THE LAW COMMISSION

REFORM OF THE GROUNDS OF DIVORCE THE FIELD OF CHOICE

REPORT ON A REFERENCE UNDER SECTION 3(1)(*e*) 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 the reform of the law. The Commissioners are—

The Honourable Mr. Justice Scarman, O.B.E., *Chairman.*
Mr. L. C. B. Gower, M.B.E.
Mr. Neil Lawson, Q.C.
Mr. N. S. Marsh.
Mr. Andrew Martin, Q.C.

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LAW COMMISSION

REFORM OF THE GROUNDS OF DIVORCE THE FIELD OF CHOICE

Report by the Law Commission on a Reference under section 3(1)(*e*) *of the Law Commissions Act* 1965

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

MY LORD,

Putting Asunder,[1] the Report of a Group appointed by the Archbishop of Canterbury in January 1964, was published on 29th July 1966. You immediately referred this important document to us, in accordance with section 3(1)(*e*) of the Law Commissions Act 1965, for our advice and asked that we should submit a Report to you as early as possible.

2. Item X (*a*) of our First Programme requires us to furnish you with an examination of the Matrimonial Law having regard to the variety of views expressed in and following the Report of the last Royal Commission on Marriage and Divorce.[2] Our Report may be regarded as the first step towards carrying out that examination and its scope will be wide enough to include the study not only of *Putting Asunder* but also of the other proposals for reform of the existing grounds of divorce which have received most support. It is not, of course, for us but for Parliament to settle such controversial social issues as the advisability of extending the present grounds of divorce. Our function in advising you must be 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.

3. Setting ourselves this limited task, we have not thought it necessary to take evidence from interested bodies and experts or to have our customary consultations with outside bodies. A great deal of evidence, however, has been taken by previous bodies that have considered these questions and reported on them and more is available in published works. These reports and publications are before us. As lawyers we recognise that the improvement of the divorce law is too important a matter to be left entirely to specialists, whether they be churchmen, sociologists or lawyers. Nevertheless public discussion of the subject should be more constructive and fruitful if it can be focused on practical possibilities. We have therefore tried to restrict this Report to a consideration of what appears from a lawyer's point of view to be practicable, while keeping it as short and non-technical as we can.

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[1] *Putting Asunder: A Divorce Law for Contemporary Society*. S.P.C.K., 1966.

[2] The Morton Commission: 1956, Cmd. 9678.

4. On 11th August the setting up of a Royal Commission to enquire into the present arrangements for the administration of justice at Assizes and Quarter Sessions outside Greater London was announced to Parliament. Under Item X(*c*) of our First Programme we are charged to carry out a preliminary examination into the jurisdiction of the courts dealing with family matters. This is a matter with which the Royal Commission will be concerned and accordingly in what follows we make no suggestions regarding the court structure. We have, however, borne in mind H.M. Government's announced intention to confer on the county courts jurisdiction to try undefended divorces. This, of course, will not produce any fundamental changes because most such cases are already heard by County Court Judges sitting as Divorce Commissioners.

The Background: Should the Rise in the Divorce Rate Cause Alarm?

5. The great increase in the number of divorces during this century is sometimes seen as evidence of a breakdown of English family life and a decline in moral standards. On this we would like to make three points: first, that an increased number of divorces is alarming only if it indicates an increase in the number of broken homes and not merely that a larger proportion of broken homes is leading to divorce; secondly, that even an increase in the number of broken homes might merely indicate that there were more marriages subject to the risk of breakdown; and thirdly, that, even if the proportion of marriages that did break down could be shown to have increased, it might merely be that the marriages were subjected to greater risks and not that there was any decline in respect for marriage and morality.

6. As regards the first point, divorce is merely one of the possible outcomes, and not necessarily the most common one, of a marriage that has broken down. Until 1857 we had no divorce at all (except by Private Act of Parliament) but this certainly did not mean that there were no broken marriages. Marriage breakdowns are well known to occur in other countries, such as Italy, where divorce is not permitted. Today in England divorce has become one course which, normally, is readily available to the parties when a marriage has broken down. It is, however, but one course among many. Instead the parties may merely part, or they may enter into a formal separation agreement, or they may obtain a judicial separation, or a maintenance or separation order from a magistrates' court. In all of such cases the marriage may have broken down just as irretrievably as if there had been a divorce. If a divorce is obtained, it follows and is caused by the breakdown—not vice versa. And in so far as it is obtained because the parties wish to establish new unions but want those unions to be marriages rather than "living in sin", the fact that they resort to divorce is not an indication of a waning of the respect for marriage but rather the contrary. From a secular point of view, divorce is socially harmful only when the possibility of obtaining it leads to the break-up of a home which would not have occurred if the parties had known that in no circumstances could the legal tie be severed. No statistics are available to show to what extent,

if at all, this is a contributory cause of marital breakdown.[3] Indeed, we just do not know what the total number of broken homes is today[4] and we know even less about how many there were fifty or sixty years ago. There may have been an increase, but no one knows.

7. As regards the second point, there has indeed been a great increase in the number of marriages; the number of married women has more than doubled during this century. This is partly because of an increase in the total population, but also because a larger proportion of the population marry and because we tend now to marry earlier. The number of divorces has, of course, risen much more rapidly than the married population, but this, as already pointed out, is not necessarily an indication of an increase in the proportion of broken homes. It is almost certain that it is very largely due to the readier availability of divorce rather than to an increase in the proportion of marriages which break down.

8. As regards the third point, there are a number of reasons which might lead us to expect that a larger proportion of marriages would break down without necessarily indicating any deterioration of moral standards. Since we tend to marry younger and to live longer, the average duration of marriage has doubled since the 19th century and marriages are at risk for twice as long as they were. In addition, the risks to which marriages are subjected have increased. The housing shortage all too often compels young couples to spend the difficult early years of marriage without a home of their own and the youngest couples, and especially those in which the bride is pregnant, appear to have been even less successful than their contemporaries in obtaining separate accommodation.[5] Half the married life of the wife is spent after she has finished bearing and rearing the children. Thanks to family planning and the mechanisation of the household, wives can take jobs in conditions of full employment and become independent of the financial support of their husbands. Despite all this, there is no real evidence that the proportion of marriages which break down has increased during the century; nor, of course, is there any evidence that it has not. But recent sociological investigations seem to show that marriage as an institution in present-day England is in a fairly healthy state as compared with the past.[6]

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[3] If the inability to obtain a divorce and remarry is an inducement to marital fidelity, its potency must be weakened by the ease with which names can be changed and an apparently regular establishment set up in another neighbourhood.

[4] Some attempt to estimate the number is made by Margaret Wynn in *Fatherless Families* (1964): see Table 1 at p. 18 and Appendix 1. The Household Composition National Summary Tables from the 1961 Census (H.M.S.O., 1966) show (Table 8) that of the 12·6 million "families" in England and Wales there were 1·1 million where only one parent was present. In more than 400,000 of these "families" at least one child was still dependent (Table 11). But they included families bereaved by widowhood as well as those in which there had been a divorce or separation. We do not know how many marriages had broken up by permanent separation of the spouses, whether or not accompanied by divorce. We hope that in future censuses an attempt will be made to ascertain this figure, together with the number of children concerned and the number of those still dependent.

[5] Teenage marriages, and especially those where the bride is pregnant, are those most likely to lead to divorce: see Rowntree: (1964) XVIII Population Studies 147 at pp. 157 *et seq.*

[6] There has been a growing and valuable sociological literature on this subject in recent years: see in particular McGregor: *Divorce in England* (1957); Rowntree and Carrier: *The Resort to Divorce in England and Wales*, 1858–1957 (1958) XI Population Studies 188; Fletcher: *The Family and Marriage* (1962); Rowntree: *Some Aspects of Marriage Breakdown in Britain during the last Thirty Years*, (1964) XVIII Population Studies 147.

9. One matter that has caused particular alarm in some quarters in recent years is the fact that, although the number of divorces fell after the immediate post-war boom, it started to rise again in 1959 and rose quite steeply from 1960 to 1964: see Appendices A, B, C and D. Hence the later increase appears to reverse a trend towards a steadily falling divorce rate. There are, however, reasons for this, independent of any rise or fall in the number of broken marriages. The tables and graph at Appendix B show in respect of each year since the Legal Aid and Advice Act 1949 came into force (*a*) the number of divorces each year, and (*b*) the number in which the petitioner was in receipt of legal aid. The number of divorces began to rise as soon as the effect of this Act was felt (i.e. in 1951, since the relevant parts of the Act were not brought into operation until 2nd October 1950). From 1952 onwards, however, there was a gradual fall in the percentage of cases in which the petitioner was legally aided; the percentage had been 64·5 in 1951 but fell to 37·6 in 1958. The fall is likely to have been due to the fact that the financial requirements of the Legal Aid Scheme did not keep pace with inflation. The position was improved by the coming into operation on 7th September 1959 of more liberal Regulations governing the assessment of means; and the trend was finally corrected by the Legal Aid Act 1960, which from 13th April 1960 substantially raised the financial limits of the Scheme. Thereupon the number of divorce cases rose steeply and the percentage in which the petitioner was legally aided even more so (from 37·9 per cent in 1959 to 49·5 per cent in 1960, 63·1 per cent in 1961, 67 per cent in 1962, and about 70 per cent thereafter). There is reason to think, therefore, that these fluctuations in the number of divorces were caused mainly by the availability of legal aid and that there would not have been a continued fall in numbers prior to 1960 but for the fact that fewer couples could afford a divorce if they wanted it. It is significant that the figures for nullity decrees fluctuated in precisely the same way.

10. The figures in Appendices A and B show the number of matrimonial petitions in each year. It is true that they include all matrimonial causes in the High Court, but the number of petitions other than for divorce (i.e. nullity, judicial separation and restitution of conjugal rights) is very small.[8] A better method of showing the real changes in the divorce rate is by taking the number of divorces and annulments per thousand married population. These figures are given in Appendix C. From these it will be seen that the annual average for husbands and wives of all ages was 2·7 in the years 1950–54, 2·0 in 1960 and 2·9 in 1964. A still more meaningful basis of

[7] It may be asked why the increase started in the latter part of 1959 rather than in 1960. One explanation for this is that from September 1959 the more generous Assessment of Resources Regulations were operating. Another may be the passing of the Legitimacy Act 1959 on 29th July 1959. Prior to this Act (which came into force three months later) the marriage of the parents of an illegitimate child did not legitimate that child if one of the parents was married to a third person at the date of the child's birth. The 1959 Act altered this and as a result added a new and powerful reason for obtaining a divorce. People who had been living in irregular unions might have been content to continue to do so, so long as they could do nothing to legitimate the children of the union. But once it became possible to legitimate these children some would naturally wish to obtain a divorce and remarry, thus legitimating the children. Statistics are not available to show what effect this had on the divorce rate, but we know that the annual number of re-registrations of children as legitimate had remained steady for some time at about 2,600 per year until the last quarter of 1959, when it rose steeply. In 1960 there were 6,506 re-registrations; in 1961, 8,513; in 1962, 8,540; in 1963, 9,896; in 1964, 10,243: Registrar General's Statistical Review of England and Wales, 1964, Part 2, Table T.3.

[8] See Appendix A, Table 2.

comparison perhaps is the number of divorces per thousand married women aged 20 to 49, since most divorces befall them between those ages ; Appendix D gives these figures for each year of the post-war period. It will be seen from these that the average number of petitions filed was 4·42 in the years 1950–54, 3·52 in 1959 and 5·77 in 1965. The comparable figures for decrees absolute granted are 4·13 in 1950–54, 325 in 1959 and 5·07 in 1965.[9]

11. These figures may merely reflect the fact that a growing segment of society is coming to regard divorce as more respectable than other outcomes of a broken home. They are, therefore, important figures for sociologists and people responsible for social policy, but they do not give cause for believing that morality is being corrupted in England, still less that it is the divorce law that is the corrupting agent. Nor do they give cause for undue alarm when compared with the position in other countries. Table 5 to Appendix 2 to the Report of the Royal Commission on Marriage and Divorce (the Morton Commission) compares the number of divorces per 1,000 of the total population in England with those in a number of comparable countries (Scotland, France, Belgium, The Netherlands, Switzerland, Norway, Denmark, Sweden, U.S.A., Canada, South Africa, Rhodesia, New Zealand and Australia). This shows that the rate in England and Scotland up to 1953 had been consistently lower than in any of these countries other than Belgium, The Netherlands, Norway and Canada. The divorce rate in England in 1953 per 1,000 of population was 0·67 and the present figure is 0·77 which is still well below that for most of the other countries, even if one assumes that their rates have not risen since 1953, as Norway's has. The rate in Australia is now 0·75 and in New Zealand about 0·96.[10] The reason why the figures for Canada are relatively low may be because judicial divorces are not granted in Quebec or Newfoundland.

12. If one ignores the immediate post-war years (when conditions were abnormal) and fluctuations due to the varying availability of Legal Aid, there appears to be a tendency for the divorce rate to rise slightly but no faster than could be explained entirely by changes in social conditions and in the law. We have already drawn attention to those factors which tend to subject marriages to new and greater risks. In addition, changes in the class structure of society have made divorce (with the resultant possibility of regularising another union) desired by sections of the population which were formerly content with illicit and fluctuating unions. And the introduction of Legal Aid has made divorce something that they can afford. In spite of all these factors, only about one marriage in ten ends in divorce.[11]

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[9] Although the 1965 figures show a continuation in the upward trend, the increase in petitions filed is very small: see Appendix A, Table 1.

[10] So far as we are aware, the only published figures for later years are those in William J. Goode's *World Revolution and Family Patterns* (1963), where a table on page 82 gives the divorce rate per 1,000 marriages (not a very satisfactory statistical basis) in U.S.A., Germany, Switzerland, England, New Zealand, Australia, Belgium, Norway, Denmark, Yugoslavia, Sweden, France, and The Netherlands. This confirms the same pattern for the earlier years 1900–1950 and goes on to give figures for the years 1956 and 1960. In these years the divorce rate calculated on this rather crude basis was lower in England than in any of the other countries except Belgium and The Netherlands.

[11] No exact figure can be given because much depends on when the marriage was celebrated and on the ages of the couples at marriage; wartime and immediately pre-war marriages suffered heavy casualties. Nor can anyone safely predict how long the marriages now being celebrated will survive. But if the divorce rates shown in Table C.31 of Part III of the Registrar General's Statistical Review of England and Wales for 1963 persisted indefinitely, one in ten of the marriages celebrated in 1963 would end in divorce.

The Objectives of a Divorce Law

13. Before describing the present basis of English divorce law and the various alternatives, it may be well to set out what, as we see it, the objectives of a good divorce law should be. As a start we cannot do better than quote the words of the Morton Commission:[12]

> "The Western world has recognised that it is in the best interests of all concerned—the community, the parties to a marriage and their children—that marriage should be monogamous and that it should last for life.[13] It has also always recognised that, owing to human frailty, some marriages will not endure for life and that in certain circumstances it is right that a spouse should be released from the obligations of marriage."

14. The Archbishop's Group expressed very similar views. They made it clear that Church of England doctrine fully recognises that it is right and proper for the State "to make provision for divorce and re-marriage",[14] that "there is nothing to forbid the Church's recognising fully the validity of a secular divorce law within the secular sphere",[15] and that the Church is not committed to defend "the matrimonial offence as the only admissible basis for dissolving legal marriage".[16] "By reason of its legal establishment the Church of England has both a special interest in what happens to the secular matrimonial law and a special duty to concern itself with that law's improvement",[17] but in so doing "the only Christian interests that need to be declared are the protection of the weak and the preservation and strengthening of those elements in the law which favour lasting marriage and stable family life. . . ."[18]

15. Accordingly, as it seems to us, a good divorce law should seek to achieve the following objectives:

(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.

16. At first sight it may appear that a divorce law, which is directed essentially towards dissolving the marriage bond, can do nothing towards achieving the first objective. This, however, is not necessarily the case. It can and should ensure that divorce is not so easy that the parties are under no inducement to make a success of their marriage and, in particular, to overcome temporary difficulties. It can also ensure that every encouragement is afforded to a reconciliation and that the procedure is not such as to inhibit or discourage approaches to that end.

17. The second objective has two facets. First, the law should make it possible to dissolve the legal tie once that has become irretrievably broken

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12 Cmd. 9678, para. 35.

13 "It is marriage itself which is important, not, I think, love or sexual gratification; and marriage is living together, making a home together, making a life together and raising children": Geoffrey Gorer: *Exploring English Character* (1955) at p. 161.

