sup>26</sup> Separation is a pure no-fault ground which is morally neutral as between the parties and, unlike actual breakdown, is susceptible to objective proof without undue difficulty. Once the parties have been separated for the requisite length of time, either party can choose to petition and thus the ability to obtain a divorce cannot become a “bargaining chip”. This is not necessarily an advantage if the parties’ bargaining power is otherwise grossly unequal. However, where separation is the sole ground, the divorce law is simple and easily understood and the divorce process can be cheap and unacrimonious.

4.10 There are two main disadvantages of a sole separation ground. First, some find it intolerable that in a case of extreme cruelty the innocent spouse should have to wait for a dissolution. Secondly, the ability of a spouse to obtain a divorce depends on either her ability or her spouse’s willingness to effect a separation in the first place. In times or places of housing shortage, particularly in the rented sector, this clearly operates differently as between different socio-economic groups and as between husbands and wives. Thus, spouses with dependent children without alternative accommodation<sup>27</sup> are prejudiced and the ability to separate becomes a “bargaining chip”.<sup>28</sup> The Australian and New Zealand legislation does address the problem of practical inability to separate by providing for separation under one roof.<sup>29</sup> The case law<sup>30</sup> makes it clear that the criteria to be satisfied are much less stringent than those in the English cases.<sup>31</sup> Although such a provision may alleviate some hardship, it is hardly ideal for parties, or for their children, to be forced to continue to live under the same roof until the separation period has elapsed or for their behaviour towards each other to be conditioned by the requirements of the law.<sup>32</sup>

#### (c) *Mutual consent*

4.11 A number of jurisdictions have introduced mutual consent as a ground for divorce.<sup>33</sup> Some countries put limitations on the availability of this ground by restricting its use at the beginning of the marriage<sup>34</sup> and by providing a period of waiting before the decree becomes effective.<sup>35</sup> In Sweden, if there is mutual consent, there is a waiting period of six months where either of the parties has legal custody of a child under 16, unless they have already lived apart for two years. In some countries mutual consent reduces the length of the separation period.<sup>36</sup>

4.12 Although divorce by mutual consent obviates the need for a separation period and enables a divorce to be obtained in a morally neutral way without any adjudication by the court,<sup>37</sup> it is not without its problems. Apart from the difficulty of ensuring that consent is freely given, the party who does not need the divorce can use his right to withhold consent as a “bargaining chip”<sup>38</sup> in negotiations about finance and children. In some countries, the court must also be satisfied that those matters have been agreed and has very limited powers to supervise such agreements, even in the interests of the children. In any event, it is quite clear that mutual consent cannot be (and is not in any jurisdiction) the only ground for divorce.<sup>39</sup> The use made of consent grounds is therefore crucially influenced by what is available without

<sup>24</sup>e.g. Maryland (1 year); Louisiana (1 year); Arkansas (3 years); North Carolina (1 year); Ohio (1 year); Vermont (6 months).

<sup>25</sup>e.g. Australia (1 year); New Zealand (2 years).

<sup>26</sup>*A Better Way Out*, *op. cit.*, part I, n.5, para. 35 *et seq.*

<sup>27</sup>See para. 2.12 above.

<sup>28</sup>See para. 3.20 above.

<sup>29</sup>Australia Family Law Act 1975, s. 49(2).

<sup>30</sup>H. Finlay, *op. cit.*, Part III, n.72.

<sup>31</sup>See, e.g., *Mouncer v. Mouncer* [1972] 1 W.L.R. 321.

<sup>32</sup>For more detailed discussion of this point see para. 5.11 below.

<sup>33</sup>e.g. U.S.S.R. (where this is the most common ground for divorce); California; Colorado; Florida; Oregon; Washington (as alternative to breakdown); Connecticut; France and Belgium (where there are mixed systems).

<sup>34</sup>e.g. France (first 6 months); Belgium (first 2 years, art. 276, or if either spouse is under 23, art. 275).

<sup>35</sup>France (3 months’ reflection between first and second hearing, art. 231); Belgium (1 year dating from appearance).

<sup>36</sup>e.g. England and Wales (from 5 years to 2 years); Missouri (2 years to 1 year); Germany (3 years to 1 year).

<sup>37</sup>Other than to verify the reality of the consent.

<sup>38</sup>See para. 3.20 above.

<sup>39</sup>For more detailed discussion, see para. 5.17 below.

consent. In France, for example, the alternatives are unilateral demand accepted by the other, fault, and prolonged separation or mental disorder (the last known as “rupture of community life”), but the financial consequences are different for each. In Sweden, where the other party does not consent or there is a minor child, there is a six month “reconsideration period” from the date of the application for the divorce, unless the parties have lived apart for two years. At the end of that time, the divorce is obtainable by either party.

(d) *Unilateral demand*

4.13 Sweden is the only European country which provides for *either* spouse to terminate the marriage at will without proving any ground, albeit after a period of reconsideration in many cases. However, we have seen that divorce on the basis of breakdown is virtually indistinguishable from divorce by unilateral demand where breakdown is proved by the statement of one party that the marriage is no longer viable.<sup>40</sup> Divorce on unilateral demand has the great merits of simplicity, moral neutrality and avoiding bitterness. Swedish lawyers have apparently found that since the reforms there has been less acrimony in relation to the consequences of divorce.<sup>41</sup>

4.14 There are two main criticisms. The first is that it represents the abdication of the State from any responsibility for determining whether a divorce should be granted. Yet, as we have seen, this may be the only logical application of the breakdown principle, which has been so widely accepted as the basis of modern divorce law. If breakdown is not justiciable and any fact chosen to prove breakdown is arbitrary, the only true judges of whether the marriage can continue are the parties themselves.<sup>42</sup> This criticism also fails to address the difficult question of the nature of the State’s interest. Once breakdown is accepted as the proper rationale for divorce, it is difficult to devise any logical basis for protecting a spouse who does not wish to be divorced even though the marriage has clearly broken down. The State’s real interest may then be in protecting that spouse’s financial position (and with it that of the State itself) and the interests of any minor children.

4.15 A second criticism is that if divorce is available immediately on unilateral demand then parties may be tempted to divorce without having considered the implications thoroughly. The mere fact of requiring a court hearing<sup>43</sup> does not necessarily solve this problem, as the court will not always be able to identify a possibility of reconciliation. The Swedish requirement that in cases involving minor children or lack of consent, the divorce is delayed for a six month “reconsideration period” (unless there has been a two years’ separation) is clearly designed to meet the problem of precipitate divorce, although it may be thought too limited.<sup>44</sup> It may, however, be more effective to use the divorce *process*, rather than the ground for divorce, as a means of identifying cases where there is a realistic possibility of reconciliation.

4.16 Divorce by unilateral demand of either party must be clearly distinguished from what may be called divorce by repudiation, where only one party (invariably the husband) is allowed to divorce the other unilaterally. The most important example of such divorce is the classical Muslim Talaq which is still available to husbands in some Muslim countries either in its original<sup>45</sup> or modified<sup>46</sup> form.

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<sup>40</sup>As, e.g. in California, see para. 4.6. above.

<sup>41</sup>See L. Tottie, “The Elimination of Fault in Swedish Divorce Law” in J. Eckelaar and S. Katz (eds.), (1984), *op. cit.*, Part II, n.55, pp. 131 *et seq.*

<sup>42</sup>The Field of Choice (1966), Law Com. No. 6, para. 58(i).

<sup>43</sup>As in California.

<sup>44</sup>A. Lödgberg, “The Reform of Family Law in the Scandinavian Countries”, in A.G. Chloros (ed.), *The Reform of Family Law in Europe*, (1978), pp 201–26.

<sup>45</sup>e.g. Saudi Arabia, most of India.

<sup>46</sup>e.g. Pakistan, where a Talaq does not become effective until 90 days after it has been notified to the relevant administrative council.

## PART V

### THE OPTIONS FOR REFORM

5.1 Just as in 1966 the Law Commission's "point of departure" in setting out the various options for reform was "the hard facts about social habits and public opinion in this country at the present time",<sup>1</sup> so today there are various considerations which limit the field of choice for reform. It is helpful to state these "hard facts", some of which have not changed since 1966, at the outset of any discussion about possible reforms.