14 *Putting Asunder*, para. 14. The nature of the Church's concern with secular matrimonial law is set out in Ch. 2 and Appendix A of *Putting Asunder*, pp. 6–15 and 80–95.

15 *Ibid.* para. 17.

16 *Ibid.* para. 36.

17 *Ibid.* para. 19.

18 *Ibid.* para. 18.

in fact. If the marriage is dead, the object of the law should be to afford it a decent burial. Secondly, it should achieve this in a way that is just to all concerned, including the children as well as the spouses, and which causes them the minimum of embarrassment and humiliation. Above all, it should seek to take the heat out of the disputes between husband and wife and certainly not further embitter the relationships between them or between them and their children. It should not merely bury the marriage, but do so with decency and dignity and in a way which will encourage harmonious relationships between the parties and their children in the future.

18. In addition to these two main objectives, another important requirement is that the divorce law should be understandable and respected. It is pre-eminently a branch of the law that is liable to affect everyone, if not directly at any rate indirectly. Unless its principles are such as can be understood and respected, it cannot achieve its main objectives. If it is thought to be hypocritical or otherwise unworthy of respect, it will not only fail to achieve those objectives but may bring the whole of the administration of justice into disrespect.

The Virtues and Vices of the Present Law

19. A divorce petition cannot be presented within three years of the celebration of the marriage, unless the judge gives special leave because of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent. In deciding whether to give leave, the judge is required to have regard to the interests of the children and to the question whether there is a reasonable probability of a reconciliation.[19] This provision seems to have proved generally acceptable to public opinion and we know of no widespread agitation for its deletion. Its retention was advocated both by the Morton Commission[20] and by the Archbishop's Group.[21] In our opinion it is a useful safegard against irresponsible or trial marriages and a valuable external buttress to the stability of marriages during the difficult early years. It therefore helps to achieve one of the main objectives of a good divorce law. In all that follows we are assuming that this three year bar will be retained.

20. The present basis of our divorce law is the commission by one spouse (" the guilty spouse ") of a matrimonial offence on which the other (" the innocent spouse ") grounds a petition for relief by way of dissolution of the marriage.[22] If the petitioning spouse is not so innocent, because he has committed a matrimonial offence, he may be refused relief.[23] So he may,

19 Matrimonial Causes Act 1965, s. 2.

20 Cmd. 9678, Ch. 5.

21 *Putting Asunder*, para. 78.

22 The only material matrimonial offences are adultery, cruelty, and desertion for three years: Matrimonial Causes Act 1965, s. 1(1)(*a*). There were in 1965 more decrees on the ground of adultery than on the other two grounds together, and more decrees for desertion than for cruelty. But taking wife petitioners alone decrees for cruelty exceeded those for desertion, and decrees on these two grounds put together were slightly more frequent than decrees for adultery: Civil Judicial Statistics 1965, Cmnd. 3029, Table 11 (ii)(C).

23 Adultery and cruelty are always discretionary bars: Matrimonial Causes Act 1965, s. 5(4)(*b*) and (*c*)(ii). Desertion is a discretionary bar where the petition is on the ground of adultery or cruelty: *ibid.* s. 5 (4) (*c*) (iii). Where the petition is on the ground of adultery, insanity or desertion, wilful neglect or conduct conducing to the adultery, insanity or desertion is a discretionary bar: *ibid.* s. 5 (4) (*c*) (iv).

if he has connived at the offence of the other before its commission or if he has condoned it afterwards[24] or if he has unreasonably delayed in petitioning.[25] Although 93 per cent of all divorce proceedings are undefended, the procedure is based on the assumption that the litigation is contentious. Hence if the petition is presented in collusion[26] between the parties relief may again be refused.

21. Serious inroads have been made into this basic principle of the matrimonial offence. In certain circumstances a divorce can be granted on the ground of the incurable insanity of the respondent[27] (which, of course, is no offence at all but a tragic misfortune for both spouses) and a marriage may be dissolved on the ground that one spouse can be presumed to be dead.[28] Only very rarely to-day is a divorce refused because the petitioner also has committed a matrimonial offence. The most important situation where this is theoretically a bar is where the petitioner's offence is adultery, but, if he fully discloses this in his discretion statement,[29] the court will nearly always exercise its discretion in his favour.[30] Refusal is normally due not to the petitioner's adultery but because it is discovered that he has failed fully to disclose it; and even such non-disclosure is often overlooked if the court is satisfied that a full disclosure has finally been made.[31] Obviously the undisclosed adultery of the petitioner is unlikely to be discovered unless it is still continuing or is very recent.[32] Despite this, discretion is asked for and some acts of adultery are disclosed in about 30 per cent of all cases.[33] Furthermore, since the decision of the House of Lords in *Blunt* v. *Blunt*[34] it has been clear that where there are cross-petitions the courts have power to grant decrees on both petitions; in recent years, therefore, cross-petitions have been far more common than before (the original respondent often petitioning on the basis of the adultery disclosed in the original petitioner's discretion statement) and, in consequence, the guilty/innocent dichotomy has been blurred. Since 1963 collusion has become a discretionary, and no longer an absolute, bar[35] and "arranged divorces"

24 Connivance is an absolute bar to a decree on the ground of adultery, as is condonation to a decree on the ground of adultery or cruelty: *ibid.* s. 5(3).

25 This is always a discretionery bar: *ibid.* s. 5 (4) (*c*) (i).

26 This is always a discretionary bar: *ibid.* s. 5 (4) (*a*).

27 *Ibid.* s. 1 (1) (*a*) (iv), (3) and (4).

28 *Ibid.* s. 14.

29 Under the Matrimonial Causes Rules 1957, r. 28, when the petition contains a prayer that the court shall exercise its discretion notwithstanding the petitioner's adultery, a discretion statement must be lodged giving particulars of his or her acts of adultery.

30 In 1965, out of a total number of 11,221 divorces and judicial separations granted in cases dealt with in the Principal Registry in London discretion was exercised in 3,850 and refused in only 3.

31 The factors which are borne in mind by the court in exercising its discretion are fully set out in the judgment of the President in *Bull* v. *Bull* [1965] 3 W.L.R. 1048 at pp. 1056 *et seq.* These are conveniently set out at the end of the headnote on pp. 1049–50.

32 The number of interventions by the Queen's Proctor (the normal source of discovery is normally less than 50 per annum and, even when the intervention is successful, the court more often than not still exercises its discretion in the petitioner's favour. In 1965, 54 interventions by the Queen's Proctor were heard and allowed, but discretion was exercised in 34 of these.

33 The proportion of cases in which discretion is asked for seems to be slightly lower in District Registries than in London.

34 1943] A.C. 517.

35 Matrimonial Causes Act 1963, s. 4 (now the Matrimonial Causes Act 1965, s. 5(4)(*a*)). This went somewhat further than the recommendations of the Morton Commission, which had recommended a statutory definition of collusion so as to distinguish more clearly the objectionable from the unobjectionable: Cmd. 9678, paras. 230–235.

are no longer banned so long as the arrangements are disclosed and the court is satisfied that they will not lead to the granting of relief for an offence which has not occurred, or to a party who would not have received it if the case had been fought out.[36] The ambit of condonation has also been reduced.[37] Delay is very rarely regarded now as a ground for refusing relief.[38]

22. A further departure from the principle that no divorce should be granted without proof of fault on the part of husband or wife has been brought about by two recent decisions of the House of Lords.[39] These have established that a divorce can be obtained on the ground of cruelty even though the respondent did not intend to be cruel in any sense of that word as understood by a non-lawyer, but simply because his conduct, e.g. owing to insanity, has produced an intolerable situation for the petitioner.

23. In the light of these inroads it may be asked why the basic principle of the matrimonial offence, so diluted, should not be allowed to remain, subject perhaps to some minor modifications of the various grounds of divorce. The main arguments for and against retention of the present law may be put as follows:—

24. *For retention of the matrimonial offence principle*

(*a*) Experience has shown that it works: that is to say, it enables some 35,000 divorces each year to be obtained reasonably cheaply and quickly and, in undefended cases, often with little embarrassment.

(*b*) The court is presented with a clear issue to try: has a matrimonial offence been committed or has it not?

(*c*) Because the issue is a clear one, solicitors are able to advise their clients with some confidence about their prospects of obtaining a divorce.

(*d*) It is a just principle in that it prevents a divorce being obtained against an unwilling party unless he or she has committed a grave fault towards the other party.[40] To allow an innocent person to be divorced against his or her will might not only offend the public's sense of justice but could frequently cause financial hardship to an innocent dependent wife and to the children.

(*e*) By laying down the circumstances in which an individual has the right to ask for his marriage to be dissolved the law provides an external buttress to the stability of marriages and deters the setting up of illicit unions, because those who contemplate such unions know that there can be no certainty of their being able to marry and have legitimate children.[41]

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36 Under the Matrimonial Causes Rules, r. 2A, the parties can apply for provisional approval of a proposed arrangement. For a detailed discussion of the principles which should guide the court, see *Nash* v. *Nash* [1965] P. 266, and (1966) 29 M.L.R. 241 and (1966) 82 L.Q.R. 371.

37 Matrimonial Causes Act 1965, s. 42, re-enacting Matrimonial Causes Act 1963, ss. 1 and 2.

38 It has now virtually ceased to be a bar, even in theory, in cases of desertion: *Becker* v. *Becker* [1966] 1 W.L.R. 423, C.A.

39 *Gollins* v. *Gollins* [1964] A.C. 644, and *Williams* v. *Williams* [1964] A.C. 698.

40 See the Morton Report, Cmd. 9678, para. 69 (iv), (xv).

41 *Ibid.* para. 69 (xxxvii).

(*f*) It is right that the choice whether to terminate a marriage or not should rest with the wronged party.

25. *Against retention of the matrimonial offence principle*

(*a*) In the majority of divorce proceedings both parties are at fault in varying degrees. The idea that marriages break up because one party has committed an offence against the other is unreal.

(*b*) The issues tried by the court are superficial; in consequence the court never gets at the root of the trouble in the marriage. The commission of a matrimonial offence normally follows the breakdown of the marriage and is not the cause of it. In a happy marriage the parties rarely commit adultery; even if they do, divorce proceedings are unlikely to follow unless the marriage has already broken up. Nor does one spouse desert the other for three years unless the marriage has failed. Cruelty, no doubt, is sometimes the cause of the breakdown but is more often a symptom of it; sexual demands, for example, may be regarded as excessive and cruel only because the marriage has already failed.

(*c*) Since the commission of a matrimonial offence must be proved in what is in form hostile litigation, one spouse must be branded as guilty. This leads to unnecessary bitterness and frequently has harmful effects on the children, who may well love both parents. In most cases both parties want a divorce without rancour. Instead the law requires them, their advisers, and the judge to take part in what begins as an elaborate parade of hostility, but may well end by causing real hostility.

(*d*) All this brings the law and the whole administration of justice into disrepute, and encourages the giving of hypocritical evidence at best and perjury at the worst. Sometimes the alleged offence has not been committed at all; for example, the voluntary separation of the husband and wife may be dressed up to look like desertion, or evidence may be supplied from which the court will infer adultery which in fact has not taken place. In other cases adultery has been committed only in order to provide grounds for a divorce.

(*e*) Obstacles are placed in the way of reconciliation since the parties have to remain at arm's length and their legal advisers have to ensure that they do nothing which, if attempted reconciliation should fail, would prejudice their chances of obtaining matrimonial relief. While recent modifications in the law relating to condonation and collusion have improved the position somewhat, a law based on matrimonial offence cannot but inhibit attempts at reconciliation.

(*f*) Although the present system often causes little embarrassment in undefended cases, in those that are contested—especially those based on cruelty—the embarrassment and distress of the parties are frequently acute. Such cases may last for days. Even in undefended cases, which constitute some 93 per cent of the total, few petitioners remain unembarrassed and free from distress while testifying in public to the matrimonial offences of someone they once loved, or while confessing, as they have to do in about one-third of all cases, that they have themselves committed adultery.

(*g*) " We think it may be said that the law of divorce, as it at present exists, is indeed weighted in favour of the least scrupulous, the least honourable and the least sensitive and that nobody who is ready to provide a ground of divorce, who is careful to avoid any suggestion of connivance or collusion and who has a co-operative spouse, has any difficulty in securing a dissolution of the marriage." —nine members of the Morton Commission in paragraph 70(*v*) of their Report.

(*h*) Marriages which have irretrievably broken down are kept in being where the " innocent " party for one reason or another refuses to petition. The result is a large number of illicit unions which cannot be regularised and a still larger number of bastard children who cannot be legitimated.[42] It would be in the public interest to permit the guilty party to bring proceedings for divorce, thus enabling the union to be regularised and the children legitimated. It is to be expected that the " innocent " party, though not prepared to institute proceedings, would, in a large number of these cases, not oppose the grant of a decree if offered just financial terms and proper arrangements for the children.

(*i*) The court's task in cases in which it is asked to exercise its discretion is an embarassing one which frequently has to be carried out without sufficient information. The discretion of the court, as we have shown, is almost invariably exercised in favour of the petitioner and it may be questioned whether it is in the public interest to refuse to grant a decree on the sole ground (i.e. in the absence of hardship to the respondent or the children) that the petitioner has blatantly disregarded his matrimonial obligations.[43]

26. We think that some of the arguments against the present system can be and often are exaggerated. In recent years the bogus " hotel case ", described by Sir Alan Herbert[44] and by Mr. C. P. Harvey, Q.C.[45], has become far less common.[46] And recent changes in the law relating to collusion[47] have enabled some of the sting to be taken out of the adversary process. Nevertheless, we are impressed by the strength of the case against the retention of the present basis. The Archbishop's Group on Divorce, a group which included a number of distinguished judges and legal practitioners, found the case overwhelming. Furthermore, they were able to say:

" That the law as it stands *is* unsatisfactory all the judges and lawyers who gave us evidence agreed, however much they differed concerning

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42 See paras. 33–37 below.

43 See in particular the recent case of *Williams* v. *Williams* [1966] 2 W.L.R. 1248, C.A., where the results of refusal to exercise discretion on the ground that the petitioner had shown a complete disregard for the sanctity of marriage were that two new stable unions formed by the parties (one of which had already resulted in the birth of an illegitimate child) could not be regularised.

44 *Holy Deadlock*, Methuen, 1934.

45 *On the State of the Divorce Market*, (1953) 16 M.L.R. 129 at pp. 131–132.

46 But adultery is still the most popular ground of divorce, constituting just over 50 per cent. of the total and there are rather more petitions on this ground by wives than by husbands.

47 See para. 21 above.

the remedies to be applied. We are far from being convinced that the present provisions of the law witness to the sanctity of marriage, or uphold its public repute, in any observable way, or that they are irreplaceable as buttresses of morality, either in the narrower field of matrimonial and sexual relationships, or in the wider field which includes considerations of truth, the sacredness of oaths, and the integrity of professional practice. As a piece of social mechanism the present system has not only cut loose from its moral and judicial foundations ; it is, quite simply, inept ".[48]

27. Admittedly the determination of fault cannot be wholly eliminated. As the Archbishop's Group recognise, it must remain an important element in the court's decisions about financial matters[49] and continue to be the basis upon which a spouse can obtain immediate protection by applying for a decree of judicial separation or a magistrate's order.[50] But this does not destroy the advantages of diminishing its role in the decision whether a marriage should be dissolved. The public determination that one party is guilty of destroying a marriage causes bitterness and distress both to the parties and their children. If the question of fault could be regarded as relevant only at the stage when maintenance comes to be determined in chambers and not in public, much of that distress could be avoided. Furthermore, the court would be likely to obtain a more realistic assessment of relative fault. Under the present system guilt has to be established during the public hearing to decide whether there should be a divorce. In the subsequent private hearing to decide on maintenance claims the parties cannot seek to dispute that finding or raise matters which might have affected the result. This has two undesirable results: first, the respondent is encouraged to defend the suit solely in order to protect his or her financial interests ; and, secondly, in cases where he or she fails to defend—the vast majority—an award of maintenance may be based on a finding of guilt which bears small relationship to the truth. If it were possible to dispense with formal declarations of guilt or innocence at any stage, some of the bitterness might be drained out of divorce litigation and maintenance might be awarded on a truer assessment of relative blame than under the present system.

28. It seems clear that the present law does not adequately achieve the objectives of a good divorce law as set out in paragraphs 13–18 above. It does not do all it might to aid the stability of marriage, but tends rather to discourage attempts at reconciliation. It does not enable all dead marriages to be buried, and those that it buries are not always interred with the minimum of distress and humiliation. It does not achieve the maximum possible fairness to all concerned, for a spouse may be branded as guilty in law though not the more blameworthy in fact. The insistence on guilt and innocence tends to embitter relationships, with particularly damaging results to the children, rather than to promote future harmony. Its principles are widely regarded as hypocritical. In particular, it has failed to solve four major problems with which a reformed divorce law must grapple.

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48 *Putting Asunder*, para. 45.

49 *Ibid.* para. 91, and Appendix C, para. 32 at p. 127.

50 *Ibid.* para. 38, and Appendix C, paras. 27 and 28 at p. 126.

Four Major Problems

(a) *Reconciliation*

29. One of the criticisms frequently heard about divorce in this country (as opposed to criticism of particular grounds of divorce) is that a disproportionate amount of public money is spent on dissolving marriages in comparison with the small sum spent on marriage guidance and conciliation. We are impressed by the work undertaken by marriage guidance agencies in preparing young couples for marriage and hope that they will be enabled to extend the scale of their operations. If more marriages are to be saved from breakdown, we believe that the preventive medicine of guidance before marriage and help during the marriage is likely to achieve far more than attempted cures after the breakdown has occurred.

30. Marriage Guidance Councils are unanimous in saying that their chances of success are greatest if their help is sought at an early stage in disputes between husband and wife. These chances are greatly diminished by the time that either party has resorted to legal advice, and have dwindled almost, but not quite, to vanishing point by the time that a petition is filed. For this reason we share the view of the Morton Commission[51] and the Archbishop's Group[52] that it would not be advisable to introduce into English law the compulsory conciliation procedures which form part of a number of foreign systems. Under some of these the parties have to submit to a conciliation procedure after petitioning for a divorce. In practice, the successes achieved by these procedures are few and they have tended to become pointless and troublesome formalities.

31. Nevertheless, we do think it very desirable that couples in matrimonial difficulties should be encouraged to resort to marriage guidance agencies and that they should be in a position to find out with ease what guidance facilities are available. Solicitors are among the people from whom advice may be sought at an early stage of the matrimonial differences and, though in practice they are very conscious of their duty to assist in a possible reconciliation, they are not trained in the art of marriage conciliation and can normally only pass their clients on to those who are. It is therefore very important that they should have at their finger tips details of the various marriage guidance agencies. Accordingly, we are attracted by the provisions of rule 15 of the Matrimonial Causes Rules of the Commonwealth of Australia, whereby when a matrimonial petition is filed the solicitor acting for the petitioner must certify, *inter alia,* that he has brought the names of available marriage guidance organisations to the attention of his client and has discussed with him the possibility of a reconciliation being effected, either with or without the assistance of such an organisation. We suggest that consideration should be given to the introduction of a similar rule in England. We think that its value is not so much that a reconciliation is likely to be effected at that late stage of the matrimonial differences, but rather that it ensures that all solicitors have ready to hand a list of marriage guidance organisations, so that this can be given to those clients who consult them at an earlier stage. We are informed that in the year ending June 1964, 7 per cent of all cases dealt with by approved marriage guidance organisations in Australia were

51 Cmd. 9678, para. 340.

52 *Putting Asunder*, para. 76.

referred to them by legal practitioners, and that many of these references are thought to be due to the existence of the rule quoted.

32. Under the present law, in a discretion case where both parties have committed matrimonial offences the court can adjourn or even dismiss the petition if it thinks that a reconciliation is possible, but it cannot even adjourn the proceedings on this account if it is the respondent only who has committed a matrimonial offence. Both in Australia and New Zealand there is always power to adjourn the proceedings (but not to dismiss the petition) to enable the possibility of reconciliation to be explored and to refer the parties to a conciliator.[53] We are informed that in Australia, where this power has existed since 1961, only 15 cases were recorded up to the end of 1965 in which this procedure was adopted and that reconciliations were effected in only two of these cases. This confirms our view that divorce proceedings are very rarely brought unless the marriage has irretrievably broken down, and that attempts to mend it once litigation has begun are unlikely to be successful. Nevertheless, so long as the power is sparingly exercised (as it obviously has been in Australia), we think that the power to adjourn (not to dismiss) the petition should be available. 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. Accordingly, whatever decision is come to regarding the grounds for divorce, we suggest that the court should be expressly empowered to adjourn, for a limited period, to enable the possibility of a reconciliation to be explored.

(b) *Stable Illicit Unions*

33. The criticism of the existing divorce law mentioned in paragraph 25(*h*) draws attention to an important problem, the size of which has never been precisely ascertained. The available statistics do not enable any estimate to be made of the total number of illicit unions or of those which cannot be regularised because one party (or both) is already married and unable, in the present state of the law, to obtain a divorce. But some information is available regarding the number of illegitimate children born into such stable unions. This gives some indication of the size and gravity of the problem, especially as unions which have produced children are those which are most likely to remain stable and those in which the greatest hardship is caused if the union cannot be regularised. To enable such unions to be regularised would be in the interests not only of the partners and, especially, their children, but also, it is argued, in that of society so long as it could be done without disproportionate hardship to the lawful spouse and children.

34. In 1960, Miss V. Wimperis in her book *The Unmarried Mother and Her Child*[54] summarised the results of various surveys which have been carried out in a number of urban centres. She concluded that some 40 per cent of illegitimate children were born into stable unions, the parties to which were debarred from marrying by the undissolved marriage of one or other partner (occasionally both). Although this estimate is not up to

[53] Australia: Matrimonial Causes Act 1959, s. 14; New Zealand: Matrimonial Proceedings Act 1963, s. 14.

[54] Allen & Unwin. See Ch. 2 and especially pp. 65–73.

date, nor based on data adequate for any firm conclusions to be drawn, some indication that it may not be very wide of the mark is afforded by figures supplied to us by the General Register Office. These show that from 1961 onwards between 38 per cent and 40 per cent of illegitimate live births were registered on the joint information of both father and mother. This indicates that in these cases the father was prepared to acknowledge that he was the natural parent, and it is a fair assumption that in the majority of such cases the father and mother were living together. It does not follow that in every case the union was one which could be regarded as stable, or one in which the parties were unable to marry because of a prior marriage. On the other hand, there must be other unions which become stable some time after the child's birth—though these are unlikely to be numerous.

35. Not all of these children remain illegitimate for all time even under the present law. The lawful spouse may die, or change his mind about not petitioning for divorce, and the parents then marry and legitimate the children. It seems that this occurs in a significant percentage of cases, for the preliminary results of a survey on illegitimacy being carried out at the present time by the General Register Office indicate that about 7 per cent of all illegitimate children have been legitimated before their tenth birthday by the subsequent marriage of their parents. Nor would all illegitimate children of stable unions be legitimated whatever changes were made in the law. Some would die before their parents could marry; in other cases the parents would decide not to marry, or one might die before there could be a divorce and remarriage.

36. The importance of the problem requires us to try to calculate even on this shaky basis the number of children involved. Assuming the approximate accuracy of Miss Wimperis' estimate, it would seem likely that the considerations referred to in paragraph 35 should reduce her figure of 40 per cent to 30 per cent or less in order to determine the number of children who cannot be legitimated as the law stands at present, but who would be if the law were changed in such a way that stable irregular unions could be regularised. For practical purposes it seems unnecessary to concern oneself with children who have already passed their sixteenth birthday. In the fifteen years up to and including 1964 there were 607,000 live illegitimate births in England and Wales. Thirty per cent of this is 182,100. As regards the future, the annual number of illegitimate births is now about 64,000 (63,340 in 1964); 30 per cent of this is 19,200. It would seem therefore that, if the law were changed, about 180,000 living illegitimate children could be legitimated and that in each future year some 19,000 children who would otherwise be condemned to permanent illegitimacy might be born in wedlock or subsequently legitimated.[55]

37. Whatever the exact figures are, they are clearly substantial and show that there may be here a far more serious social problem than is generally realised. At present the position of the children cannot even be ameliorated by their parents jointly adopting them. Only married couples can apply

[55] It would appear that the estimate given by Mr. John Parker, M.P. (H.C. Debs. 8th Feb. 1963, Col. 848) in the debates on the Matrimonial Causes Bill in 1963 of the total number of illegitimate children who might be affected (800,000) was much too large unless it included adult children. Lord Silkin's estimate (H.L. Debs. 21st June 1963, Col. 1533) was 200,000 children under 16 which accords closely with ours.

jointly for adoption, and although adoption by one parent alone could be applied for, this would merely emphasise the irregularity of the parents' union. Something might be done by removing the remaining legal disabilities attaching to illegitimacy (one step in this direction has recently been recommended by the Russell Committee,[56]) but a fundamental change in public attitudes would be needed if the stigma of bastardy were to be totally erased. Moreover, alleviating the lot of the children would not remove all the undesirable social consequences of large numbers of permanently illicit unions masquerading, in many cases, as lawful marriages.

(c) *Divorce and Justice to Wives*

38. As the Archbishop's Group have pointed out[57], the first target of critics should be "the existing system which so often allows divorce to operate to the comparative disadvantage of the wife". We certainly agree that the present law not infrequently causes injustice to wives, especially where they are economically the weaker partners. Moreover, one of the most powerful objections to any reform of the divorce law which would enable an "innocent" and unwilling party to be divorced is that these injustices would be magnified. The Archbishop's Group have pointed out that the problem has four separate but interrelated facets: first, the economic deprivation; second, the deprivation of status; third, the scandal of the petitioner taking advantage of his own wrong; and, fourth, the feeling of insecurity that may be engendered in a wife by the knowledge that, however well she behaves, she may be divorced against her will.

39. As regards the economic aspect, a wife has three major interests in the marriage: current support for herself and her family; the future security of any pension for which the husband, or she as his widow, may qualify; and the shelter of the matrimonial home. If the husband is a man of property, she also has the security of his capital. In regard to all these interests the break-up of the marriage will diminish her security in most cases. To some extent this is inevitable, if only because few people can afford to maintain more than one home. But it should be possible to alter those features of the present law whereby a wife will frequently be worse off if the marriage is dissolved than she would be if there were no divorce, even though the husband has left and established an irregular union with another woman. Her position will be improved if the Matrimonial Homes Bill now before Parliament becomes law; this will at least secure her right to continue to occupy the matrimonial home. But far more radical reforms are needed in the law relating to the family property (in which we include pension rights) and in the rules governing financial relief and the machinery for its enforcement if, as a result of the divorce, she is not to suffer materially, either at once, or later through loss of a pension as her ex-husband's widow. These problems are among those dealt with in two separate studies on which we are engaged at the present time: one on family property and the other on financial relief. We expect that reform of these branches of the law could go some way both to mitigate the inevitable

56 The Committee on the Law of Succession in Relation to Illegitimate Persons: 1966, Cmnd. 3051. See also *Fatherless by Law?* (1966) a Study by the Board of Social Responsibility of the National Assembly of the Church of England.

57 *Putting Asunder*, para. 64 at p. 47.

hardship caused by a break-up of the home and to eradicate the additional hardships which may result from a subsequent dissolution of the marriage.

40. We agree with the Archbishop's Group that if the law were to be altered so that an "innocent" wife could be divorced against her will "there should be the safeguard of an absolute bar, whereby the court would have a duty to refuse a decree, unless it was satisfied that the proposals concerning property, pension and maintenance, were equitable. This safeguard would operate in all cases to preclude decrees which might cause hardship offensive to justice and contrary to the public interest."[58] This should certainly operate to preclude the grant of a divorce where the husband has not made the most equitable provision for the wife that is possible in the circumstances. Until the rules relating to family property and financial relief are reformed in a way which will protect the wife against additional hardship resulting from a divorce, it may be necessary to go even further by providing an additional safeguard whereby a divorce cannot be forced on the wife if it is impossible for the husband to make provisions which protect her from disproportionate hardship. If such a safeguard cannot be dispensed with, it is much to be hoped that resort to it could be infrequent: it is offensive to decency and derogatory to respect for family ties to preserve the legal shell of a dead marriage for purely monetary considerations.[59] Moreover, a rich husband can easily make satisfactory financial provision for his wife and get his divorce; a poor man cannot, and it will be argued that it would be discriminatory for the law to refuse him a divorce on that account. Fortunately, the orders which the court makes can be varied subsequently if the circumstances of the parties alter, and this may enable an initial injustice to be corrected. In most cases, as we have said, the hardship will already have resulted from the break-up of the home and a refusal of a divorce cannot mend this.

41. Even so there will be an irreducible—but we hope small—number of cases where a marriage has broken down entirely and the parties have separated permanently and yet the grant of a divorce, as the law stands at present, must operate to the further economic disadvantage of the wife to such an extent as to appear to "cause hardship offensive to justice and contrary to the public interest". When this occurs it may be that a divorce should not be forced on an unwilling innocent wife (or husband for that matter). We would think, however, that it would be more appropriate to express this as a discretionary, rather than an absolute, bar, for the court would in reality be called upon to make a subjective assessment whether greater hardship would be caused by granting or refusing a divorce and to exercise its discretion accordingly. We return to this question in a later section of this Report.[60]

42. Of course, there are cases where finance is not the main consideration. For instance, the wife may have religious objections to divorce. Here the present law places her in an invidious position. If she petitions, she acts

58 *Putting Asunder*, para. 64.

59 For a particularly distressing recent example where, under the present law, this had to be done, see *Davis* v. *Davis*, *The Times*, 17th March 1966.

60 See paras. 114–119 below.

contrary to her religious principles; if she does not, she will often appear to be spiteful and vindictive and will realise that she is causing pain and hardship to the husband, the other woman, and any children of the second union. If the husband were enabled to petition, she might be relieved of this dilemma. In some cases she might feel able to say to the husband: "My religious beliefs do not enable me to petition for divorce. But I agree that unfortunately our marriage has become an empty shell and if you like to end it, go ahead. I, for religious reasons, shall not regard myself as free to remarry, but I do not want to stop you from doing so." In other cases there may be spite. It would be generally agreed that this is not a valid reason for keeping the parties tied or for enabling the wife to blackmail the husband into making an unduly generous financial settlement as a condition for divorce. Another motive may be the hope that some day the husband will recover from his infatuation for the other woman and return to the wife. If, however, the husband has been living with another woman for a considerable time, the chances of his returning are remote. He is unlikely to want to return to a wife who has refused to give him his freedom; this in fact is more likely to increase his feeling of bitterness towards her. So long, therefore, as a substantial period of separation is required before a divorce can be obtained, further preservation of the legal tie does not seem to be justified on these grounds.

43. The second facet of this problem—deprivation of status—is of a different order. The faithful spouse is likely to suffer a blow to her pride from deprivation of married status and the publicity given to this, but as the Archbishop's Group point out[61] the real wound is inflicted not by the divorce but by the previous break-up of the marriage and separation of the parties. The injury to the wife caused by the loss of status must be weighed against the social advantages to be derived from an opportunity of regularising a new union and improving the status of the children of that union. From the point of view of the wife herself, it is not clear that the status of a rejected wife is at the present day superior in society's esteem to that of a divorcee.

44. This second facet is closely related to the third—the scandal of the petitioner taking advantage of his own wrong by obtaining a divorce on the ground of the breakdown of the marriage brought about by himself. The Morton Commission[62] pointed out that the public's sense of justice and propriety would be outraged if a petitioner had been clearly responsible for ending the common life, blatantly flouted the obligations of marriage, treated the other party badly, and nevertheless obtained his freedom. It is for this reason that the Archbishop's Group favour the introduction of an additional safeguard: that the court should refuse a decree, even though breakdown had been proved, "if to grant it would be contrary to the public interest in justice and in protecting the institution of marriage".[63] We consider more fully hereafter the question whether such a safeguard is desirable and, if so, how it should be formulated.[64] Here it suffices to say

61 *Putting Asunder*, para. 65.
62 Cmd. 9678, paras. 69–71.
63 *Putting Asunder*, para. 66.
64 See paras. 114–119 below.

that if such a safeguard (in addition to the financial one previously mentioned) cannot be dispensed with, it is desirable that it should be narrowly restricted. The expedient of preserving the sanctity of marriage by insisting that one who has shown a wanton contempt for it should be punished by remaining married seems illogical and unattractive, especially if, as is usually the case, it involves punishing others as well.