5.2 First, as in 1966 and despite increased public concern about marriage and the family, it is unlikely that a system which made divorce substantially more difficult to obtain would be acceptable. Although many of the "consumers" interviewed by Davis and Murch<sup>2</sup> thought that in general it was too easy to obtain a divorce, few petitioners thought that it had been too easy for them personally. Often the view that divorce should be more difficult is based on the highly questionable assumption<sup>3</sup> that more restrictive grounds for divorce will buttress the stability of marriage and lead to a reduction in the rate of marital separation and breakdown. Such a reduction is far more likely to stem from a change in individual attitudes and expectations than from a change in the law. There are some indications, including the levelling-off of divorce rates in recent years,<sup>4</sup> that such a change is now taking place.

5.3 In any event, as was recognised in 1966, many couples will separate when their marriage has broken down whether or not divorce is obtainable. Increased social acceptability of marital breakdown and extra-marital cohabitation and child-rearing, along with many other factors discussed in Part II, have made this more likely. This fact serves to reinforce the point that more restrictive divorce laws would not buttress the stability of marriage. Equally, given the present state of our law and practice, we have probably already reached the point where further changes in divorce laws are unlikely to lead to an increase in the rate of divorce itself. What would change is not the numbers of divorces but the way in which those same divorces would take place.

5.4 Secondly, as in 1966, the expense (both public and private) of any proposed divorce law is a crucial factor. We have already seen that the prohibitive cost of divorce legal aid led to the extension of the special procedure, which has had such a radical effect on the divorce process. Present Governmental consideration of procedural reform and conciliation services is very much dependent on the cost-effectiveness of the proposals. Thus, it is unrealistic to make any proposal for reform of the ground for divorce which would involve increased public resources, for example, by requiring more judicial time. No doubt, public opinion would also be unwilling to see more money spent on the actual divorce process, although increased expenditure on conciliation and counselling services would probably be welcomed.

5.5 Having set out the constraints upon any proposals for reform, it is expedient to mention the two models for divorce law which would not seem to be even worthy of consideration. First, any reformed system should not involve the use of fault either as a ground or as evidence of breakdown. This is consistent with the worldwide retreat from fault-based divorce<sup>5</sup> and clearly follows from the "hard facts" above and from the analysis of the present system in Part III above. There we saw that any requirement of proving fault brings with it the risk of unfairness and bitterness, is not conducive to the attainment of sensible post-divorce arrangements and therefore increases the risk of prejudice to the children. Although some improvement might be made if the alternative separation facts were reduced to a common and much shorter period of, say, one year,<sup>6</sup> these criticisms would remain largely unaffected.

5.6 Secondly, the rejection in 1969 of breakdown with inquest as the ground for divorce must be clearly affirmed. Apart from impracticality in terms of resources, the point made in 1966 that breakdown is not a justiciable issue has been widely recognised.<sup>7</sup> Any attempt to

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<sup>1</sup>The Field of Choice (1966), Law Com. No. 6, para. 52.

<sup>2</sup>G. Davis and M. Murch, (1988), *op. cit.*, Part I, n.7.

<sup>3</sup>See paras. 3.6-3.8 above.

<sup>4</sup>These are set out in Appendix A.

<sup>5</sup>See paras. 4.2 and 4.3 above.

<sup>6</sup>Which would provide grounds very similar to those recently introduced in Canada.

<sup>7</sup>See, e.g. Law Reform Commission of Canada, (1975), *op. cit.*, Part II, n.11 and Ormrod J. in *Pheasant v. Pheasant* [1972] Fam. 202.

adjudicate on breakdown is liable to reintroduce the problems of fault or at least to keep open rather than to heal old wounds. Of course, as in 1966, the rejection of breakdown with inquest does not preclude adoption of the *principle* of breakdown as the ground for divorce, with provision that that breakdown be established in one of the ways discussed below. In effect, the method of establishing breakdown then becomes the ground for divorce.<sup>8</sup> However, there may be good reasons for stating the breakdown principle as the ground for divorce. These will be discussed below<sup>9</sup> and in the meantime it will be assumed that the principle is to be retained.

### Separation as a sole ground

5.7 Separation, which is now the sole ground for divorce in Australia and New Zealand, is an obvious candidate for consideration and has a number of supporters in this country, most notably The Law Society who favour one year as the requisite period.<sup>10</sup>

5.8 The broad advantages of separation as a sole ground have been rehearsed above.<sup>11</sup> In particular, it has none of the disadvantages associated with fault-based facts and has the important merit of simplicity. The period of separation would seem to be a natural restraint against precipitate divorce and to provide a transition period in which post-divorce arrangements could be worked out with appropriate help and support.

5.9 However, the problems of introducing a sole separation ground in this country are often seriously underestimated. First, there is the theoretical problem that separation for a particular period cannot seriously be regarded as irrebuttable evidence of breakdown. A marriage may have broken down even though the parties are still living together and conversely a marriage may still be viable although the parties are living apart. Even if living apart is taken to be a good indicator of breakdown for most cases,<sup>12</sup> it is impossible to identify what particular period of separation clearly indicates breakdown. This will vary from marriage to marriage. Thus, any period chosen is entirely arbitrary and in reality based on a policy decision as to how quickly it should be possible to obtain a divorce, or how long it should take the parties to adjust, rather than bearing any relationship to the question of breakdown. This is well illustrated by the way in which the acceptable period of separation has reduced over the years. Thus, Mrs. White's abortive Private Member's Bill in 1951 proposed seven years' separation; by 1969, five years without consent and two years with consent were approved by Parliament and today proposals tend to be for one year.<sup>13</sup> A similar trend is discernible in other countries.<sup>14</sup> In *The Field of Choice*, however, it was pointed out that the period would have to be as little as six months if divorce were not to become substantially more difficult than it was even under the old law.<sup>15</sup> This would apply to some particularly deserving cases.

5.10 Hence, the main practical problem of a sole separation ground is that often those who most need a divorce are unable to effect a separation. The available evidence on the use of the various facts shows that the separation facts are used least by women with dependent children in lower socio-economic groups.<sup>16</sup> As suggested above,<sup>17</sup> this does not necessarily show greater marital misconduct among their husbands, but simply the inability to separate from their husbands because of lack of alternative accommodation. The husbands may be either unwilling or unable to leave. This situation is exacerbated at present where local authorities are either unable or unwilling to rehouse parties until there is a divorce decree or ouster injunction. Paradoxically, the advent of secure tenancies in the public sector (to which there are otherwise important social advantages) has made it more difficult for local authorities to reallocate the tenancy between them. Even if this could be changed, the general housing shortage<sup>18</sup> is likely to prejudice certain categories of spouses far more than others and thus to cause a sole separation ground to work in a discriminatory fashion.

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<sup>8</sup>See paras. 3.13, 3.15 and 4.5 above.

<sup>9</sup>See para. 5.29–5.30 below.

<sup>10</sup>*A Better Way Out*, *op. cit.*, Part I, n.5, para. 52.

<sup>11</sup>See para. 4.9 above and *ibid.*, paras. 39 *et seq.*

<sup>12</sup>*A Better Way Out Reviewed*, *op. cit.*, Part III, n.57, para. 30.

<sup>13</sup>*Ibid.*, paras. 35 *et seq.*

<sup>14</sup>e.g. in the Netherlands.

<sup>15</sup>*The Field of Choice* (1966), Law Com. No. 6, para. 76.

<sup>16</sup>See para. 2.11 above.

<sup>17</sup>See para. 2.12 above.

<sup>18</sup>It has been suggested that this is much more severe in England and Wales than in Australia and New Zealand. Thus, it is misleading to draw close analogies with those systems, S.M. Cretney, *op. cit.*, Part II, n.67, p. 217.

5.11 There are two possible responses to this problem. One is to have separation under one roof, as provided for in the Australian and New Zealand legislation. However, in cases of cruelty it is intolerable to require the parties to remain in the same dwelling and in any case it can hardly be desirable to encourage such an unnatural situation in which the spouses' everyday conduct has to be conditioned by what the law dictates. There are also problems of proof. Under present English case law<sup>19</sup> it is theoretically difficult to establish separation under one roof. Although this could be changed by statute,<sup>20</sup> it is highly likely that any new definition would soon give rise to difficulties which would have to be resolved by litigation.<sup>21</sup> No doubt a body of case law would soon be built up, which would add undesirable complexity to divorce law and be of benefit only to lawyers. If it became necessary to check whether the requirements of separation under one roof were fulfilled by oral hearing in every case,<sup>22</sup> then this would involve additional expense, which could not easily be justified. On the other hand, if the parties' assertion that they have been living separately under one roof is to be accepted without any form of verification, the whole requirement of one year's separation becomes something of a charade.