45. The fourth and final facet of the problem under discussion concerns the anxiety that wives may be caused by the thought that when they lose their youth their husbands will turn to younger and more attractive partners. At present a wife has the assurance that, provided she does not commit a matrimonial offence or go mad, she can keep the status of wife permanently. If the law were altered so that she could be divorced without having committed any matrimonial offence, she would have no guarantee that she might not find herself supplanted in this way to make room for a younger successor. But, as the Archbishop's Group point out, power to keep one's legal status is not the same as being secure from disruption of the home and family. "Whenever a husband (or a wife for that matter) has so far broken away from the original marriage as to set up a new ménage with the intention that it should be permanent, the lot of the deserted partner cannot be appreciably improved, in terms of human life, by mere maintenance of the legal *status quo*. The real damage has already been done."[65] In many cases where this occurs the wife already faces realities and divorces her husband. The effect of the introduction of some grounds of divorce not based on matrimonial offence would be that the husband, after a time, might petition if the wife refused to do so.

46. Finally, we must point out that it is not always the wife who is the more innocent party or the one who suffers the greater hardship. Sometimes the husband, as the price of his freedom, may have to accept lifelong responsibilities towards an ex-wife who is capable of earning her own living if she chooses to do so. Sometimes, too, the husband's desire for a divorce may be based on motives more commendable than a wish to switch partners. Where, for example, the wife has borne a child by another man it is natural for the husband to want a divorce in order to establish that the child is not his and to disclaim financial responsibility. Although it is still normally the wife who is the economically weaker party and therefore the more likely to suffer, the boot is sometimes on the other foot. A reformed divorce law must be just to husbands as well as to wives.

(d) *The Position of the Children*

47. One of the most serious and disturbing aspects of the breakdown of marriage and of divorce is the effect on the children.[66] They are the innocent victims of their parents' marital differences and are as vitally affected by the results of any matrimonial proceedings as are their parents —perhaps more so. Yet they are not parties to these proceedings and are normally not represented. Following the recommendations of the Morton Commission[67] greater attention is now paid to their interests. Under what

65 *Putting Asunder*, para. 67.

66 Here and throughout this Report we use the term children to mean infant children who are either children of the marriage or who have been received into the family.

67 Cmd. 9678, paras. 373–394.

is now section 33 of the Matrimonial Causes Act 1965 the court is precluded from granting a decree absolute[68] unless satisfied that arrangements for the care and upbringing of all "relevant children"[69] have been made if it is practicable to do so and that such arrangements are satisfactory or the best that can be devised in the circumstances. To satisfy itself on this point the court can avail itself of the services of court welfare officers, and can order that the children be separately represented.[70] Nevertheless, these provisions have been widely criticised as inadequate, both in their scope and in the way that they are working in practice, and we propose as soon as possible to institute an investigation—possibly in collaboration with an outside body—into this.

48. So far as concerns the financial position of the children, much that we have said in paragraphs 39–41, above, regarding the position of the wife, is equally applicable to the children. We there referred to our present investigations of the rules relating to matrimonial property and financial relief and said that we hoped to be able to make recommendations which would provide better safeguards for the wife. These safeguards would operate equally for the protection of the children. Similarly, the bar proposed by the Archbishop's Group which would prevent a divorce until equitable financial arrangements had been made, should extend to arrangements for the children. Clearly, too, it should apply not only where the wife, as the innocent party, objects to a divorce but also where she consents, for her interests are not necessarily the same as those of the children. To some extent, indeed, this is already achieved by section 33 of the 1965 Act to which, as we have indicated, we propose to give further consideration. It is arguable, however, that none of this goes far enough and that where there are infant children there should either be no divorce at all or a divorce should be obtainable only if the court were satisfied that a divorce would be in the children's interest.[71]

49. The argument is that divorce inevitably has adverse psychological effects on the children. It is said that those who have brought children into the world (especially in these days when knowledge and availability of contraception are widely diffused) should subordinate their own interests to those of the children—as many undoubtedly do. When there are children a divorce can never be as complete as when there are none, for, though the marriage tie may be broken, the tie of joint parentage remains. As against this, however, it can be argued that what causes the major disturbance to the children is the break-up of the home and the quarrels that preceded it, and that once a break-up has occurred a subsequent legal recognition that the marriage is dead can do little more harm and may indeed do good. The final break may lead to a lessening of the bitterness between the parents

68 The Morton Commission had to reject as administratively impracticable the refusal of the decree nisi, rather than the decree absolute: Cmd. 9678, para. 372. These difficulties arose chiefly from the assize system and it may be possible to solve them after the Royal Commission, referred to in paragraph 4, has reported. We agree with the Archbishop's Group (*Putting Asunder*, para. 90) that it would be more satisfactory if the interests of the children could be considered at the earlier stage.

69 This expression is defined in section 46 of the Act and corresponds, though not perfectly, to the definition in para. 66 above. In our study of financial relief we shall make recommendations on how the definition in section 46 might be improved.

70 Matrimonial Causes Rules 1957, r. 56.

71 See the suggestions of Sir Jocelyn Simon P. referred to below (para. 81) in connection with Divorce by Consent.

and may facilitate the establishment of a new stable environment which is the children's greatest need. On the other hand, it is argued that the re-marriage of the divorced parents is liable to cause a further psychological shock, especially if it is followed by the birth of a new family. The step-mother or step-father may resent having to accept responsibility for the children of the former marriage and is unlikely to display towards them the same degree of affection as towards her or his own children of the new marriage. In reply to that, it can be argued that merely to refuse a divorce and the possibility of remarriage will not prevent the establishment of new unions or the birth of children to them—the only difference will be that the new unions will be irregular and the children illegitimate. All that could be said is that a step-mother who has no legal hold over the father is perhaps more likely to behave well towards his children by the former marriage.

50. We agree with the Archbishop's Group[72] that it is quite impossible to generalise. Sometimes the children will suffer more if their quarrelling parents stay together than they would if they parted ; sometimes they will not. Sometimes they will suffer more if the parting is followed by a divorce ; sometimes they will not. Sometimes they will suffer further if there is a remarriage ; sometimes they will gain thereby. All one can be sure of is that it is in the best interests of the children that their parents' marriage should be a happy one and not break up. This truism is recognised by all parents but, unhappily, not all of them are able, however hard they try (and we believe that most of them try desperately hard), to preserve a happy home and marriage. Inevitably some marriages will break up notwithstanding that there are children. That being so, we doubt the practicability or desirability of attempting to differentiate radically between marriages with children and those without.

51. The Archbishop's Group thought that no such differentiation should be made : "we cannot think it just . . . that there should be one law of divorce for those with children and another for those without."[73] Quite apart from any consideration of the justice of discriminating between childless and fruitful marriages in this way, we think that the divorce law should not make such a distinction because this would not be in the interests of the children themselves. Whether one considers the proposal that no divorce whatever should be available for couples with dependent children or whether one accepts some modified form of it which makes the parents' right to a divorce depend on the children's welfare, the inevitable result would be (especially if both parents wanted a divorce) that the children would come to be regarded as the main obstacle to their parents' happiness. We do not think that public opinion would accept a total ban on divorces for parents in this position.[74] Such a provision would be thought a very harsh aggravation of the restrictive features of the present law. If, however, divorce were allowed only if it could be shown that the children's welfare

72 *Putting Asunder*, para. 57, and Appendix D, paras. 14 and 15, at pp. 148–149.

73 *Putting Asunder*, para. 57.

74 A survey of public attitudes to divorce was carried out in October, 1965 for the *Daily Sketch* by National Opinion Polls, Ltd., who interviewed a representative sample of 1,010 adults throughout Great Britain. Only 33 per cent agreed with the suggestion that nobody should be able to get a divorce if they have children under 16 and only 39 per cent if the children were under 10. This view was held mainly by those in the older age groups. Whereas 50 per cent of those over 55 held that view if the children were under 10, only 35 per cent of those aged 35–54 did so and only 31 per cent of those under 35.

would gain by it, it would inevitably be in the interests of parents wanting a divorce to induce any children that were of an age to give evidence to testify to the effect that a divorce would be in their own interests. When a divorce could not be obtained, not only would the parents regard the children as the main obstacle to their own happiness but there would be a great danger that the children would come to know this. We do not think that it would be desirable to make the children the fulcrum on which their parents' hopes of a divorce would turn.

THE FIELD OF CHOICE FOR REFORM

Some Basic Assumptions

52. In attempting to mark out the boundaries of the field of choice our point of departure must be the hard facts about social habits and public opinion in this country at the present time. It may be helpful therefore to set out a number of the considerations which are, we think, undeniably real, which limit the field of choice of reforms, but which are frequently overlooked. Disregard of these considerations may render a proposal useless, or unjust or unacceptable to public and Parliamentary opinion. We think that the following are some of the factors which must be borne in mind when working out realistic proposals:

(*a*) Public opinion would not accept any substantial increase in the difficulty of obtaining a divorce or of the time it takes, unless it could be shown that an appreciable number of marriages would be mended as a result.[75]

(*b*) Experience shows that the chances of reconciliation between the parties have become almost negligible by the time that a petition for a divorce is filed.

(*c*) Whether a divorce is obtainable or not, husbands and wives in modern conditions will part if life becomes intolerable. The ease with which names can be changed under English law simplifies the establishment of a new and apparently regular "marriage"; where the deception is not complete, the resulting children are the main sufferers because of the stigma that still attaches to the status of illegitimacy.

(*d*) Children are at least as vitally affected by their parents' divorce as are the parents themselves.

(*e*) Breakdown of a marriage usually precedes the matrimonial offence on which the divorce petition is based. Thus, an isolated act of adultery or isolated acts with different partners may be the grounds for divorce, but are likely to be the result of the breakdown of the marriage rather than its cause.

(*f*) Public opinion would be unlikely to support a proposal which had the effect of, say, doubling the amount spent on divorce proceedings; in so far as more Judges, more courts and more Legal Aid would impose a burden on public funds, it would be felt that the money could be better spent on other objects, including, for example, marriage guidance and conciliation.

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75 See the Morton Commission Report, Cmd. 9678, para. 50.

(*g*) Public opinion would be equally unlikely to support a great expansion of the Queen's Proctor's Office or the employment of additional public servants with the function of investigating the truth of the evidence given by parties to divorce proceedings. At the present time there is a shortage of trained welfare officers attached to the courts and no sudden addition to their numbers can be hoped for in the near future.

(*h*) Even where a marriage is childless, divorce granted automatically if the parties consent ("Post Office divorces") would not be acceptable; there must be an independent check if only to ensure that the economically weaker party really and freely consents to the divorce and to approve the financial arrangements worked out by the parties and their solicitors. The need for outside intervention is, of course, far greater where there are children.

The Main Types of Reform Usually Proposed

53. The proposals which are most frequently advanced for the reform of the divorce law fall into three main categories:—

(1) divorce on the sole ground of breakdown of marriage;

(2) divorce by consent as an addition to the existing grounds;

(3) divorce after a period of separation as an addition to the existing grounds.

54. For convenience, we shall deal with these and their variants under the following heads and shall give them the following names:—

A. (i) Breakdown with Inquest.

(ii) Breakdown without Inquest.

B. Divorce by Consent.

C. The Separation Ground.

55. It is not for us, as lawyers, to recommend which, if any, of these proposals should be adopted. All we can do is to set out the arguments for and against each proposal and to indicate whether the proposal is a practicable one having regard to the considerations set out in paragraph 52.

A. (i) *Breakdown with Inquest*

56. The Archbishop's Group in *Putting Asunder* advocate the abolition of all existing grounds of divorce and the substitution of breakdown of marriage as the sole ground. This view derives from the line of thought started by Lord Walker in 1956, when he dissented from the conclusions of the rest of the Morton Commission that the doctrine of the matrimonial offence ought to be retained.[76] At the time no other members of the Commission supported this view, though, as we point out later,[77] half of the members favoured the introduction of a seven year period of separation as a ground for divorce, additional to those based on a matrimonial offence.[78] But the Group have now unanimously adopted it, and rejected the existing basis of the matrimonial offence for reasons similar to those

76 Cmd. 9678, pp. 340–341.

77 See para. 85 below.

78 Five of these nine members would have limited the proposal to cases where the respondent did not object to the grant of a divorce.

in paragraph 25 above. In the next paragraph we summarise their arguments in favour of substituting breakdown and in paragraph 58 the arguments against. We deal more fully with the arguments against only because those in favour have been set out in *Putting Asunder* with far greater clarity and persuasiveness than we could hope to match. Their views will have been studied by all who are interested in this subject.

57. *Arguments for Breakdown with Inquest*

(*a*) The existing grounds of divorce are mutually inconsistent. "If, as many defenders of the present law have insisted, the moral principle underlying the doctrine of the matrimonial offence is right and necessary to be maintained, then divorce on the ground of a spouse's insanity must surely be immoral; for insanity is not an offence but an affliction. If, on the contrary, it is morally right to grant divorce in cases where the common life has been brought to an end by circumstances outside the control of either party, it is hard to see why the law should make decrees depend on the commission of an offence, except in the one case. The two concepts do not mix."[79]

(*b*) Hence, "there are only two theories alive on this problem—namely, are we going to act on the matrimonial offence, or are we going to act on the breakdown of marriage theory?"[80]

(*c*) There is an overwhelming case against the matrimonial offence theory: see paragraph 25 above. Of the arguments against it, those that seem to have weighed most heavily with the Archbishop's Group were its superficiality and remoteness from marital realities, the bitterness that it engenders, the adverse effect on the children and the obstacles it places in the way of reconciliation.

(*d*) "A divorce law founded on the doctrine of breakdown would . . . accord . . . with social realities . . . [and] would have the merit of showing up divorce for what in essence it is—not a reward for marital virtue on the one side and a penalty for marital delinquency on the other, not a victory for one spouse and a reverse for the other; but a defeat for both, a failure of the marital 'two-in-oneship' in which both its members, however unequal their responsibility, are inevitably involved together."[81]

(*e*) "When the prospect of continuing cohabitation has ceased, the true view as to the significance of marriage seems to require that the legal tie should be dissolved. Each empty tie—as empty ties accumulate—adds increasing harm to the community and injury to the ideal of marriage."[82]

(*f*) Already the law is tending in the direction of substituting breakdown for matrimonial offence. Not only is breakdown openly recognised as the basis of divorce on the ground of incurable insanity; it is also discernible as the true criterion in connection with cruelty (the conduct no longer has to be culpable in any ordinary sense of the

79 *Putting Asunder*, para. 44.
80 Lord Hodson in H.L. Debs. 21st June, 1963, col. 1538.
81 *Putting Asunder*, para. 26.
82 Cmd. 9678: Lord Walker at p. 341.

word)[83] and in "discretion" cases.[84] "In practice . . . the law is moving away from basing divorce on a finding concerning the delinquency of one of the parties towards basing it on a finding concerning the state of the marriage relationship and the demands of distributive justice."[85]

(*g*) Hence the only logical and sensible course is to scrap the specific grounds based on the commission of a matrimonial offence and to substitute the one ground: that the court is satisfied that the marriage has broken down. Instead of there being hostile litigation designed to prove the commission of an offence, there should be an inquest into the marriage to see whether it is dead or not. In the course of this inquest matrimonial offences would not be irrelevant; they would be evidence, but no more than evidence, from which the court might infer breakdown. Equally important would be the parties' efforts at reconciliation, which would thereby be encouraged.

58. *Arguments against the substitution of breakdown*

(*a*) That one spouse should have a right to dissolve the marriage when the other has committed a serious matrimonial offence enshrines a sound moral principle and is in accordance with public opinion.

(*b*) The fact that in one extreme case (insanity) the law permits a divorce where there has been no such offence is no ground for totally scrapping the matrimonial offence principle. The two principles can operate side by side and are in no way inconsistent.

(*c*) Divorce on the ground of breakdown is virtually equivalent to allowing divorce by consent, for if both parties say that they want a divorce and that they are not prepared to live together again, it will be impossible not to hold that the marriage has broken down.

(*d*) "Many divorces would in reality be given merely on the ground of incompatibility or for such defects of temperament as should be regarded as coming within the ordinary wear and tear of married life."[86] If the petitioner tells the court that the marriage is dead and is supported by the evidence of friends, the court could not do otherwise than accept that evidence and grant a divorce.

(*e*) The doctrine of breakdown is intrinsically incompatible with the conception of marriage as a lifelong union. "A law based on breakdown . . . could be represented as making marriage essentially 'perishable'. Would it not therefore inevitably derogate from the lifelong intention hitherto required at the making of the marriage? Those approaching marriage would no longer be expected to regard marriage as indissoluble, unless one party behaved intolerably (or went mad), but would be invited to see it as a relationship liable to die a natural death without any grave fault having been committed on

83 *Gollins* v. *Gollins* [1964] A.C. 644, H.L.; *Williams* v. *Williams* [1964] A.C. 698, H.L.; see para. 22, above.

84 See, for example, *Little* v. *Little* (1966) 110 S.J. 546, C.A.

85 *Putting Asunder*, para. 53.

86 Morton Report, Cmd. 9678, para. 69 (xxxiv).

either side. Would this not turn every marriage into a trial marriage? "[87]

(*f*) To permit divorce merely because the marriage has failed would mean that an entirely innocent wife who has entered into a lifelong union could be divorced against her will, thus depriving her of the status and rights of a wife. As a result, her confidence in the stability of the marriage might be sapped and she might suffer financially, especially in regard to pension rights.

(*g*) The admitted disadvantages of the matrimonial offence principle can be mitigated in a variety of ways, for example by recognising further grounds of extreme hardship in addition to insanity, and by procedural reforms.

(*h*) It is impossible wholly to eradicate the concept of fault, since if it is rejected as a ground for divorce it will creep back as an essential element in determining questions such as maintenance.[88]

(*i*) The issue of breakdown is not easily triable, or, if it is triable, a court of law is not the appropriate tribunal to adjudicate on it, accustomed as it is to trials conducted on the adversary system and unused to inquisitorial procedures. Moreover, the test of breakdown leaves considerable room for individual judgment and discretion concerning matters about which even Judges are liable to entertain the strongest feelings; the result would be varying and unpredictable conclusions.

(*j*) Because of this unpredictability and the vagueness of the test of breakdown, solicitors would find it extremely difficult, especially at first, to advise clients whether a divorce was likely to be obtained.

(*k*) Court hearings would take far longer. Undefended cases at present constitute 93 per cent of the total and take about ten minutes each. Under the suggested procedure the length of trials could not at best be less than trebled.[89] Present resources are fully extended to achieve about 35,000 divorces a year. Therefore great additional expenditure would be required on court-houses, Judges, court staff, etc. Scarce, highly skilled manpower would have to be diverted to this work. A great expansion of the Queen's Proctor's Office would be required, since it is proposed that numerous officials should be employed to investigate the truth of the evidence contained in the pleadings (*Putting Asunder,* paragraph 89). The proposal to employ a considerable number of officers on this work is unattractive (see generally paragraph 52 (*f*) and (*g*) above).

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87 *Putting Asunder*, para. 60. This objection is much emphasised in para. 69 of the Report of the Morton Commission, where nine members of the Commission gave reasons for rejecting the introduction of the principle of breakdown.

88 But see para. 27, above.

89 In *Putting Asunder* it is said (para. 87 and Appendix C, para. 14, p. 120) that all matters would be disposed of at one hearing so that the total time would not exceed that now spent on the hearing and on subsequent decisions about ancillary relief. Even if that were so (and we find this difficult to believe), there is all the difference quantitatively and qualitatively between the man-hours employed in formal hearings in open court, and in relatively informal hearings in chambers or before Registrars. The latter involve the presence of far fewer people and are much less expensive. Moreover, we would not regard it as an improvement to debate all matters—including those affecting children—in open court.

(*l*) If a thorough investigation into the marriage were to be mounted, a large number of trained social workers would be needed. There is a great shortage of them already.

(*m*) A detailed inquest into the whole married life would prove more distasteful and embarrassing than proceedings under the present law.

(*n*) If the court had to be satisfied that the parties had made every effort to reach a reconciliation, resort to marriage guidance counsellors would be regarded as necessary evidence, even in hopeless cases. The time of marriage guidance counsellors and others would be wasted on "cock and bull" stories to the detriment of sincere applicants for whom the chances of success are greater.

(*o*) If evidence of attempts at reconciliation were required, the privacy of the discussions between the conciliation agencies and the parties would be breached. The efficiency of the work of marriage guidance counsellors would be greatly reduced as a result because parties would no longer feel free to talk to them frankly.

(*p*) The number of divorces would be greatly increased. This would cause particular difficulty in the early years if, as there might be, there were a rush of applications for divorce with a view to securing the regularisation of unions and the legitimation of children mentioned in paragraphs 33-37 above. The judicial system could not readily take this load of work if each case involved the lengthy procedure suggested.

59. We are persuaded that there is a strong case for the introduction into our law of the principle of breakdown ; we think it has many advantages over the principle of the matrimonial offence. But we have doubts whether it really is desirable for the law to require positive proof of breakdown by an inquest in all cases : an enquiry into the breakdown and its causes might be humiliating and distressing and not achieve the second of the two objectives of a reformed divorce law set out in paragraph 15. We shall show later that it would be possible, by using a period of separation as the test, to give effect to the principle of breakdown without being forced into an inquest, which we believe most people would wish to avoid. Be that as it may, many of the arguments for and against the breakdown test depend on judgments of personal and social morality. To these we can only draw attention ; it is not for us to determine their validity. We turn, rather, to those arguments which involve questions of practical feasibility.

60. Argument (*i*) in paragraph 58 deals with the difficulties that the courts, as we now know them, would encounter in conducting an inquest to decide whether the marriage is alive or dead. There would be nothing particularly novel in requiring the court to assume an inquisitorial role ; already the court in a divorce case is supposed to act as an inquisitor rather than as an umpire. Whether or not the suit is defended, "it shall be the duty of the court—(*a*) to inquire so far as it reasonably can into the facts alleged and whether there has been any connivance or condonation on the part of the petitioner and whether any collusion exists between the parties . . ."[90] But this duty is discharged in theory rather than in practice. In ten minutes, the average time of a hearing in an undefended case, the Judge obviously

90 Matrimonial Causes Act 1965, s. 5(1).

cannot carry out a thorough inquisition. It is true that he can refer the case to the Queen's Proctor for investigation, but, as we have seen,[91] that is very rarely done and the staff presently available to the Queen's Proctor could not cope with any substantial increase. If the inquest was to become a genuine one, preliminary enquiries by trained personnel would have to be undertaken and the actual hearing would have to take much longer than at present. Moreover, it seems to us that public opinion would be unlikely to regard it as an improvement if in every case the whole matrimonial history were ventilated in public. In effect this would be to introduce into every divorce case the distressing features of defended divorces which at present constitute only about 7 per cent of the total. The Archbishop's Group appear to face this prospect with an equanimity[92] that we cannot share. If our divorce laws are to be made more humane, it seems to us that the undefended divorce affords a better model than the dilatory, expensive and distressing defended divorce.

61. The fact is, as we see it, that although the Archbishop's Group have recognised that fundamental reforms of the courts and their procedure are essential if the Group's substantive proposals are to be feasible, they have, understandably, stopped short of trying to provide a blue-print for root and branch reorganisation of the courts[93] and have instead tried to find means of adapting the existing court structure and adversary procedure so as to cope with the suggested inquisitorial investigation. They suggest, first, fuller pleadings.[94] Secondly, they recognise that it would be difficult for the court to be sure that it had ascertained the true facts unless it heard the stories of both parties.[95] They say that it would be "oppressive, as well as expensive", to require this in every case, but suggest that the court should have power "to require the attendance of both parties on occasion".[96] There would, however, be considerable practical difficulties in enforcing the attendance of an apathetic or absent respondent. Thirdly, they recognise that "it would be contrary to the ethos of English law to ask judges to act as inquisitors"[97] and that accordingly if the court is to be seized of all the relevant facts it must have assistance. Having rejected as Utopian the introduction of the *defensor vinculi* of Roman canon law, they recommend that provision should be made "for the intervention, when needed, of counsel representing the public interest or the interests of children" and further that there should be created "a body of officers (the name of 'forensic social workers' has been suggested) to help the court. . . . These

91 See *n.* 32 to para. 21 above.

92 "There has been discernible a tendency, prompted no doubt by considerations of expense and judicial time, to draw too sharp a line between contested and uncontested suits and to favour dealing with the two classes in different ways, so as to despatch the latter more cheaply and expeditiously than the former. This would have to be checked; for if, as we have recommended, the court's duty should be to make inquest into the actual condition of marriages brought to its notice, and at the same time to have regard always to the public interest in the stability of marriage, an uncontested case could on occasion call for greater care and judicial skill than one that was contested": *Putting Asunder*, para. 100.

93 In Part 2 of Appendix C one member of the Group suggests further long-term reforms of the court structure, but these are not underwritten by the Group as a whole: see para. 102. We, too, have not attempted to suggest how the court structure might be reorganised: see para. 4 above.

94 Para. 85 and Appendix C, paras. 7–14, pp. 118–120.

95 Paras. 86 and 88.

96 Para. 86. See also para. 88.

97 But see para. 60 above.

officers could, when required to do so, verify attempts at reconciliation, test the reliability of assertions made to the court, and investigate any other matters on which the court wished to be informed, and could report on the circumstances of children of the family."[98] Finally, at the trial all matters should be disposed of at a single hearing, including matters of property, maintenance, and the future of any children of the marriage.[99]

62. Of these suggestions, we regard more detailed pleadings and the possibility of the intervention of counsel to represent the interests of the public or the children[1] as feasible: as the Group point out[2] the Official Solicitor and the Queen's Proctor already perform these latter functions to some extent. But the other suggestions and the procedure as a whole seem to us incompatible with several of the basic assumptions which we set out in paragraph 52 above.[3] Cases would inevitably take longer and cost more. Far more Judges, court-houses and court officials would be needed. Thereby the cost of divorce proceedings, both to individuals and to the State, would be greatly increased. Of these needed officials, persons with the appropriate training for "forensic social workers" would be unobtainable in sufficient numbers and, if they were obtained, they could be more usefully employed in the probation service, in child care and in marriage guidance.

63. Similarly, it appears to us that objections based on the likely effect on marriage guidance are well-founded. The Archbishop's Group are undoubtedly right in placing emphasis on the need for conciliation. They are equally realistic in recognising that, nevertheless, compulsory recourse to reconciliation agencies would be likely to be self-defeating.[4] The Group would, however, confer on the court "a duty to inquire what attempts at reconciliation had been made (unless the nature of the case were such that it would be vain to do so) and the right, if not satisfied that the possibilities of reconciliation had been exhausted, to adjourn the hearing".[5] If, as the Group hope, this would have the effect of encouraging parties to avail themselves of marriage guidance before coming to court, *and at a time when reconciliation was still possible,* this would be excellent. But in practice we have no doubt that the first part of this proposal would often merely encourage them to refer their problems to a marriage counsellor as a pre-petition formality. Indeed, in most cases their solicitors would be likely to advise them that they had better do so. Thereby our already over-strained agencies would be completely swamped. There is also another consideration, which we know is of great concern to the conciliation agencies: that of the privacy of their discussions with the parties. They take the view that their work will be greatly handicapped unless all who resort to them can rely upon the fact that what is said shall not be revealed. At present, privilege can be claimed, but the privilege is that of the party, not of the counsellor. If the party wants him to give evidence and subpoenas him, he can be compelled to testify. Under the procedure suggested by

98 Para. 89.

99 Para. 87.

1 As pointed out, the Rules already provide for this: see para. 47 above.

2 Appendix C, para. 16, p. 121.

3 Notably (*a*), (*f*) and (*g*).

4 See para. 30 above.

5 *Putting Asunder*, para. 76.

the Group, one party or both might well wish to subpoena him, for his evidence might be vital in persuading the Judge that every effort has or has not been made to effect a reconciliation. The agencies fear that if this became common practice, public confidence in them would be sapped and their efficiency gravely diminished.[6]

64. Finally, we come to the last objection raised to the introduction of the breakdown principle, namely that it would enormously increase the number of divorces.

65. Under the present law, when both parties want a divorce, in most cases they get one sooner or later. Sometimes they get one by questionable means which would be more difficult under the proposed inquisitorial procedure. To that extent the number of divorces would be reduced. If we are right in thinking that all undefended divorces would, under the suggested procedure, take much longer and be more expensive, that too would be likely somewhat to reduce the number of cases. But as against these trifling reductions there would undoubtedly be an increase in respect of those cases where at present one party refuses to divorce the other and that other has no legal grounds on which he can proceed. Many of these would qualify for relief under the proposed system.

66. In paragraphs 33–37 we attempted to estimate the number of children of stable illicit unions in which one or other party is already married and unable, under the present law, to obtain a divorce. We concluded that there may be about 180,000 living illegitimate children under 16 years who might be legitimated if their parents were enabled to marry, and that at present some 19,000 children are born annually into such unions. These very approximate figures suggest that the numbers of additional divorces, both at the outset and annually thereafter, would be substantial, but it is not possible from them to make even an approximate estimate of how many there would be. Not all of those who could obtain divorces if the breakdown principle were introduced would in fact do so. Some would still be content to continue in an illicit union notwithstanding the birth of children.[7] Others would feel that they could not face the publicity of a divorce, especially if that were forbidden by their religion. In some cases the illicit union would itself break down. In others one divorce would lead to the legitimation of several children and, if the law were changed, many children who would otherwise be born illegitimate would be born into unions which had already become legal marriages. Furthermore, an unpredictable number of divorces would occur in cases where there was no stable union to which children had been born.

67. However, some guidance can perhaps be obtained from experience in Australia. By the Matrimonial Causes Act 1959, Australia made five years' separation, with no reasonable prospect of reconciliation, a ground

[6] In Australia (Matrimonial Causes Act 1959, s. 16) and New Zealand (Matrimonial Proceedings Act 1963, s. 5) no evidence is admissible of anything said to a counsellor after the court has adjourned proceedings with a view to reconciliation: this would not be a sufficient protection for communications made before proceedings had begun.

[7] Miss Wimperis (*op. cit.* para. 34, at p. 67) draws attention to the fact that there are still many people in England who take the view that marriage is not to be entered into until financial reserves have been built up. She quotes the case of a woman who had been living with a man for years and had five children by him, but said that they could not yet afford to marry.

for divorce in all States.[8] This came into operation in February 1961. Appendix E to this Report gives the divorce figures for 1959–1965 inclusive. It will be observed that the Act did not lead to a startling increase in the number of divorces; its main effect was to reduce the number of petitions based on other grounds (mainly desertion and adultery), and to cause an increasing percentage of petitions to be based on the new ground of separation. But as between 1964 and 1965 the increase on this new ground has been negligible. This suggests that the backlog may now have been cleared off and that 1965 may represent the future pattern.[9] If so, it appears that the introduction of the new ground may have resulted in a permanent increase in the number of divorces annually from about 6,650 (or 64·57 per 100,000 of the then population) to about 8,450 (or 74·73 per 100,000 of the present population). A similar increase in the divorce rate in England would result in approximately 4,900 more divorces assuming no increase in our population.

68. It may be that the increase in England would be rather greater: even before the new Commonwealth Act the grounds in some States of Australia were somewhat wider than those in England. Moreover, under the proposals of the Archbishop's Group, five years' separation would not be mandatory as it is in Australia. However, social conditions and the pattern of the divorce rates in the two countries are sufficiently similar to make it reasonable to think that the Australian figures give some guidance on what the increase might be if the Breakdown Ground were introduced. They afford a more definite indication of what the effect would be if the Ground of Separation, dealt with below, were introduced as an additional instead of the sole comprehensive ground, for that would resemble still more closely what occurred in Australia.

69. It seems reasonable to assume that the likely number of additional divorces would not of itself constitute an insoluble problem if divorces continued to be disposed of as rapidly as under the existing procedure; the major problem would be to deal with the initial backlog, especially if this proved proportionately greater than in Australia. If, however, a lengthier procedure, such as is suggested by the Archbishop's Group, were introduced, the disposal of divorces would be very difficult.

70. Thus we are forced to the conclusion that Breakdown with Inquest as proposed by the Archbishop's Group cannot, despite its undoubted attractions and our sympathy with the principles underlying the Group's approach, be made to work because of purely practical difficulties. It seems to us, however, that the concept of breakdown of marriage put forward by the Group is of such importance and value that an effort ought to be made to modify the scheme in which they embody it and to propose an easier procedure which would yet give effect to the underlying principles. Such a modified scheme would be radically different in its operation from that envisaged by either Lord Walker or the Archbishop's Group and it is convenient therefore to treat it as a distinct proposal. To it we have given

[8] There had previously been similar grounds in only South Australia and Western Australia which together account for only a small fraction of the total divorces.

[9] This is by no means certain, since in New South Wales, the State with the largest number of divorces, there is a considerable delay in hearing cases. It may be, therefore, that the Australian figures are still inflated by the backlog and that ultimately the figures will settle down below the 1965 figures.

the name "Breakdown without Inquest", although, as will appear, a full investigation might be needed in a small residue of cases.