5.12 Moreover, courts will not generally approve the arrangements made for the children<sup>23</sup> if the parties are still living under one roof. Sometimes a petitioner can be caught in a vicious circle, where it is impossible to get a divorce while living in the same house, but impossible to resolve what is to happen to the house without one. In any event, it cannot be in the children's interests to live with the tension and uncertainties created when hostile parents have to lead separate lives under one roof or, perhaps worse, for relatively amicable parents to have to take care that their lives are indeed separate. All of this is likely to exacerbate the trauma of the marital breakdown for the children and to delay the time when their parents can begin to think constructively about their relationships with one another and with their children in the future.

5.13 A second answer is for the courts to resolve any dispute about the occupation of the matrimonial home at the outset of the separation period. Power to do this already exists under the Matrimonial Homes Act 1983.<sup>24</sup> The criteria require the court to make such order as is just and reasonable in the light of all the circumstances, including the conduct of the parties, their respective needs and financial resources and the needs of any children.<sup>25</sup> This inevitably requires the court to consider the parties' marital conduct and the reasonableness of the desire of either to live a separate life.<sup>26</sup> In effect, therefore, considerations of fault are reintroduced, but at the point of separation rather than divorce.

5.14 There is no easy solution to this problem. If considerations of conduct are relevant at the point of separation, a spouse may be driven to make hostile allegations simply in order to bring it about. If they are not, the courts may well be reluctant to order one spouse to leave the matrimonial home so long before there is any question of divorce. There is always a risk that such an order might be thought prejudicial to the eventual property settlement.<sup>27</sup> It is better for all concerned if the issue can be decided in that context rather than as an artificial precondition to the availability of the divorce itself.

5.15 Indeed, separation itself is not as simple a concept as is often assumed. There is already English case law<sup>28</sup> on the mental element required for separation. No doubt the case law would rapidly increase in volume if separation became the sole ground for divorce, with consequent increase in complexity. Even if it is clear what is required, there is ample scope for the parties to present perjured evidence about the date of their separation if they do not want to wait for the requisite period. This would be undetectable unless corroborative evidence were required from witnesses. Furthermore, if the test of separation is too strict, it is difficult for the couple to reconsider the position or attempt a reconciliation during the period. If it is too weak, it is of little value as a test of whether the marriage has indeed broken down.

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<sup>19</sup>e.g., *Mouncer v. Mouncer* [1972] 1 W.L.R. 321.

<sup>20</sup>*A Better Way Out Reviewed*, *op. cit.*, Part III, n.57, para. 59, and see Australian Family Law Act 1975, s.49.

<sup>21</sup>This has been the case in Australia, see H. Finlay, *op. cit.*, Part III, n.72.

<sup>22</sup>Apparently, some registrars under the present system take the view that separation under one roof can only properly be established by oral hearing.

<sup>23</sup>Under the Matrimonial Causes Act 1973, s.41, see para. 3.37 above.

<sup>24</sup>S.1(2).

<sup>25</sup>S.1(3).

<sup>26</sup>*Richards v. Richards* [1984] A.C. 174.

<sup>27</sup>Hence courts will not grant ouster orders in such cases; *Hall v. Hall* [1971] 1 W.L.R. 404; *Bassett v. Bassett* [1975] Fam. 76, 82 and 83; and *O'Neill v. Williams* [1984] F.L.R. 1.

<sup>28</sup>*Santos v. Santos* [1972] Fam. 247.

5.16 Thus, in a number of ways a sole separation ground falls short of the objectives of a good divorce law.<sup>29</sup> In particular, it might not work fairly between the spouses and would discriminate against particular categories of spouse; it would not necessarily ensure that dead marriages would be buried where it was not possible to effect a separation; it would not be as simple and easily understandable as would appear; there would be too much scope for abuse and perjury; there is a considerable risk that issues of fault, with their attendant risks of unfairness, bitterness and humiliation, would reappear but at the point of separation rather than divorce; it could prejudice rather than encourage reconciliation; and above all it could prejudice rather than promote the interests of the children.

### **Mutual consent**

5.17 As was seen in Part IV, a number of jurisdictions allow divorce by consent, although in no case is this the sole ground for divorce. It might be thought that since 99 per cent of divorces in England and Wales are undefended, then there would be very few cases in which divorce by consent would be unavailable. However, it is quite clear that at least some of those who do not defend a divorce would not be prepared to consent either because they want to remain married<sup>30</sup> or simply on principle or out of spite. Thus, it would clearly be necessary to provide alternative grounds for cases where consent could not be obtained. Although there are grave objections to separation as the sole ground for divorce, it might be more acceptable if it were just a residual ground for non-consensual cases. On the other hand the cases in which a separation ground causes the greatest difficulty would be the very cases in which consent was not forthcoming.<sup>31</sup> The alternatives of fault and breakdown with inquest have already been rejected as unworkable. If one of the solutions discussed below is adopted, there would be no need for a separate ground of consensual divorce.

5.18 There are other problems with consensual divorce. There is the obvious difficulty of ensuring that consent has been freely given. At the moment, the respondent's signature is sufficient. However, it might be thought that if consent became a ground for divorce without any need for a separation period, an oral hearing, or perhaps independent legal advice, would be required for voluntariness to be ensured. This would clearly involve extra expense, which cannot easily be justified. A second major problem is that where one party wants a divorce more than the other, the latter is given an unfair advantage in negotiations about children, finance and property. This problem of the law providing "bargaining chips" in a capricious manner has already been noted in relation to the present law. This would be exacerbated if divorce by consent became the main ground for divorce because in every such case one party would have the power to veto the divorce. Clearly, the size of this advantage would depend on what other grounds for divorce were available. Thirdly, if consensual divorce were available immediately, there could be a serious danger of precipitate petitioning although this could be alleviated by providing for some period for reflection.<sup>32</sup>

5.19 Overall, it must be concluded that although it is now considered beneficial to encourage the spouses to agree on the grant of the divorce decree as well as on all other issues<sup>33</sup> and to remove the adversary nature of the present divorce law,<sup>34</sup> this would not best be achieved by making consent a ground for divorce.

### **Immediate unilateral demand**

5.20 It has already been stated that a logical application of the breakdown principle suggests that divorce should be granted on the unilateral statement of one party that the marriage cannot be saved. In practice, divorce under the adultery and behaviour facts can bear a strong resemblance to divorce by immediate unilateral demand, given the disincentives to defending and the lack of serious questioning of the petitioner's allegations. In some cases the main difference is that the petitioner has to go through a number of

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<sup>29</sup>As set out in para. 2.3 above; see also para. 3.4.

<sup>30</sup>And are not defending because they have no defence to a fault-based fact or because the cost is prohibitive and the exercise likely to be pointless.

<sup>31</sup>Principally cases where a wife with dependent children cannot effect separation because of lack of alternative accommodation and whose husband is neither prepared to move out nor to consent to a divorce.

<sup>32</sup>As in Sweden, see para. 4.12 above.

<sup>33</sup>See in particular the terms of reference of the Booth Committee; Part II, n.27 above.

<sup>34</sup>e.g., by providing for a joint petition as recommended by the Booth Report, *op. cit.*, Part I, n.8, para. 4.10, and see para. 5.51 below.



procedural "hoops" before obtaining his divorce, none of which generally involve any real test as to whether the alleged fact is established or the marriage has broken down. Nonetheless, it is unlikely that public opinion would accept a simple system of immediate divorce on unilateral demand. No doubt this is because the present system appears to provide some moral basis for divorce and some test of breakdown. We cannot know how many people are in fact inhibited by the difficulties of establishing the required facts, even if those difficulties may be more apparent than real.