A. (*ii*) *Breakdown without Inquest*

71. The basic weakness, as we see it, of the proposals of the Archbishop's Group is that they call for an elaborate, time-consuming and expensive investigation to satisfy the court that the marriage has irretrievably broken down. The realities of the situation are that unless the marriage had broken down the parties would not be before the court. Conceivably, it may not have broken down irretrievably, but if cohabitation has ended and both parties are convinced that reconciliation is impossible the chances of saving it are remote. The parties are likely to be better judges of the viability of their own marriage than a court can hope to be, even with the most elaborate and searching inquest.

72. As we see it, a divorce case based on breakdown should involve the determination of four questions:—

(*a*) Has the marriage broken down?

(*b*) If so, is there any reasonable prospect of a reconciliation?

(*c*) If not, is there any reason of public policy, including in particular justice to the parties and the children, why the marriage should not be dissolved?

(*d*) If not, what are the appropriate consequential arrangements to be made regarding the parties and the children?

The Archbishop's Group wish the answers to all these questions to be proved positively to the satisfaction of the court by means of an inquest into the whole of the married life. Under the alternative proposal that we are now considering, the court, *on proof of a period of separation,* would be prepared to assume a positive answer to (*a*) and, in the absence of evidence to the contrary, negative answers to (*b*) and (*c*). The ending of cohabitation and a sustained failure to resume it are the most cogent, objective, and justiciable indications of breakdown, and the objectives of a sound divorce law, as summarised in paragraph 15, might be better achieved by relying on these indications rather than on an attempted inquest, in all cases, into the whole marital history.

73. Question (*a*), as we have already said, is answered by the fact that the parties have separated and that divorce proceedings have been brought. Normally neither it, nor question (*b*)—the possibility of a reconciliation—requires investigation. If both parties, who are the best judges, have decided that their differences are irreconcilable, and if this is confirmed by the fact that they have parted for some time, the court does not need further proof on these points. If something in the pleadings or evidence led the court to think that there was a possibility of reconciliation, then, as we have already suggested, the court should be empowered to adjourn the hearing for a limited period so that the possibility could be explored. But the court would not attempt an inquest into the marriage to satisfy itself that the marriage had irretrievably broken down unless this was seriously disputed between the parties. Even if it was disputed, an adjournment for attempts at reconciliation would normally be more constructive than an inquest into the past. In most cases it would not be disputed; the dispute, if any, would be about

whether, despite the breakdown, a divorce should be refused in order to do justice to the parties and the children. Normally that would turn on the answer to the final question—the adequacy of the arrangements for the future of the parties and the children. Once that question, which would normally be dealt with in the privacy of chambers, had been answered satisfactorily, a divorce would follow. The only circumstances in which an inquest into the marital history might be needed to determine this point would be when the wife opposed a divorce on the ground that this would impose hardship on her and the children notwithstanding that the husband had made the most equitable arrangements possible in the circumstances. We consider later[10] whether, on such grounds or on general grounds of public policy, the court should have a discretion to refuse a divorce. If such a discretion were conferred, a full enquiry might sometimes be needed to enable the court to exercise it. But this would not be a frequent occurrence. Accordingly there would rarely be anything in the nature of an inquest. At present, all but 7 per cent of divorce cases are undefended: i.e. both parties accept that the marriage has irretrievably broken down and should be dissolved. Even in the 7 per cent of defended cases, there is normally no dispute about that, but merely about who should divorce whom. The introduction of breakdown would enable some divorces to be obtained in circumstances where this is not at present possible, and in these there might be a greater proportion of disputed petitions. But the total number of cases in which an inquest would be needed would be so few in relation to the whole that the courts would be able to find time to devote to them.

74. Accordingly, if a solution on these lines were acceptable (we point out the objections in paragraphs 75–76 below), we believe that it would be a practicable solution and one which would enable most divorce cases to be disposed of as speedily and as cheaply as at present. We envisage that it would operate somewhat as follows:—

(*a*) There would be one ground only for divorce: breakdown of the marriage evidenced by a period of separation.

(*b*) Either party, or possibly both parties[11], could petition on this ground.

(*c*) The petition would have to set out the matrimonial history and give the reasons why, in the opinion of the petitioner or petitioners, the marriage had broken down.

(*d*) When one spouse only was the petitioner, the other, whether or not he wished to oppose the granting of a divorce, would have an opportunity of replying to the petition and of giving his version.

(*e*) The petitioner, and in the case of a joint petition, one of the joint petitioners, would be required to give evidence at the hearing, and both spouses could do so if they wished and either of them could call any other evidence that he wished.

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[10] See paras. 114–119 below.

[11] The introduction of provisions for joint petitions would raise a number of difficulties—not least concerning the relationship between the petitioners and their legal advisers—into which we need not enter here.

(*f*) As at present, where there were infant children of the marriage the court would be empowered to direct, if it thought fit, that they should be separately represented.[12]

(*g*) Where there were no infant children, the court would be required[13] to grant a divorce if satisfied that the parties had been living separate and apart for the prescribed period unless, because equitable financial arrangements were not made, the court was bound to refuse, or unless it ordered an adjournment for attempts at reconciliation to be made.

(*h*) As at present, where there are infant children the court would further be required to satisfy itself that the arrangements proposed for the children were the best possible in the circumstances.[14]

75. Under the procedure suggested, the principles proposed by the Archbishop's Group would clearly not be upheld if breakdown were to be presumed in a case where the parties had not separated for a period sufficiently long to enable them to recover from what may have been no more than momentary pique. But it is the fixing of a suitable period of separation as a pre-condition of the right to file a petition that presents the greatest difficulty in the way of this scheme. If the period chosen were a relatively long one, say, three years,[15] innocent parties who can now obtain a divorce with reasonable dispatch on the ground of outrageous conduct by the other spouse would have to wait three years in all cases. This would appear to many to be an intolerable hardship, and would moreover inevitably add to the already large number of illicit unions and illegitimate children. On the other hand, if a short period were prescribed, it would be possible for the parties to seek a divorce without having had time to recover from a passing affair or from the resentment left behind from a serious matrimonial quarrel or, indeed, time to consider whether the differences in the marriage were really insoluble. And a party who was himself largely to blame for the breakdown of the marriage would have altogether too little difficulty in freeing himself to marry someone else.

76. In our view, however, if prompt relief is to continue to be given in cases of outrageous conduct, no period of much more than six months prior to the filing of the petition could be regarded as a feasible proposal were breakdown to become the sole ground for divorce. If as short a period as that is regarded as unacceptable, then this proposal ceases to be a practicable one. It can be argued that if the parties have lived separate and apart for six months the chances of a reconciliation are remote and that, in any case, if the Judge thinks that there is a chance, he can adjourn to enable it to be explored. It should also be borne in mind that by the time the petition is heard the period of separation will be nearer twelve months than six. If, however, that argument is rejected, then Breakdown is not a possible

[12] We would hope that this power would be exercised rather more frequently than at present.

[13] Subject, perhaps, to an ultimate discretion: see paras. 114–119, below.

[14] As already indicated, we intend to institute an investigation to see whether the existing provisions for the protection of the children can and should be strengthened.

[15] The period suggested by Lord Walker (Cmd. 9678 at p. 341) and, in certain circumstances, by the Archbishop's Group (*Putting Asunder*, para. 82).

solution as the sole comprehensive ground. With a longer period, however, it would be a practicable solution if coupled with other grounds. We revert to this possibility in paragraphs 85–105 below. The Separation Ground there discussed is, in effect, another method of introducing Breakdown, but as an additional ground instead of a substitute for the existing grounds based on matrimonial offence.

B. *Divorce by Consent*

77. The next possible solution to be considered is the frank acceptance of mutual consent as a ground for divorce, either in all cases or in cases where there are no dependant children.[16] This would clearly be a practicable solution—it is in fact the position in a number of countries, including some of the Scandinavian ones. Moreover, it would undoubtedly achieve some of the objectives of a reformed divorce law: it would spare the parties to divorce proceedings the embarrassment and humiliation to which they are now subjected and would make the proceedings less of a source of bitterness and recrimination.

78. On the other hand, Divorce by Consent would be no substitute for matrimonial offence as a sole ground of divorce. In many cases based on adultery, desertion and, especially cruelty, only one party wants a divorce. Furthermore, introduction of Divorce by Consent would do nothing to improve the situation of those who have established stable illicit unions and are at present unable to have their marriages dissolved so as to regularise these unions and legitimate their children; the problem with these unions is that the lawful spouse refuses to consent. Hence introduction of Divorce by Consent would be a less effective reform than the introduction of the principle of breakdown. With this caveat, we proceed to summarise the arguments for and against its introduction as an additional ground for divorce.

79. *Arguments for Divorce by Consent*

(*a*) At present, 93 per cent of divorce cases are undefended. Both parties agree that there should be a divorce, which to that extent is consensual. That parties frequently agree in wanting a divorce " is a fact which a realistic law needs to take into account ".[17]

(*b*) But the present law forces the parties to rely not on that agreement but instead on the commission, or apparent commission, by one of a matrimonial offence towards the other. This leads to the distasteful features of the present system which have already been canvassed (see paragraph 25).

(*c*) These distasteful features could be removed in a high proportion of cases if divorce were granted on the ground of mutual consent instead of the commission of a matrimonial offence.

(*d*) In the majority of cases this proposal would merely afford open recognition to what at present occurs; open consent would be substituted for clandestine consent.

16 In the survey by National Opinion Polls referred to above at para. 51, *n.* 74, 4 out of 5 of those interviewed expressed themselves as in favour of Divorce by Consent. The actual figures were 80 per cent in favour, 17 per cent against and 3 per cent " don't knows ", with no significant difference in the replies by men or women.

17 *Putting Asunder*, para. 48.

(*e*) This would be in accordance with recent tendencies which, by relaxing the prohibition on collusion,[18] have come close to legalising consensual divorce.

(*f*) It is unrealistic to suggest that the open recognition of consensual divorce would lead to irresponsible or trial marriages. Already couples are aware that if their marriage breaks down, they will have little difficulty in obtaining a divorce, but despite this the great majority of those who marry intend their marriage to be for life.[19] The bar on divorce within three years of the marriage is a potent restraint on trial marriages, as is the fact that a divorce does not necessarily wholly relieve the parties from further financial responsibility.

(*g*) We allow couples to enter into marriage without any inquiry or intervention by the State beyond a purely formal and ceremonial one. That being so, it is hypocritical to suggest that the State's interest in marriage is such that the parties should not be equally free voluntarily to dissolve the bond that they have voluntarily created. At any rate where there are no children, there is no further interest which requires the maintenance of a legal bond between two people who have agreed to dissolve it.

80. *Arguments against Divorce by Consent*

(*a*) To recognise Divorce by Consent would be to reduce marriage to the level of a private contract and to ignore the community interest that is involved.

(*b*) "If the covenant that initiates marriage is to be revocable by mutual consent, its intention cannot meaningfully be called 'lifelong'; provision for divorce can be reconciled with a lifelong intention only if divorce is subject to an authority that is independent of the will of the parties."[20]

(*c*) If parties knew that they could always obtain a divorce by mutual consent, marriages would be entered into irresponsibly and on a "trial" basis. Undergraduates, it has been said, would marry when they went up to the University and divorce when they came down. However that may be, marriage would be contracted far more lightly than at present.[21]

(*d*) The community has an interest in the stability of marriage which is different in kind from its interest in the stability of private contracts.

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18 See para. 21 above.

19 This was the view of the Archbishop's Group (*Putting Asunder*, para. 60) and also the conclusion of Miss Griselda Rowntree who carried out a survey of pre-marital attitudes to divorce: (1964) XVIII Population Studies 147. "Thus even in the context of a growing awareness of the possibility of divorce, few of the informants, when engaged, seemed prepared to envisage that they might resort to it if their marriages did not work out well. At this stage these people did not typically regard marriage 'as a temporary affair with no degree of permanency'": at p. 151.

20 *Putting Asunder*, para. 48.

21 But on this see *Putting Asunder:* "A great deal has been said and written about the pernicious effect that easy divorce must have on stability in marriage. In fact there is no evidence whatever to show that couples enter marriage more lightly if divorce is legally easy to obtain": Appendix D, para. 13 at p. 147.

(*e*) Unless a period of separation were also required before a petition could be presented, introduction of Divorce by Consent would cause marriages which had not irretrievably broken down to be dissolved.

(*f*) It is unlikely that both spouses will be in an equally strong economic position, and hence what appears to be mutual consent may not be true consent because the will of the weaker may have been overborne by pressure exerted by the stronger.

(*g*) Countries which permit divorce by consent tend to have divorce rates considerably higher than those which do not. While this does not necessarily mean that there are more broken homes in the former countries, there is some evidence that the prevalence of divorce has a disturbing effect on the children not only of broken marriages but also of happy ones. They see so many divorces among the parents of their contemporaries that they worry lest the same fate befall their parents. This, it is said, has particularly disturbing effects on children approaching adolescence.

81. The supporters of Divorce by Consent would concede that the case for it is very much weaker when there are children. There, clearly, interests besides those of the spouses are vitally concerned and the State has a duty to protect those interests. It is this consideration that led Sir Jocelyn Simon, the President of the Probate, Divorce and Admiralty Division, to draw attention to a proposal that there should be divorce by consent where there are no dependent children and no divorce at all where there are.[22] For reasons which we have already set out in paragraphs 47–51, we are convinced that such an extreme differentiation between marriages with children and those without would be quite unacceptable and, in our opinion, undesirable. Apart from its effects on the children, we do not think that public opinion would accept a change in the law which made divorce so much more difficult that it would be impossible for a couple with children ever to obtain it until the children had grown up. This would conflict with the first of our basic assumptions set out in paragraph 52.

82. On the other hand, we do not think that the same objections would apply if other grounds for divorce remained, Divorce by Consent being added as a further ground available only to couples without infant children. A differentiation to that extent between fruitful and childless marriages would, we think, be a practicable solution, and one which would meet many of the most potent objections to Divorce by Consent. Accordingly we would regard Divorce by Consent as a feasible proposal if:

(*a*) it were restricted to cases where there were no dependent children; and

(*b*) other grounds for divorce remained available in all cases.

83. In addition, we think that there are strong reasons for further limiting the possible ambit of Divorce by Consent. We believe that there is a real danger that the economically weaker party (normally the wife) might be overborne by the stronger, and that accordingly it would not be safe to assume that her signature to an agreement necessarily represented a real and free

[22] In an address to the Law Society's Regional Conference, now published as *The Seven Pillars of Divorce Reform* in the Law Society's Gazette for June, 1965, at p. 344.

consent. It is partly for this reason that we do not think that public opinion would or should accept Divorce by Consent with no more formality or scrutiny than registration of a form signed by both parties.[23] In our view there should be some independent verification of the genuineness of the consent; this could be achieved by an appropriate judicial, or even an administrative procedure. The court would, of course, continue to be concerned with the financial arrangements that the parties had worked out with their solicitors, both in dividing up the family property and in making any arrangements that might be necessary for financial support thereafter of the poorer by the richer.

84. Even if it were circumscribed in the ways suggested, the arguments against Divorce by Consent set out in paragraph 80 would not all be met. We apprehend that the argument that would be regarded as particularly cogent is that, unless coupled with a period of separation, it might enable marriages to be dissolved which had not broken down irretrievably. That objection could be met if the Separation Ground, to which we now turn, were introduced in the manner suggested below.

C. *Separation Ground*

85. The introduction of an additional ground for divorce based on a number of years' separation is the solution on which, in recent years, most attention has been focussed. The intention behind it is to afford recognition to the principle embodied in divorce on the ground of breakdown: that a marriage which has irretrievably broken down should be dissolved irrespective of guilt or innocence. This would be achieved not by making breakdown the one comprehensive ground for divorce but by retaining the grounds based on commission of a matrimonial offence and adding this further ground to it. A Bill to this effect was introduced by Mrs. Eirene White, M.P., in 1950 and secured a Second Reading in the Commons, but was thereafter withdrawn on the Government's undertaking to set up a Royal Commission. The resulting Morton Commission was divided on this proposal. Nine members rejected it *in toto*.[24] Nine members favoured the introduction of divorce based on seven years' separation (the period that had been suggested in Mrs. White's Bill). But five of them would have permitted a divorce on this ground on the petition of one spouse only if the other did not object.[25] The other four were prepared to permit divorce after seven years' separation provided that, if the other spouse objected, the petitioner would have to satisfy the court that the separation was due in part to the unreasonable conduct of the other spouse.[26] As we have seen, Lord Walker was prepared to make three years' separation with proof of irretrievable breakdown the sole ground of divorce.[27] No member of the Commission gave unqualified support to Mrs. White's Bill, which would have permitted either party to obtain a divorce after seven years' separation provided that the court was satisfied that there was no reasonable prospect of a reconciliation.[28]

23 See para. 52 (*h*), above.
24 Cmd. 9678, para. 69.
25 *Ibid.* para. 70.
26 *Ibid.* para. 71.
27 *Ibid.* pp. 340–341.
28 The Bill also contained certain provisions designed to protect the financial position o the wife.