5.21 Apart from the problem of general acceptability, immediate divorce on unilateral demand suffers from two serious defects. First, it provides no safeguard against precipitate petitioning. There is no incentive for a spouse to try to solve marital problems before requesting a divorce and once this has been done, there is no opportunity for him to reflect upon whether this is really what he wants. Secondly, immediate divorce on unilateral demand does not provide any transition period for the family to adjust to the marital breakdown and to work out post-divorce arrangements, because the actual divorce would take place prior to and entirely separately from any agreement or adjudication on the consequences of divorce. The final option discussed below is an attempt to solve these particular defects, consistently with the broad objectives of divorce law which have been accepted since 1969.

#### A process over time

5.22 We saw earlier<sup>35</sup> that two aspects of the criteria of a good divorce law have been particularly emphasised in recent years. These are, first, the importance of promoting co-operation between the parties and, secondly, the fact that divorce must be seen as a process rather than a single event. Most of the options discussed above<sup>36</sup> treat the actual divorce as separate from its consequences, whereas it would seem preferable to treat the *process* of divorce with all its repercussions as a whole. This would enable appropriate legal and other support to be given to the parties during the transition from married to non-married life. As others have pointed out,<sup>37</sup> a process which both enables the parties to resolve the practical consequences of their decision before it is made final, and reduces the need for them to make hostile allegations against one another, may increase the chances of a reconciliation between them even though it is not the express objective of the system to do so.

5.23 These aims could be achieved by providing for a period of time (referred to as the transition period) in which this transition can take place and during which the parties would be given every encouragement to reach agreement on all aspects of the divorce, failing which these would be decided judicially. The divorce would not be available until the end of the period. Thus, during the whole transition period the parties would have the opportunity to reflect on whether they really wanted a divorce. This would be particularly valuable as they would be able to reassess their decision as all the repercussions of divorce became clear to them. Under the present system, it is often too late to go back by the time that the full implications have become apparent; issues relating to the children are often resolved, and issues of finance and property can only be resolved, after the divorce nisi has been obtained.

5.24 The underlying principle, which could be stated in the legislation, would remain the irretrievable breakdown of the marriage, but there would be no need to establish any particular basis for the divorce, which would be available as of right at the end of the transition period, subject to a number of possible conditions to be discussed below. Thus, all the negotiations about children, finance and property could take place without any concern as to whether the ground could be made out and without the background of any allegations.

5.25 The main advantage of such a scheme is that it combines the logical position that the only true test of breakdown is that one or both parties consider the marriage at an end, with the need to provide a period for reflection and transition. Once it is accepted that the present system provides neither a real test of breakdown nor any real obstacle to divorce for most people, then the proposed procedure can be seen as an improvement. Because divorce would

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<sup>35</sup>See paras. 3.2 and 3.3 above.

<sup>36</sup>With the possible exception of a sole separation ground which might provide a natural transitional period.

<sup>37</sup>L. Parkinson, "Conciliation: Pros and Cons", (1983) 13 Fam. Law 22; L. Parkinson, *op. cit.*, Part III, n.13. See also Consultative Document of the Home Office Working Party on marriage guidance, *Marriage Matters* (1979), paras. 7.10 and 7.11.

not be available immediately, it would not be “too easy”.<sup>38</sup> Attention throughout the process would be focussed on the continuing obligations of the parties in respect of their children and financial arrangements. The object would be to enable both parties to maintain their relationship with their children, while making the necessary arrangements for the future in as civilised a manner and timespan as can be achieved.

(a) *The length of the transition period*

5.26 Before considering whether the right to a divorce at the end of the transition period should be circumscribed in any way, two preliminary questions need to be considered. First, how long should the transition period be? It seems clear that anything longer than one year would make divorce substantially more difficult than it is at present.<sup>39</sup> Thus, the real issues are whether one year is too long and whether some shorter period such as six or nine months would be adequate.

5.27 It might be thought, having regard to the arguments against a sole separation ground set out above,<sup>40</sup> that one year would be too long. However, it is important to appreciate that under a one year separation ground the actual process of divorce would only begin one year after separation, whereas under the current proposal the whole process would be completed one year from when it was initiated by one or both parties filing some form of document.<sup>41</sup> Under the current system, although the median time from petition to decree absolute for fault-based facts is seven to eight months, quite often questions of maintenance and property adjustment are still outstanding after the divorce. It is likely that under the proposed scheme ancillary matters would be decided more expeditiously as they would be the focus of attention of the parties, their advisers and the court<sup>42</sup> from the date of initiation. Thus, a transition period of one year would be unlikely to involve any substantial additional delay for most spouses.

5.28 However, it might be thought that if a shorter period were adequate it would be preferable. It is suggested that six months would not be sufficient for the parties to reflect, adjust to the new situation and sort out the consequences of divorce. Indeed, public opinion would probably consider that such a short period would make divorce far “too easy”. It should be emphasised that this proposal is not designed to make divorce more freely available, as it is already available to all who seriously desire it, but rather to focus the attention of the law and the parties upon different and more relevant issues than those required at present. Nevertheless, within those who divorce under the present law there is a proportion, perhaps substantial, for whom a long delay would present a serious risk of hardship. There will also be some couples who live apart for a considerable period before one or both decide to seek a divorce. Nine months would probably serve both as a safeguard against hardship and as an appropriate period of transition for all. Consideration might, however, be given to providing a shorter period for those who have been separated for some time when proceedings are begun.

(b) *Retention of the principle of breakdown*

5.29 The second question to be resolved is whether irretrievable breakdown should remain the basic ground for divorce although no court would be asked to decide whether breakdown had in fact occurred. The *principle* of irretrievable breakdown has, as seen in Part IV above, gained wide acceptance. None of the criticism levelled at the present law or its operation in Part III above is directed at the breakdown principle, except that in conjunction with fault-based facts it causes confusion. This problem is clearly attributable to the use of fault-based facts and not to the breakdown principle itself. However, if breakdown remains the *ground*, it may still provoke resentment from those who believe that the marriage has not irretrievably broken down but are unable to prevent the divorce. It may be thought that as the proposal under discussion would provide for divorce automatically at the end of the process period (subject to the possible conditions to be discussed below) the retention of the breakdown principle as the ground for divorce would be redundant.

<sup>38</sup>In fact, depending on the period which is chosen, some may have to wait a little longer for a divorce than under the present system, although all ancillary matters would be finalised during this time, which is not always the case under the present system.

<sup>39</sup>See para. 5.2 above and *A Better Way Out Reviewed*, *op. cit.*, Part III, n.57, para. 40.

<sup>40</sup>See paras. 5.9–5.16 above.

<sup>41</sup>See para. 5.52(i) below.

<sup>42</sup>The role of the courts in this procedure will be discussed below.

5.30 However, there is a case for positively asserting that divorce is for marriages which have irretrievably broken down. Even if the law is unable to adjudicate on whether, why or how breakdown has occurred, it should make clear that the community expects those marriages which are viable to continue and only those which have died to be buried. Despite recently announced changes in taxation, there are still some happily married couples who would be financially better off unmarried. If it is thought right to impose, for example, fiscal disadvantages upon marriage, it may also be thought right to deter those who would otherwise wish to remain married from divorcing simply in order to obtain the fiscal advantages it brings. The point could be brought home to parties by including in the document initiating the divorce process a statement, to be signed by one or both parties, that the marriage has irretrievably broken down and is no longer viable and requiring this to be repeated at the end.<sup>43</sup>

(c) *Possible conditions for the grant of the divorce at the end of the transition period*

(i) *Reconciliation, counselling or conciliation*

5.31 Since one of the avowed aims of the "process" proposal is to provide a period of reflection, it might be thought that the law should require that the parties seek professional counselling to ensure that every possibility of reconciliation has been explored. We have already seen that the present provisions requiring solicitors to certify whether or not they have discussed reconciliation with their client and allowing the court to adjourn where there is a possibility of reconciliation have not achieved their object. The only practical way to ensure that parties do seek appropriate counselling would be to make the grant of the decree conditional upon their so doing.