86. Since then, numerous attempts have been made to introduce the breakdown principle on the lines of Mrs. White's original proposal. In some cases the minimum period of separation has been five years, in others seven. In recent years at least one such Bill has been introduced each Session. The pressure behind these efforts has been prompted by the desire to do something about the serious social problem of stable illicit unions and their issue.[29]

87. That it would be practicable to adopt this solution cannot be doubted, for it already operates in a number of countries with broadly comparable legal systems and social structures. In New Zealand three years' separation under a decree, order or separation agreement was made a discretionary ground of divorce in 1920,[30] but the court's discretion was subsequently fettered by imposing an absolute bar if the petition was opposed and the court found that the separation was due to the wrongful conduct of the petitioner.[31] In 1953 a further ground was introduced—seven years' separation with no likelihood of reconciliation: there was a similar absolute bar.[32] Finally, by the Matrimonial Proceedings Act 1963, an absolute discretion was restored where the grounds were seven years' separation with no prospect of reconciliation.[33] The present position, therefore, is that the court has a discretion to grant a divorce where separation has lasted for seven years, or for three years following a decree, order or agreement and the petition is unopposed. But a divorce may not be refused solely on the ground that the petitioner has committed adultery since the separation.[34] Where, however, the petition is based on three years' separation under a decree, order or agreement and is opposed, a divorce cannot be granted if the court finds that the separation was due to the wrongful conduct of the petitioner.[35]

88. In Australia a simpler version of the ground of separation was introduced by the (Commonwealth) Matrimonial Causes Act 1959, which came into force on 1st February 1961 and for the first time provided a single national code.[36] Previously, separation had been a ground only in South Australia[37] and Western Australia.[38] A divorce can now be obtained in all States by either party after five years' separation if there is no reasonable likelihood of cohabitation being resumed.[39] But a divorce on this ground must not be granted if " the court is satisfied that, by reason of the conduct of the petitioner, whether before or after the separation commenced, or for any other reason, it would, in the particular circum-

29 See paras. 33–37, above.

30 Divorce and Matrimonial Causes Amendment Act 1920 (N.Z.), s. 4.

31 Divorce and Matrimonial Causes Amendment Act 1921–2 (N.Z.), s. 2.

32 Divorce and Matrimonial Causes Amendment Act 1953 (N.Z.), s. 7.

33 Matrimonial Proceedings Act 1963 (N.Z.), ss. 29 and 30.

34 *Ibid.*

35 These legislative changes have not had any marked effect on the incidence of divorce. In 1950 there were 1,633 divorces, in 1964 (the last year for which we have statistics) 1,894—the same number as in 1949. But as the 1963 Act did not come into operation until 1965 these figures do not reflect any changes resulting from that Act. In each of the years 1963 and 1964, 202 decrees were granted on the ground of seven years' separation.

36 For a discussion of this code and its working, see an article by Mr. Justice Selby of the New South Wales Supreme Court in (1966) 29 M.L.R. 473.

37 Matrimonial Causes Amendment Act 1938.

38 Supreme Court Amendment Act 1945.

39 Matrimonial Causes Act 1959 (Aus.), s. 28 (m).

stances of the case, be harsh and oppressive to the respondent, or contrary to the public interest, to grant a decree . . .".[40] Further, if the court is of the opinion that it is just and proper for the petitioner to make financial provision for the respondent, it cannot grant a decree until the petitioner has made arrangements to the satisfaction of the court.[41] Adultery, whether before or after[42] the separation, is a discretionary bar.[43] Appendix E shows the effect of this Act on the incidence of divorce; both desertion and adultery still remain more common grounds than separation.

89. Finally, New York, a State which hitherto has granted divorces only on the ground of adultery, passed a law in the Spring of this year which will permit divorces on the ground of two years' separation under a decree of separation or a formal deed of separation, provided that the petitioner has duly performed all the terms and conditions of the decree or deed.[44] The effective date of the new Act is 1st September 1967, but 1st September 1966 is the date after which decrees or deeds of separation can start the two year separation period running.[45] The Act also contains elaborate provisions for compulsory attempts at conciliation by a commissioner appointed by the court[46] and for the appointment of special guardians to protect the interests of the children.[47]

90. In considering whether the Separation Ground should be introduced in England, the main questions that would first have to be answered are whether there should be a single period (as in Australia) or two different periods (as in New Zealand) and what the basis of any such differentiation and the length of the period or periods should be. To these and a number of subsidiary questions we now turn.

91. We assume first that if it were decided to introduce the Separation Ground there would be an ultimate period, though it might be as long as five or seven years, after which, subject to safeguards (see paragraphs 106-119 below), a divorce would be obtainable irrespective of who was at fault and irrespective of whether one spouse objected. Nothing less than this can solve the problem of stable illicit unions and children born into them[48] which the Archbishop's Group have rightly described as "a social evil that calls for remedy".[49] Australia, New Zealand and New York have all now recognised that it accomplishes little to provide for divorce on the ground of separation only if the petitioner is not at fault or if the respondent does not object. This would enable a few illicit unions to be regularised—those where the lawful spouse refuses to petition out of apathy or because of religious convictions but would not feel sufficiently strongly to object if the other spouse petitioned. But it would not touch the heart of the problem. In most cases the unwilling spouse would object. Hence we

40 *Ibid.* s. 37(1).
41 *Ibid.* s. 37(2).
42 Contrast New Zealand.
43 *Ibid.* s. 37(3).
44 *Laws of New York*, Ch. 254 of 1966.
45 See s. 15.
46 See s. 8.
47 See s. 8.
48 See paras. 33–37, above.
49 *Putting Asunder*, para. 39.

would see little point in adopting the suggestion of the five members of the Morton Commission who favoured that proposal.[50]

92. On the other hand, if the introduction of the Separation Ground were adequately to achieve the objectives of a good divorce law which we have stated in paragraphs 13-18, it should not deal only with the problem of stable illicit unions but should also enable divorces at present obtained on the ground of matrimonal offence to be obtained with less embarrassment and bitterness. If a single period of separation of five or seven years were prescribed, but divorces were also obtainable on the grounds of matrimonial offence, it would be on those latter grounds that petitions would continue to be brought when possible and all the distasteful features of the present system would remain. That this would be so is brought out very clearly by the Australian statistics in Appendix E. It will be seen that the introduction of the ground of five years' separation resulted in some decrease in the number of decrees on the ground of desertion—though not as substantial a reduction as one might have expected[51]: in 1960 there were 3,873 decrees on this ground, in 1965, 3,762. The reduction in the number grounded on adultery was, naturally, also small: there were 2,103 in 1960 and 2,023 in 1965. As regards cruelty cases—the most distressing of all—there seems to have been no reduction at all. On the contrary, there were 216 decrees on this ground in 1960 and 375 in 1965. The fact is that if someone can get a divorce by a speedy method he will generally not wait until he can obtain it by a much more dilatory one, even if that method may avoid some of the bitterness and recrimination likely to arise in proceedings based on proof of a matrimonial offence.

93. Hence, the shorter the period could be, the more the reform would accomplish. The aim should be to fix a period which is not so short that it might undermine the stability of marriage but not so long that parties who had grounds for petitioning on the basis of a matrimonial offence would not be prepared to wait. If both parties are anxious to end their marriage without rancour and without seeking to secure a public finding of guilt or innocence, they may be prepared to wait, it seems to us, as long as two years. If, therefore, that period of separation were required by the law in these cases, there might be an appreciable diminution in the number of petitions based on cruelty or adultery and a big drop in those based on desertion.

94. However, this relatively short period should not necessarily apply in cases where one party objects. We think it likely that public opinion would demand an appreciably longer period in such cases (to this we revert in paragraph 102). In other words, our answer to one of the questions mentioned in paragraph 90 is that there might well be a differentiation based on whether or not both parties acquiesce. Since 93 per cent of present divorce cases are undefended, it is clear that they would acquiesce in the vast majority of cases.

95. The argument again reducing the period to two years, even if both parties accept the fact that the marriage should be dissolved, will be that

[50] See para. 85 above.

[51] It should be noted, however, that in Australia the prescribed period of desertion is two years only—not three as in England.

this period is insufficiently long to raise a strong inference that the breakdown of the marriage is irretrievable. In our view that is unrealistic. If parties have separated and lived apart for as long as two years and then take or acquiesce in steps to dissolve the marriage, the chances of their coming together again are negligible. If the court should nevertheless have reason to think that there is still a chance, it should, as we have suggested in paragraph 32 above, be empowered to adjourn for a limited period to enable the possibility of reconciliation to be explored.

96. Such a solution will not commend itself to those who think that the period of three years now required for a petition on the ground of desertion should not be shortened[52], or who fear that the prospect of spouses being able to demand a divorce as of right, if they so agree, after two years' separation may take away the inducement, which the present law is thought to provide, to try hard to mend the marriage. Despite the fact that a divorce will still normally not be obtainable within the first three years after marriage—for the existing restriction on divorces within that time would remain—it may be argued that a marriage terminable after only two years' separation will be entered into more lightly than now. These arguments must be balanced carefully against the obvious attractions of a scheme which diminishes reliance on the commission of a matrimonial offence, with its attendant dangers of embittering differences and of harming the children.

97. It would be necessary to decide whether this shorter period should apply only where both parties consented or also where the respondent did not object. If the active consent of both parties were required, there would be less possibility of injustice to an innocent spouse who was too confused, harassed or afraid of the law and lawyers to raise any objection. Furthermore, the requirement of joint agreement would emphasise the joint responsibility of the parties for seeing that the legal bond was discharged with the maximum fairness to all the family and would reflect their joint responsibility, in many cases, for the breakdown. On the other hand, it would mean that a divorce would not be available in cases where the respondent had disappeared, or was apathetic, or had religious or other objections to taking an active part in the proceedings. There is no doubt that one of the attractions of the present system to many wives is that, if they let their husbands petition, they can avoid all the embarrassing features of the divorce procedure; they would not be attracted by a system which forced them to participate actively if a divorce was to be obtained. That objection could partly be met if the reality of their consent could be tested by some administrative procedure not involving appearance in court. But that would not meet the case of those with religious objections to taking any part in divorce proceedings, and would therefore not relieve them of the invidious dilemma to which we have drawn attention in paragraph 42. It might therefore be better to provide that the respondent's veto should operate only when he or she opposed the petition rather than when he or she failed positively to consent. In that event, however, it would be vital to ensure that the respondent was fully aware of the consequences; in paragraph 112 we make some suggestions about how that might be achieved.

98. Another question that arises is whether the veto of the respondent should operate only when the petitioner was responsible for the separation.

[52] This was the opinion of the Morton Commission: Cmd. 9678, para. 138.

As we have seen, in New Zealand the opposition of the respondent does not prevail if the separation was not caused by the petitioner's fault. This will not often be a matter of great importance since, if the separation is the fault of the respondent, the petitioner will normally be able to obtain a divorce on the ground of the respondent's matrimonial offence. There are, however, some cases where neither is at fault or where the respondent's fault is not sufficiently serious to amount to a matrimonial offence. It is arguable that in those circumstances the petitioner should be able to obtain a divorce after two years' separation even against the wishes of the respondent. On the whole, however, we would have thought that it would be unfortunate to introduce the fault concept into the Separation Ground. One of the objects of introducing the latter ground is to enable divorces to be obtained without argument about guilt or innocence, thus removing the likelihood of increasing bitterness and resentment.

99. We must next consider whether, as in New Zealand and New York, the suggested two year period should operate only when there is a separation agreement or court order. As we understand it, the object of this requirement is to encourage the parties to regularise their initial separation and to make the needful arrangements regarding maintenance, custody of children and so on[53]. On the other hand, it must virtually force the parties to seek legal assistance and to formalise the separation, which we would not think necessarily the best way of encouraging them to come together again. Especially is this so under the New York Law, which requires a written separation agreement duly recorded and filed. In New Zealand the agreement to separate can be oral and informal so that it merely amounts to providing that the separation must be by mutual consent. We do not see much purpose in such a provision, particularly having regard to the frequent difficulty of determining whether a separation was truly consensual or not. On the whole, therefore, we would not favour this requirement either.

100. Finally, we come to the question whether, as in New York, it should be provided that if there is a separation agreement or court order the petitioner should be granted a divorce only if he has duly discharged his obligations under the agreement or order. Anything that exerts legitimate pressure on husbands to honour their maintenance obligations is to be commended in the light of the extreme difficulty that wives often experience in enforcing their rights. But we would think that it goes too far to make a failure to pay an absolute bar. His failure may be due to pure misfortune and the wife may have acquiesced in the non-payment. In any case, what seems to be relevant is whether the wife and children can be safeguarded for the future, not what the wife has been paid in the past.

101. Accordingly, our answer to the questions posed in paragraph 90 would be that if the Separation Ground were introduced there should be two different periods of separation. The longer one should operate even if the respondent objects to a divorce. The shorter, two years, should operate only where the other spouse does not object (or perhaps consents) to the divorce. Both should apply whichever spouse bears the responsibility for the separation and whether or not the separation was consensual or under a court order.

[53] It also has the effect of excluding cases where the separation is neither consensual nor due to matrimonial misconduct by either.

102. The next question that arises is what should be the prescribed period of separation where the other spouse has objected to the divorce. We have, in paragraph 91, pointed out the reasons why divorces should be available after some period of separation notwithstanding the other party's objection. But, as we have indicated in paragraph 94, the period then could well be longer. As we have said, the various Bills which have been introduced into Parliament in recent years have specified periods of either five years (as in Australia) or seven years (as in New Zealand). Personally we would prefer five years to seven because we believe that it is unrealistic to think that a marriage has not broken down irretrievably if the parties have lived separately and apart for as long as five years, and because we think that if stable illicit unions are to be regularised and the children of them legitimated it is in the public interest that this should be sooner rather than later. This, however, is a policy decision which it is not for us to make.

103. In talking of a period of separation, we have hitherto assumed that the prescribed period would be a single continuous one. This, however, would tend to discourage, rather than encourage, a resumption of cohabitation with a view to effecting a reconciliation, and if the parties have tried to become reconciled but later parted again, this is particularly strong evidence that the marriage has in fact broken down irretrievably despite their best efforts. Hence it would be desirable to follow the lines of sections 1(2) and 42(2) of the Matrimonial Causes Act 1965, whereby resumption of cohabitation with a view to reconciliation does not interrupt a period of desertion or amount to condonation of a matrimonial offence. Under those sections only one period of cohabitation not exceeding three months is permitted. It is for consideration whether in the present context that would not be unduly restrictive, and whether it would not be preferable to allow a number of periods of separation to be added together so long as there was a prescribed minimum period of separation immediately before the filing of the petition. This might encourage the parties to make continuous efforts at reconciliation and to stay together for as long as possible.

104. If the Separation Ground were introduced on the lines suggested, it would in effect recognise the breakdown principle advocated by the Archbishop's Group in *Putting Asunder* but would treat it, not as the sole comprehensive ground as they wish, but as a ground additional to the ground of matrimonial offence. It would differ from the modified form of Breakdown, which seems to us to be the only workable form as a sole ground, in that the period of separation on which breakdown would be assumed would be considerably longer than six months. The period would not be less than two years, and would be five or seven unless both parties acquiesced in the view that their marriage had broken down irretrievably and should be dissolved.