5.32 However, there is good reason to think that such a condition would be counter-productive and lead to an ineffective use of resources. The evidence presented to the Archbishop's Group in 1966 that attempts at reconciliation were rarely successful unless they were voluntarily sought<sup>44</sup> seems to be equally applicable today.<sup>45</sup> Although in Part III above some doubt was cast on the conventional wisdom that by the time the parties have sought legal advice or taken legal steps it is usually too late for reconciliation,<sup>46</sup> this is clearly true in the majority of cases. To insist on reconciliation attempts in these cases would be to impose an unnecessary burden on the parties and to waste scarce and valuable counselling resources. The point made by the Law Commission in 1966 that "The saving even of a very small number of marriages is worthwhile, provided that it is not accompanied by a disproportionate waste of time and effort in a great many others"<sup>47</sup> applies equally today. Above all, there will always be some cases, for example of extreme cruelty, where it would be wrong to put any pressure upon the aggrieved spouse to attempt a reconciliation. Of course, rejection of the idea of requiring reconciliation counselling does not mean that the parties should not be encouraged to seek professional help to save their marriage.<sup>48</sup>

5.33 Counselling with a view to reconciliation should be clearly distinguished from two other types of help. Divorce is for most people a difficult and painful process during which they may well need professional help and support. Whether such a service should be made available is not a matter for law reform. More closely connected with the present proposal is the question of conciliation or mediation, the object of which is to enable the parties to reach their own agreements about the consequences of their separation and divorce. The conditions and procedure which we describe below should give both the opportunity and incentive for such conciliation to take place but we would not suggest that it be made a mandatory requirement.<sup>49</sup>

(ii) *Arrangements for the children*

5.34 Under the present system, section 41 of the Matrimonial Causes Act 1973 provides that a decree absolute may not be granted where there are certain minor children of the family

<sup>43</sup>It is not thought, however, that it would be necessary to retain the Queen's Proctor to investigate this; the sanction of criminal liability for perjury would suffice to achieve the limited policy objective suggested here.

<sup>44</sup>*Putting Asunder*, *op. cit.*, Part II, n.6, para. 76.

<sup>45</sup>See Booth Committee, *op. cit.*, Part I, n.8, para. 4.58. It is noteworthy that the requirement of compulsory mediation was abolished in Sweden.

<sup>46</sup>See para. 3.10 above.

<sup>47</sup>The Field of Choice (1966), Law Com. No. 6, para. 32.

<sup>48</sup>See para. 5.52(vi) below.

<sup>49</sup>The costs and effectiveness of various types of conciliation are currently being studied by the Conciliation Research Unit established by the Lord Chancellor's Department at the University of Newcastle.

until the court is satisfied that the arrangements made for those children are either satisfactory or the best that can be devised in the circumstances, or that it is impracticable for the parties to make any arrangements. Recent research<sup>50</sup> has highlighted the deficiencies of the operation of this provision in practice and some commentators have called for its repeal. We have recently examined the merits and demerits of the section and its operation in some detail.<sup>51</sup> Our provisional conclusion, like that of the Booth Committee,<sup>52</sup> was that although section 41 should not be retained in its present form, it should not be repealed unless something is put in its place. The preferred option was that the court should be under a duty to consider whether any order concerning the children should be made. The whole aim of our proposals in this area is to “lower the stakes” in divorce cases, so that the court intervenes only in order to arrange those matters which the parties cannot arrange for themselves, and in such a way as to leave the basic relationship between parent and child as unaffected by the marital breakdown as is possible in all the circumstances.

5.35 There does not seem to be any reason why this approach should not apply equally to divorce by “process of time” as to the present system. In fact under the “process” proposal, the parties are more likely<sup>53</sup> to have their attention focussed on the need to make the best arrangements for their children<sup>54</sup> as part of the overall consequences of their divorce. The evidence shows that making the grant of a decree conditional upon the court’s declaration of approval does not necessarily help to safeguard the welfare of the children and may well be an ineffective use of resources which could be better targeted. In practice, unless there are obvious welfare problems, the usual obstacle to approval is that the parties are still living under the same roof. A major object of the “process” proposal would be to enable such difficulties to be resolved all together without the costly formality of a separate appointment with the judge. Thus, the interest of the law in the protection of children should be asserted and safeguarded by imposing upon the court a duty to investigate and consider whether it is necessary to exercise any of its powers in order to safeguard or promote the welfare of the children. In some cases it may be necessary to postpone the decree to enable this to be done, but the period of transition should be quite sufficient for all but a small proportion.

(iii) *Finance and property arrangements*

5.36 Under the present system, there are two safeguards for respondents to petitions based on separation. First, in five year cases a decree can be refused altogether if this would result in grave financial or other hardship to the respondent and it would in all the circumstances be wrong to dissolve the marriage.<sup>55</sup> This has been restrictively applied, partly because any hardship has usually already resulted from five years’ separation and will not be materially increased by the divorce itself, save where substantial widows’ benefits are at stake, and partly because a liberal application of the provision would circumvent the very policy which led to the 1969 reforms.

5.37 The rationale for this provision was to safeguard the position of the innocent spouse who did not wish to be divorced. From the Parliamentary debates on the 1969 Bill it is clear that the no-fault non-consensual divorce provided by the five year separation fact would probably not have been enacted without such a safeguard.<sup>56</sup> As we have already pointed out,<sup>57</sup> the implication that only respondents in these cases are wholly innocent and worthy of protection whereas respondents in other cases are not, is unfounded. A respondent in a case of behaviour may be wholly blameless<sup>58</sup> whereas a respondent in a five year case may not. If we were to move to a wholly no-fault divorce law, there would obviously be a case for extending the protection of a hardship bar to all who wished to invoke it.<sup>59</sup>

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<sup>50</sup>See references in Review of Child Law: Custody (1986), Working Paper No. 96, p. 90, n.34.

<sup>51</sup>*Ibid.*, paras. 4.4–4.16.

<sup>52</sup>See Booth Report, *op. cit.*, Part I, n.8, para. 2.24.

<sup>53</sup>Because they will not have to worry about the ground for divorce and because it would be clear that one of the purposes of the “process period” would be for such arrangements to be concluded.

<sup>54</sup>This is one of the main purposes of the present s.41, see Review of Child Law: Custody (1986), Working Paper No. 96, para. 4.5.

<sup>55</sup>Matrimonial Causes Act 1973, s.5, see para. 3.29 above.

<sup>56</sup>See, e.g., Divorce Reform Bill debate, *Hansard* (H.C.), 12 June 1969, vol. 784, cols. 2009 *et seq.*, 2033, 2043, 2064 and 1925–52; 17 October 1969, vol. 788, cols. 709–13.

<sup>57</sup>Para. 3.31 above.

<sup>58</sup>e.g. where the behaviour is the result of an organic mental disorder, as in *Thurlow v. Thurlow* [1976] Fam. 32.

<sup>59</sup>Significantly, the hardship bar in s.5 was originally to apply to all divorces and was only restricted to 5 year cases after a Lords amendment; see Part III, n.104 above.

5.38 There are considerable attractions in doing so. There is still a substantial economic imbalance between the spouses in most marriages which have lasted for any length of time, particularly where there are children.<sup>60</sup> We cannot conclude from the fact that the hardship bar is hardly ever invoked at present that it is totally ineffective. The combination of an enforced delay of five years with the possible hardship bar at the end may well have an effect upon the bargaining of couples who divorce on the other facts. To remove all the obstacles to divorce by the economically more powerful spouse, without giving any protection to the weak, might well be thought objectionable.

5.39 However, there are objections to using a hardship bar to supply that protection. If divorce were impossible in cases where hardship could not be avoided, it would defeat the object of enabling dead marriages to be dissolved in due course. As the Commission pointed out in 1966,<sup>61</sup> it would deny divorce to the poor or not-so-poor who were unable to make proper provision. It might well be necessary to reintroduce notions of fault in order to ensure that divorces were not denied to deserving spouses in such cases. There clearly will be cases in which to deny one spouse a divorce on the ground that it will cause hardship to the other will be to cause as much if not more hardship to the first.

5.40 The second safeguard, which applies in both two and five year separation cases, is that the respondent may apply for a decree absolute to be postponed until the court is satisfied either that the petitioner need not make financial provision for the respondent or that provision has actually been made and is reasonable and fair or the best that can be made in the circumstances.<sup>62</sup> The protection thus given is less than with the first safeguard, in that the best that can be made may still not be enough to avoid grave hardship. It is nonetheless an improvement on the usual position, where the property and financial consequences may not be sorted out until some time after the divorce. This may enable or encourage one party to take on new legal commitments without proper regard to the old.

5.41 Once again, the implication that respondents in separation cases deserve such protection, whereas others do not, is unfounded under the present law and completely out of place in a no-fault system. The case for making such a procedural safeguard available in all divorces is much stronger than the case for a universal hardship bar. The parties should be given every encouragement to use the period of transition to negotiate and resolve all the practical issues arising from the breakdown of their marriage. As with the arrangements for the children, the period of transition should be sufficient to enable this to be done in all but a small proportion of cases. There may be some, however, in which it will be necessary to delay the decree in order to ensure that it is done. Such protection may be needed, not only in the interests of the economically disadvantaged spouse or the children, but also in the interests of the whole community, upon whom the burden may otherwise be that much greater.<sup>63</sup>

5.42 The object could be achieved either, as with the arrangements for the children at present, by requiring the court to consider and approve the property and financial arrangements in every case,<sup>64</sup> or, as with the present safeguard in section 10, by giving either spouse the right to request that the decree be postponed until the court decides either that no provision need be made or that the provision made is fair and reasonable in the circumstances, or by a combination of the two.

#### (d) Procedure

5.43 As mentioned above,<sup>65</sup> the Booth Committee made a number of recommendations aimed at improving the procedure by which divorce and ancillary matters were dealt with by the courts. Some of these would be redundant if the "process" option were adopted. For example, it would no longer be necessary to consider whether particulars of alleged adultery or behaviour should be given in the petition. Many of their recommendations, however, would fit in particularly well with this proposal.

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<sup>60</sup>Paras. 3.34 *et seq.* above.

<sup>61</sup>The Field of Choice (1966), Law Com. No. 6, para. 40.

<sup>62</sup>1973 Act, s.10; see para. 3.30 above.

<sup>63</sup>Because of the availability of means-tested benefits, particularly for lone parents, which will be reduced by any maintenance paid for claimant or child.

<sup>64</sup>At present, consent orders must be submitted for approval with prescribed information as to the parties' resources; see Matrimonial Causes Rules 1977, r.76A.

<sup>65</sup>See para. 2.8 *et seq.*

5.44 One of the Committee's recommendations was that the parties should be able to file a joint petition.<sup>66</sup> This proved controversial because of the apparent inconsistency between a fault-based fact and a joint petition. Clearly, this would not be a problem under the "process option". Indeed, it would be advantageous for the parties to initiate proceedings jointly wherever they were agreed about the termination of the marriage. Similarly, the proposal<sup>67</sup> that the parties should be encouraged to file a joint statement of arrangements for the children, or failing that two separate statements, would emphasise both parties' responsibility for the children.

5.45 Perhaps the most important of the Committee's recommendations for present purposes is the institution of an initial hearing<sup>68</sup> to take place at a specified time after the initiation of proceedings. This would be attended by both parties and, if so desired, their advisers. The court would make any orders which were agreed, refer the parties to conciliation where appropriate (although this would not be mandatory), define the issues remaining between the parties and where appropriate give directions.<sup>69</sup> The advantages of this procedure were stated to be that it

will provide an opportunity for conciliation and will assist parties in reaching an early settlement. It will place responsibility on the parties themselves to seek agreement and discourage them from defining their differences in ways which intensify disputes. This is nowhere more important than in relation to children, since in most cases their welfare depends on the parents' ability to agree satisfactory and workable arrangements for the future.<sup>70</sup>

Clearly a procedure which satisfied these objectives would help the parties to adjust to the new situation, which is precisely the aim of the transition period. Without the need to worry about the actual ground for divorce, it would be possible to concentrate exclusively on the ancillary matters.

5.46 One other possible purpose of an initial hearing at a fairly early stage would be to discourage "bogus" initiation of proceedings by parties who wanted the transition period to start running in case they wanted to terminate the marriage speedily. It might also be sensible to provide for proceedings to lapse after a particular period if no decree has been issued to prevent this sort of abuse.<sup>71</sup>

5.47 The Committee's desire that the court should be more in control of the progress of any disputed issues,<sup>72</sup> whilst encouraging the parties to take responsibility for their own decisions, also fits in well with the "process" proposal as it would enhance the aim of getting everything settled during the transition period. The increased role of the court in this respect would also make it clear that the law and the courts were not abdicating their responsibility in relation to the termination of marriage. Scarce public resources would be being used to help the parties during the transition process rather than in attempting to apply unworkable tests to determine whether the marriage had broken down.

5.48 It should be noted that the Committee only recommended that there should be an initial hearing in cases involving minor children. It might be thought that even in cases where there are no minor children, the "process" of adjustment would be facilitated by attendance at an initial hearing. However, particularly if there were no claims for ancillary relief, it might be felt that such a hearing was a waste of resources. Some might also feel it an unnecessary intrusion into the parties' own arrangements which might otherwise have been settled quite amicably and without the intervention of the State.

5.49 It seems unnecessary under the "process" proposal for there to be a two stage decree. As there would be no doubt from the beginning that a decree will be available if still desired, there seems little point in providing for a provisional decree. Indeed, the "process" itself provides for two stages, with the first being the initiation of proceedings and the second the issue of a decree at the end of the transition period upon the application of either or both parties. Thus, it is suggested that the final decree be available at the end of the transition period upon request of either party.

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<sup>66</sup>Booth Report, *op. cit.*, Part I, n.8, para. 4.10.

<sup>67</sup>*Ibid.*, para. 4.36.

<sup>68</sup>*Ibid.*, paras. 4.53 *et seq.*

<sup>69</sup>*Ibid.*

<sup>70</sup>*Ibid.*, para. 3.5.

<sup>71</sup>See G. Davis and M. Murch, (1988) *op. cit.*, Part I, n.7.

<sup>72</sup>Booth Report, *op. cit.*, Part I, n.8, paras. 3.14-3.16.

5.50 It would seem appropriate to retain a requirement that no decree should be granted when the parties are still cohabiting at the end of the transition period. This would deter "sham" divorces for fiscal or other reasons. It would also encourage the parties to settle their accommodation arrangements during the transition period. It would, however, be essential to enable them to do so by court order if this were necessary. Otherwise the problem for some spouses of bringing about a separation could be as great at the end of the period of transition as it was at the beginning.

5.51 Finally, the Booth Committee recommended that the decree should be in neutral form, stating simply that the marriage of the named parties has irretrievably broken down and has been dissolved.<sup>73</sup> This would fit in admirably with the neutral approach of the "process" proposal.

(e) *Summary of the "process" system*

5.52 The aim of this section is to outline how the option of divorce by process over time might operate, summarising the various points discussed above.

(i) Legal dissolution of a marriage would be available on the sole ground that the marriage has irretrievably broken down. Such breakdown would be established by the written statement of one or both parties to that effect, made at the beginning and at the end of the divorce process.

(ii) The decree would not be granted until a specified period, referred to as the transition period, had elapsed from the initiation of proceedings. That period might be nine or twelve months.

(iii) Proceedings would be initiated by the filing of a document (referred to as the application) by one or both parties containing the statement referred to in (i) above.

(iv) Where there were minor children of the family, the parties would file a statement of arrangements for the children either with the application or within a specified time thereafter. Where possible this would be joint, but otherwise the applicant would file a statement and the other would have the opportunity of filing a separate statement if he wished.

(v) Where any financial relief or property adjustment was sought by one of the parties for herself or the children, statements giving information about their financial position would be filed by both parties either with the application or within a specified time thereafter.

(vi) Within a specified time of the filing of the application, in all cases where there were minor children (and possibly in some or all other cases as well)<sup>74</sup> there would be an initial hearing before a judicial officer of the court. At this hearing, the court would make agreed orders in relation to the children and financial relief. Where the parties were still in dispute about such matters the court would help to define the issues; draw to the attention of the parties the availability and benefits of conciliation and where necessary make further directions. Where appropriate, the court would also draw to the attention of the parties the availability of other forms of counselling.<sup>75</sup>

(vii) At the initial hearing, the court might also be able to discharge its duty to consider whether any order need be made in relation to the children. If not, it could give further instructions with a view to resolving their future as quickly as possible.

(viii) At any initial hearing or subsequent hearing, the court would, if appropriate,<sup>76</sup> arrange for such subsequent hearings as were necessary bearing in mind the matters still in dispute.

(ix) At the expiration of the transition period either party would be able to apply for a decree of divorce to be issued. Such application would include a statement that the marriage had irretrievably broken down and that the parties were no longer cohabiting.

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<sup>73</sup>See Booth Report, *op. cit.*, Part I, n.8, para. 4.107.

<sup>74</sup>See para. 5.48 above.

<sup>75</sup>See para. 5.32 above.

<sup>76</sup>See Booth Report, *op. cit.*, Part I, n.8, para. 3.15.

(x) The court, of its own motion or on the application of either party, should be able to postpone the issue of the decree where it had not yet been able to resolve whether any order was necessary in relation to the children or where proper financial and proprietary arrangements had not yet been made.

(xi) The decree would simply state that the marriage of the named parties was dissolved.

(xii) If no decree had been requested after a specified time had elapsed from the date of the original initiation of proceedings, the application would automatically lapse.



## PART VI

### CONCLUSION

6.1 In this paper, we have examined the background and present operation of the law of divorce in the light of its original objectives and of the more recent emphasis upon reducing conflict and bitterness between the parties so as to enable them to make the best possible arrangements for their own future and that of their children. There is no doubt that the present law falls far short of these objectives.

6.2 We suggest that the principle that divorce should be available when, but only when, a marriage has irretrievably broken down should be retained. Several methods of establishing this are discussed. Two, the reintroduction or retention of fault-based grounds and the introduction of a full inquest into each marriage, are rejected as impracticable and likely to make matters worse. Two others, mutual consent or immediate unilateral demand, provide no safeguard against hasty applications in which the arrangements for the parties and their children have not been properly considered.

6.3 Two proposals therefore emerge as the most realistic. These are:

- (a) divorce after a period of separation; and
- (b) divorce after a period of transition in which the parties are given time and encouragement to reflect and make the necessary arrangements for the future.

The advantages and disadvantages of each are discussed in the paper. The second proposal, for divorce by a "process over time", is examined in most detail, as it is a relatively new and unfamiliar idea.

6.4 Two final points should be emphasised. First, we share the view of the Scottish Law Commission that changes in the law along these lines are now unlikely to affect the stability of marriage in general:

The truth of the matter is that, under the present law, anybody who wants a divorce can eventually get one. Making divorce less quickly available to some and more quickly available to others is unlikely to affect marriage breakdown rates one way or the other.<sup>1</sup>

If anything, the options discussed would have a greater potential for saving those marriages which could and should be saved than has the present law.

6.5 Secondly, the object of this paper has been to discuss and inform rather than to make final proposals for reform. We should welcome comments and further information in response. This, above all, is a subject in which reform can only take place after the fullest possible public debate.

*(Signed)* ROY BELDAM, *Chairman*  
TREVOR M. ALDRIDGE  
BRIAN DAVENPORT  
JULIAN FARRAND  
BRENDA HOGGETT

MICHAEL COLLON, *Secretary*  
22 April 1988.

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<sup>1</sup>Scottish Law Commission, *The Ground for Divorce: Should the Law be Changed?* (1988), pp. 16-17.

## APPENDIX A

### The numbers of petitions and decrees and divorce rates per 1,000 married people

	1961	1971	1976	1981	1982	1983	1984	1985 <sup>1</sup>	1986
<b>Petitions filed<sup>2</sup></b>									
<b>(thousands)</b>									
<b>England and Wales</b>									
By husband	14	44	43	47	47	45	49	52	50
By wife	18	67	101	123	128	124	131	139	131
Total	32	111	145	170	174	169	180	191	180
<b>Decrees nisi granted</b>									
<b>(thousands)</b>									
<b>England and Wales</b>									
	27	89	132	148	149	150	148	162	153
<b>Decrees absolute granted (thousands)</b>									
<b>England and Wales</b>									
	25	74	127	146	147	147	145	160	154
<b>Persons divorcing per thousand married people</b>									
<b>England and Wales</b>									
	2.1	6.0	10.1	11.9	12.1	12.2	12.0	13.4	12.9
<b>Percentage of divorces where one or both partners had been divorced</b>									
<b>England and Wales</b>									
	9.3	8.8	11.6	17.1	18.5	20.0	21.0	23.0	23.2

Source: Social Trends 18, Central Statistical Office.

<sup>1</sup>Part I of the Matrimonial and Family Proceedings Act 1984, allowing divorce after one year rather than after three years of marriage came into effect on 12 October 1984.

<sup>2</sup>This table includes annulment throughout.

## APPENDIX B

### The Use of the Five Facts by which Irretrievable Breakdown of Marriage is Evidenced

**Table 1 ADULTERY**

Year	Total decrees absolute (dissolutions)	W Petitioner		H Petitioner		All	
		No. of adultery decrees	% of all decrees granted to W pet. solely	No. of adultery decrees	% of all decrees granted to H pet. solely	No. of adultery decrees	% of all decrees
1964	34,000	8,600	43.9%	8,900	61.8%	17,500	51.5%
1970	56,000	16,200	46.4%	15,400	70.3%	31,600	55.6%
1971	73,666	17,011	38.5%	15,846	53.5%	32,857	44.2%
1972	118,253	18,849	25.7%	16,863	37.1%	35,712	30.2%
1973	105,199	17,430	25.4%	14,747	39.8%	32,177	30.6%
1974	112,740	18,833	25.0%	14,764	39.0%	33,597	29.8%
1975	119,688	20,479	25.0%	15,525	40.3%	36,004	30.1%
1976	125,724	21,285	24.3%	15,497	40.0%	36,782	29.2%
1977	128,118	21,550	24.1%	15,606	39.6%	37,156	29.0%
1978	142,726	22,845	23.1%	17,571	39.4%	40,416	28.3%
1979	137,868	23,105	24.0%	16,974	40.4%	40,079	29.0%
1980	147,381	25,845	24.9%	18,340	41.6%	44,185	30.0%
1981	144,763	25,625	24.9%	18,262	43.0%	43,887	30.3%
1982	145,802	25,267	24.2%	18,010	43.1%	43,277	29.7%
1983	146,669	25,571	24.3%	18,151	43.7%	43,722	29.8%
1984	143,746	25,730	25.0%	17,614	43.0%	43,344	30.2%
1985	159,693	27,887	24.3%	19,560	44.1%	47,447	29.7%
1986	153,418	27,003	25.5%	19,019	44.0%	46,022	30.0%

**Table 2 BEHAVIOUR**

Year	Total decrees absolute (dissolutions)	W Petitioner		H Petitioner		All	
		No. of behaviour decrees	% of all decrees granted to W pet. solely	No. of behaviour decrees	% of all decrees granted to H pet. solely	No. of behaviour decrees	% of all decrees
1964	34,000	5,000	25.5%	300	2.1%	5,300	15.6%
1970	56,000	11,200	32.1%	600	2.7%	11,800	20.8%
1971	73,666	12,324	27.9%	734	2.5%	13,058	17.7%
1972	118,253	19,400	26.5%	1,410	3.1%	20,810	17.6%
1973	105,199	21,055	30.7%	1,637	4.4%	22,692	21.6%
1974	112,740	24,325	32.3%	1,948	5.1%	26,273	23.3%
1975	119,688	28,375	34.7%	2,147	5.6%	36,004	25.5%
1976	125,724	32,980	37.7%	2,517	6.5%	36,782	28.2%
1977	128,118	34,711	38.9%	2,817	7.3%	37,156	29.3%
1978	142,726	39,799	40.3%	3,828	8.6%	40,416	30.6%
1979	137,868	39,137	40.6%	3,640	8.7%	40,079	31.0%
1980	147,381	43,129	41.6%	4,148	9.4%	44,185	32.1%
1981	144,763	44,482	43.3%	4,343	10.2%	43,887	33.7%
1982	145,802	47,573	45.6%	4,767	11.4%	43,277	35.9%
1983	146,669	48,849	46.4%	5,243	12.6%	43,722	36.9%
1984	143,746	47,514	46.1%	5,499	13.4%	43,344	36.9%
1985	159,693	56,867	49.6%	7,030	15.9%	63,897	40.0%
1986	153,418	55,990	51.1%	7,514	17.4%	63,504	41.4%

**Table 3 DESERTION**

Year	Total decrees absolute (dissolutions)	W Petitioner		H Petitioner		All	
		No. of desertion decrees	% of all decrees granted to W pet. solely	No. of desertion decrees	% of all decrees granted to H pet. solely	No. of desertion decrees	% of all decrees
1964	34,000	4,600	23.5%	4,400	30.5%	9,100	26.7%
1970	56,000	5,900	16.9%	5,300	24.2%	11,300	19.9%
1971	73,666	6,314	14.3%	5,428	18.3%	11,742	15.9%
1972	118,253	7,478	10.2%	4,145	9.1%	11,623	9.8%
1973	105,199	5,499	8.0%	2,348	6.3%	7,847	7.5%
1974	112,740	4,745	6.3%	1,867	4.9%	6,612	5.9%
1975	119,688	4,165	5.1%	1,380	3.6%	5,545	4.6%
1976	125,724	3,934	4.5%	1,187	3.1%	5,121	4.0%
1977	128,118	3,444	3.9%	1,173	3.0%	4,617	3.6%
1978	142,726	3,556	3.6%	1,298	2.9%	4,854	3.4%
1979	137,868	2,934	3.0%	1,444	2.7%	4,078	2.9%
1980	147,381	2,831	2.7%	1,087	2.5%	3,918	2.6%
1981	144,763	2,343	2.3%	873	2.1%	3,216	2.2%
1982	145,802	2,104	2.0%	771	1.8%	2,875	2.0%
1983	146,669	1,803	1.7%	678	1.6%	2,481	1.7%
1984	143,746	1,462	1.4%	561	1.4%	2,023	1.4%
1985	159,693	1,382	1.2%	581	1.3%	1,963	1.2%
1986	153,418	1,019	0.9%	459	1.1%	1,478	0.9%

**Table 4 TWO YEARS' SEPARATION AND CONSENT**

Year	Total decrees absolute (dissolutions)	W Petitioner		H Petitioner		All	
		No. of separation decrees (2 year)	% of all decrees granted to W pet. solely	No. of separation decrees (2 year)	% of all decrees granted to H pet. solely	No. of separation decrees	% of all decrees
1971	73,666	2,591	5.9%	1,802	6.1%	4,393	6.0%
1972	118,253	12,690	17.3%	8,042	17.7%	20,732	17.5%
1973	105,199	14,114	20.6%	8,775	23.7%	22,889	21.8%
1974	112,740	17,208	22.8%	10,564	27.9%	27,772	24.6%
1975	119,688	19,308	23.6%	11,813	30.7%	31,121	26.0%
1976	125,724	20,120	23.0%	12,200	31.5%	32,320	25.7%
1977	128,118	20,774	23.3%	12,459	31.6%	33,233	25.7%
1978	142,726	23,348	23.6%	14,355	32.2%	37,703	26.4%
1979	137,868	22,981	23.9%	13,813	32.9%	36,794	26.7%
1980	147,381	24,195	23.3%	14,120	32.1%	38,315	26.0%
1981	144,763	23,348	22.7%	13,399	31.5%	36,747	25.3%
1982	145,802	22,926	22.0%	12,831	30.7%	35,757	24.5%
1983	146,669	22,850	21.7%	12,219	29.4%	35,069	23.9%
1984	143,746	22,439	21.8%	12,100	29.5%	34,539	24.0%
1985	159,693	23,252	20.3%	12,501	28.2%	35,753	22.4%
1986	153,418	20,421	18.6%	11,492	26.6%	31,913	20.8%

**Table 5 FIVE YEARS' SEPARATION**

Year	Total decrees absolute (dissolutions)	W Petitioner		H Petitioner		All	
		No. of separation decrees (5 year)	% of all decrees granted to W pet. solely	No. of separation decrees (5 year)	% of all decrees granted to H pet. solely	No. of separation decrees	% of all decrees
1971	73,666	3,835	8.7%	4,737	16.0%	8,572	11.6%
1972	118,253	11,886	16.2%	13,645	30.1%	25,531	21.6%
1973	105,199	8,296	12.1%	8,639	23.3%	16,935	16.1%
1974	112,740	8,078	10.7%	7,752	20.8%	15,830	14.0%
1975	119,688	7,319	9.0%	6,793	17.7%	14,112	11.8%
1976	125,724	7,133	8.1%	6,445	16.7%	13,578	10.8%
1977	128,118	6,941	7.8%	5,573	14.1%	12,514	9.8%
1978	142,726	7,540	7.6%	6,847	15.3%	14,387	10.1%
1979	137,868	6,811	7.1%	5,924	14.1%	12,735	9.2%
1980	147,381	6,551	6.3%	5,753	13.1%	12,304	8.3%
1981	144,763	5,888	5.7%	5,072	11.9%	10,960	7.6%
1982	145,802	5,531	5.3%	4,867	11.7%	10,398	7.1%
1983	146,669	5,384	5.1%	4,820	11.6%	10,204	7.0%
1984	143,746	5,370	5.2%	4,774	11.7%	10,144	7.1%
1985	159,693	4,979	4.3%	4,566	10.3%	9,545	6.0%
1986	153,418	4,828	4.4%	4,657	10.7%	9,485	6.2%

Source: O.P.C.S., Marriage and Divorce Statistics.

## APPENDIX C

### REFORM OF THE GROUND FOR DIVORCE Joint Law Commission—University of Bristol Seminar Friday, 6 December 1985

#### Chairman

Rt. Hon. Sir John Arnold, President of the Family Division.

#### Speakers

Mr. Mervyn Murch, University of Bristol, "The 'Behaviour' Petition; and Factors Influencing the Choice of 'Fact'".

Mr. Gwynn Davis, University of Bristol, "The 1969 Legislation in Practice—Cause for Concern?"

Professor J.M. Grossen, Professor at the University of Neuchâtel, and Chairman of the Swiss Family Law Reform Commission, "A European Perspective".

Professor Henry Finlay, Monash University, "The Australian Experience". Later published as, "The Grounds for Divorce: the Australian Experience", (1966) 6 O.J.L.S. 368.

#### Those who attended

Ms. R. Bailey-Harris, University of Adelaide  
The Rt. Hon. Lord Justice Balcombe  
The Hon. Mr. Justice Beldam, Chairman of the Law Commission  
The Hon. Mrs. Justice Booth, D.B.E.  
Dr. R. Chester, University of Hull  
Mr. M.J.W. Churchouse, Family Law Committee of The Law Society  
Dr. E.M. Clive, Scottish Law Commissioner  
Mr. M.H. Collon, Lord Chancellor's Department  
Miss R. Copner, University of Bristol  
Mr. J.R. Cornwell, Solicitors' Family Law Association  
Professor S.M.C. Cretney, F.B.A., University of Bristol  
Miss G. Douglas, University of Bristol  
His Honour Judge Dyer, Council of Her Majesty's Circuit Judges  
Baroness Faithfull, O.B.E.  
Professor J.T. Farrand, Law Commissioner  
Ms. P. Ferguson, Family Forum  
Mrs. T. Fisher, National Family Conciliation Council  
Professor M.D.A. Freeman, University College London  
Professor M. Furnston, University of Bristol  
Mr. D. Green, Family Law Committee of The Law Society  
His Honour Judge Heald, Council of Her Majesty's Circuit Judges  
Miss J.C. Hern, Law Commission  
Mrs. B.M. Hoggett, Law Commissioner  
Mr. J. Jackson, Q.C.  
Sir John Kingman, F.R.S., Vice-Chancellor, University of Bristol  
Mr. R. Laurie, Family Law Bar Association  
His Honour Judge Sir Ian Lewis  
Mr. N. Lowe, University of Bristol  
Mr. Registrar Lewis, Association of County Court Registrars  
Lady Oppenheimer, Church of England Working Party on the Doctrine of Marriage  
Mr. O. Parker, Lord Chancellor's Department  
Professor R. Parker, University of Bristol  
Mrs. L. Parkinson, National Family Conciliation Council  
Mr. Registrar Parmiter  
Professor P. Parsloe, University of Bristol  
Mr. Registrar Proctor, Association of County Court Registrars

Mr. H. Redgwell, Lord Chancellor's Department  
Mr. N. Tyndall, National Marriage Guidance Council  
Mr. S. Walker, National Council for the Divorced and Separated  
Mr. A. Ward, Q.C., Family Law Bar Association  
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Mr. J.M. Westcott, Solicitors' Family Law Association  
Mr. J. Whybrow, Law Commission

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