105. We must draw attention, however, to the fact that the Archbishop's Group have expressed very strong objections to the introduction of the breakdown principle as an addition to, instead of a substitute for, the principle of matrimonial offence. They say that (1) the mutual incompatibility of the two principles would be glaringly obvious ; (2) the superficiality inseparable from verbally formulated grounds would tend to render the principle of breakdown inoperative ; and (3) that it would make divorce easier to get without really improving the law. " Failing the complete substitution

of principle . . . it would be better to keep the law based firmly on the matrimonial offence . . ."[54] On this we would quote the comment of Professor Monrad Paulsen:

> " But why should an exclusive choice be made? 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. The legal system frequently chooses different principles to dispose of distinguishable situations."[55]

All we need add is that, according to our information, a scheme on these lines is working to general satisfaction in Australia and New Zealand, and that in neither has it led to any great increase in the number of divorces.[56] In Australia, where divorce after five years' separation has been in operation for five years, the number of divorces per 1,000 population is now fractionally less than in England.

Safeguards

106. In every case the existing provisions for a waiting period would apply. These prohibit the presentation of a petition for divorce within three years of the celebration of the marriage unless special leave is given.[57]

107. We have already suggested[58] that in all cases the court should have power to adjourn for a limited period if it thinks there is a real likelihood of a reconciliation.

108. If any of the possible grounds not involving a matrimonial offence were introduced, the present absolute and discretionary bars would be inappropriate to petitions brought on those new grounds. There would be no relevant offence to connive at, conduce to or condone. A mutual agreement to facilitate the obtaining of a divorce on those grounds would be something to encourage rather than the reverse, and would not attract the penalties of collusion. Nor would the petitioner's adultery, at any rate if subsequent to the separation, appear to be relevant; in this respect the New Zealand rule seems more logical and sensible than the Australian. We do not suggest that the petitioner's pre-separation adultery should always be irrelevant, but it should, we think, be merely one factor to be taken into consideration by the court in deciding whether to exercise any ultimate discretion such as is referred to in paragraphs 114–119 below. As for delay, this should be openly recognised to be as irrelevant as in cases based on desertion.

109. On the other hand, we think it would be necessary to provide adequate safeguards to ensure that the petitioner does not wilfully deceive the court—this, rather than collusion, is what needs to be guarded against. For

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[54] *Putting Asunder*, para. 69 at p. 59.

[55] In a review of *Putting Asunder* in *New Society* of 4th August, 1966. He also says: " The main trouble with the doctrine of matrimonial offence has been that it has been substantially the only doctrine. Little lay criticism is heard when a wife is quickly given a divorce from a husband who has badly beaten her and the children. In the light of general popular approval in such cases, and the sense of justice which supports the attitude, these grounds should be retained in the law ".

[56] See paras. 66–68 above, where an attempt is made to estimate the likely effect on the English divorce rate.

[57] See para. 19 above.

[58] See para. 32 above.

this purpose the Rules should make it clear exactly what the petitioner is called upon to disclose in his petition. If he has wilfully failed to do so or deliberately attempted to deceive the court in the course of his evidence or has conspired with his witnesses to do so, the court should have a discretion to refuse a decree. This might be a salutary rule to introduce as regards petitions based on matrimonial offence also.[59]

110. In all cases the position of the children is of vital importance. At present they are safeguarded by the provisions of section 33 of the Matrimonial Causes Act 1965, whereby a decree absolute cannot be granted unless the court is satisfied regarding the arrangements made for the care and upbringing of the children. As already stated[60] we intend to undertake an investigation into the working of this section in order to see if it can be improved.

111. In all cases, too, the financial position of the children and the economically weaker party needs to be protected. On this, as already stated, our studies of family property and financial relief will, we hope, lead to greater protection being afforded. But we have to face the fact that for the present there will be cases where the grant of a divorce will cause greater financial hardship than has already been caused by the *de facto* breakdown of the marriage and that it may not be possible wholly to eliminate these cases.

112. At present, the economically weaker party (normally the wife) has the safeguard that she cannot be divorced against her will so long as she does not commit a matrimonial offence (or become insane). But the will of the weaker party may be overborne by that of the stronger, and we have therefore suggested that if divorce by consent were introduced it would be advisable to ensure, by judicial or administrative supervision, that the consent was real and based on an understanding of the financial and other implications. This would equally apply if the Separation Ground were introduced and a divorce was obtainable after two years should both parties consent. There would be no particular difficulties about this, because if mutual consent is required, both parties are necessarily active participants to some extent in the divorce proceedings. But the need to afford this protection would be just as great if it were decided to allow divorce after two years' separation where the respondent did not object. It would then be vital to ensure that the failure to object was based on adequate knowledge and understanding. Stricter proof of service of the petition would be needed and, it is suggested, the petition should be accompanied by a more elaborate notice. This would draw the respondent's attention to the fact that a divorce might have adverse financial consequences and that he or she could prevent a divorce being obtained by objecting; it would also stress the need to take legal advice and explain how this was available under the Legal Aid and Advice Scheme. It would also be possible to devise a procedure whereby, if the court doubted whether the respondent could have

[59] At present the court under the wording of the statute appears to have no power to refuse a decree on the ground that attempts have been made to deceive it unless these attempts amount to collusion; but where it has a discretion because of the petitioner's adultery, it is in practice deceit rather than adultery which leads it to refuse to exercise its discretion in the petitioner's favour.

[60] See para. 47 above.

fully appreciated the position, a welfare officer was instructed to investigate and report.[61]

113. Still greater safeguards would obviously be needed if a party who had committed no offence could be divorced even if he or she objected ; i.e. if either the Breakdown or Separation Grounds were introduced. As we have seen, the Archbishop's Group recommend a bar whereby a divorce should not then be granted unless the court were satisfied that the arrangements concerning property, pensions and maintenance were equitable. For reasons already set out in paragraphs 38–40 such a bar would appear to be essential. For administrative reasons it would probably be necessary to express this in the same way as the safeguard for the children under section 33 referred to in paragraph 110 above. In other words, it would be a bar on the granting of a decree absolute until the court was satisfied as to the financial arrangements, rather than an absolute or discretionary bar on the granting of a decree nisi.[62]

114. The question arises, however, whether that bar should be coupled with another based on considerations wider than simply those of the interests of the parties. As pointed out in paragraph 87 above, the New Zealand legislation now gives the court a general discretion whether to grant a decree on the Separation Ground. The Australian legislation[63] provides for the refusal of a decree where it would be harsh or oppressive to the respondent, or contrary to the public interest, to grant a decree. The Archbishop's Group considered the Australian and New Zealand enactments, and rejected the idea that the court should have a general discretion, because the court would be left without guidance as to the principles on which it should be exercised. On the other hand they considered that " the court should have a duty to refuse a decree, even though breakdown had been proved, if to grant it would be contrary to the public interest in justice and in protecting the institution of marriage."[64]

115. On practical grounds we think that any such discretionary bar should be so circumscribed as to give the courts as clear and precise guidance as possible. This is particularly necessary since divorce jurisdiction is perforce exercised by a great number of different judges—High Court Judges, County Court Judges, and Special Commissioners—and experience with the existing discretions has shown that it is extremely difficult to ensure that they are exercised consistently. The general discretion conferred by the New Zealand legislation and the Australian " harsh or oppressive or contrary to the public interest " give no clear guidance. Nor, as it seems to us, does the formula suggested by the Archbishop's Group. It is not easy to devise a formula that has the needed precision, yet without it the role of legal advisers will become extremely difficult, for they will not be able to offer their clients firm advice regarding the likelihood of obtaining a divorce.

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61 It would also be necessary to ensure that an unwilling respondent was not bombarded by a series of petitions in the hope of exhausting her patience so that, to obtain a quiet life, she eventually decided not to oppose.

62 But see para. 47, *n.* 68 above.

63 See para. 88 above.

64 *Putting Asunder*, para. 66 at p. 53.

116. There appear to be only two practical alternatives. The first is not to have any bar additional to that suggested in paragraph 113, which, being restricted to cases where equitable financial arrangements are not made, does have the desired precision. The second is to couple it with a wider discretion, in which event a measure of imprecision appears unavoidable.

117. The object of any additional bar would be twofold: (1) to protect the respondent (especially a wife respondent) and the children from adverse consequences flowing from the divorce, notwithstanding that the petitioner had made the most equitable arrangements possible in the circumstances; and (2) to protect the public interest. As regards the first object, we hope that our studies of family property and financial relief will lead to the removal of most of the financial hardships flowing from the divorce, as opposed to those caused by the earlier break-up of the home which cannot be wholly eradicated. But at present hardship may flow from the divorce itself. As regards the second object, protection of the public interest, we have already drawn attention to the fact that it is distasteful to maintain the sanctity of marriage by insisting that those who have treated it with contempt should remain married.[65] Nevertheless, when one party objects to the marriage being dissolved, it may be thought that the public interest sometimes demands that the objections be upheld.

118. In deciding whether to refuse a divorce, five interests would need to be balanced:—

(1) The first is that of the respondent (especially the wife respondent) who may suffer disproportionate hardship and injustice. If the hardship is economic and of sufficient gravity, the court will in any case normally have to refuse a decree under the bar referred to in paragraph 113. But the maintenance arrangements, though equitable in the sense that they are fair in the circumstances, may nevertheless mean that the wife respondent will be less well provided for than if there were no divorce, the effect of which will be to allow a husband to contract fresh legal obligations. A court would have to take into account, among all the other circumstances of the case, the pension position and the likelihood that a subsequent marriage might make it impossible for a petitioner to continue to pay maintenance to a former wife at a rate which was fair. While to refuse a divorce on this ground might be said to be discriminating against the poor, it may be argued that on marriage the petitioner has undertaken an obligation to support his wife—at least while she is innocent of any matrimonial offence—and should not be allowed to acquire other obligations which disable him from fulfilling his prior one. In addition the wife respondent may suffer hardship other than of an economic character. Although, as we have already suggested[66], these hardships may not be sufficiently weighty to preclude the introduction of the breakdown principle, they are not necessarily to be entirely disregarded in the exercise of any ultimate discretion.

(2) The second is that of the children of the marriage. Their interests may sometimes suggest that a divorce should be refused, but in

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65 See para. 44 above.

66 See paras. 42–45 above.

other cases it may be better for them that the marriage should be ended.[67]

(3) Despite what is said in paragraph 117, there are strong arguments for saying that the petitioner's disregard of his matrimonial obligations should be taken into account. The Archbishop's Group considered that "in such cases—to put it crudely—it just would not do to let the petitioner get away with it".[68] "It would shake confidence in the administration of justice and cast doubt on the reality of the State's concern for marriage"[69]. The arguments would seem to be twofold: it would be wrong to let this petitioner get away with it, and if he did, others might be encouraged to think that the more outrageously they behaved, the more certain they could be of obtaining their decree.

(4) Against this last consideration, which amounts to upholding the sanctity of marriage by refusing to end a marriage which has broken down, must be weighed the public interest, as Lord Walker put it, in ending "empty ties".[70]

(5) Finally, there must be considered the interests of the petitioner, any partner in the petitioner's illicit union and any children of that union.

119. These considerations suggest that if a wider bar were considered essential in cases based on Breakdown or Separation (should either be introduced) it should be formulated somewhat as follows:

> The Judge may in his discretion refuse to grant a divorce if satisfied that, having regard to the conduct and interests of the parties and the interests of the children and other persons affected, it would be wrong to dissolve the marriage, notwithstanding the public interest in dissolving marriages which have irretrievably broken down.

This would approximate to a statement of the principles which the Australian and New Zealand courts have worked out in the exercise of the bars under their Acts.

Summary and Conclusions

120. The main conclusions already reached can be summarised as follows:—

(1) The objectives of a good divorce law should include (*a*) the support of marriages which have a chance of survival, and (*b*) the decent burial with the minimum of embarrassment, humiliation and bitterness of those that are indubitably dead (paragraphs 13–18).

(2) The provision of the present law whereby a divorce cannot normally be obtained within three years of the celebration of the marriage may help to achieve the first objective (paragraph 19). But the principle of matrimonial offence on which the present law is based does not wholly achieve either objective (paragraphs 25–28).

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67 See paras. 47–51 above.

68 *Putting Asunder*, para. 66, p. 53.

69 *Ibid.*

70 Cmd. 9678, p. 341; see also *Blunt* v. *Blunt* [1943] A.C. 517.

(3) Four of the major problems requiring solution are:—

(*a*) The need to encourage reconciliation. Something more might be achieved here; though little is to be expected from conciliation procedures after divorce proceedings have been instituted (paragraphs 29–32).

(*b*) The prevalence of stable illicit unions. As the law stands, many of these cannot be regularised nor the children legitimated (paragraphs 33–37).

(*c*) Injustice to the economically weaker partner—normally the wife (paragraphs 38–46).

(*d*) The need adequately to protect the children of failed marriages (paragraphs 47–51).

(4) The field of choice for reform is circumscribed by a number of practical considerations and public attitudes, which cannot be ignored if acceptable and practicable reforms are to be undertaken (paragraph 52).

(5) The proposals of the Archbishop's Group on Divorce made in *Putting Asunder,* though they are to be welcomed for their rejection of exclusive reliance on matrimonial offence, are procedurally impracticable. They propose that there should be but one comprehensive ground for divorce—breakdown of the marriage—the court being required to satisfy itself by means of a thorough inquest into the marriage that it has failed irretrievably. It would not be feasible, even if it were desirable, to undertake such an inquest in every divorce case because of the time this would take and the costs involved (paragraphs 56–70).

(6) However, the following alternative proposals, if any of them were thought desirable, would be practicable in the sense that they could be implemented without insuperable legal difficulty and without necessarily conflicting with the critical factors referred to in (4):—

(*a*) *Breakdown without Inquest*—a modification of the breakdown principal advocated in *Putting Asunder,* but dispensing in most cases with the elaborate inquest there suggested. The court would, on proof of a period of separation and in the absence of evidence to the contrary, assume that the marriage had broken down. If, however, this were to be the sole comprehensive ground of divorce, it would not be feasible to make the period of separation much more than six months. If, as seems likely, so short a period is not acceptable, breakdown cannot become the sole ground, but might still be introduced as an additional ground on the lines of proposal (*c*) below (paragraphs 71–76).

(*b*) *Divorce by Consent*—This would be practicable only as an additional, and not a sole comprehensive, ground. It would not be more than a palliative and would probably be unacceptable except in the case of marriages in which there are no dependent children. Even in the case of childless marriages, if consent were the sole criterion, it might lead to the dissolution of marriages that had not broken down irretrievably (paragraphs 77–84).

(*c*) *The Separation Ground*—This would involve introducing as a ground for divorce a period of separation irrespective of which party was at fault, thereby affording a place in the law for the application of the breakdown principle. But since the period would be substantially longer than six months, it would be practicable only as an addition to the existing grounds based on matrimonial offence. The most comprehensive form of this proposal would provide for two different periods of separation. After the expiration of the shorter period (two years is suggested) either party, subject to safeguards, could obtain a divorce if the other consented, or, perhaps, did not object. After the expiration of the longer period (five or seven years) either party, subject to further safeguards, could obtain a divorce even if the other party objected (paragraphs 85–105).

(7) If any of these proposals were adopted, the following safeguards would appear to be necessary :—

(*a*) The three year waiting period (see (2) above) should be retained (paragraphs 19 and 106).

(*b*) The court should have power to adjourn for a limited period to enable the possibilities of reconciliation to be explored (paragraphs 32 and 107).

(*c*) The court should have a discretion to refuse a decree if attempts had been made by the petitioner wilfully to deceive it ; but the present absolute and discretionary bars would be inapplicable to petitions on these new grounds (paragraphs 108 and 109).

(*d*) Additional safeguards would be needed to protect the respondent spouse and the children. These should include :—

(i) A procedure to ensure that the respondent's decision to consent to or not oppose a divorce, had been taken freely and with a full appreciation of the consequences (paragraphs 83, 97 and 112).

(ii) Retention, and possible improvement, of the provisions of the present law designed to ensure that satisfactory arrangements are made for the future of the children (paragraphs 47 and 110).

(iii) Provisions protecting an innocent party from being divorced against his or her will unless equitable financial arrangements are made for him or her (paragraphs 40 and 113).

(*e*) It is for consideration whether there should be a further discretionary bar based on protection of interests wider than those of the parties alone. If such a bar were introduced, it should be defined as precisely as possible so as to promote consistency in its exercise and to enable legal advisers to give firm advice to their clients (paragraphs 41 and 114–119).

121. It is for Parliament to decide whether any, and if so which, of the solutions summarised in paragraph 120 (6) is to be adopted. The question arises whether Parliament needs any further information before it can make an informed decision and whether, therefore, there should first be a reference to another Royal Commission or similar investigation. We would suggest that there is no such need. While no one could pretend that all the facts about family life are known, further details could be ascertained only by elaborate, time-consuming and costly social investigations. These would not alter the general picture, which is already clear enough for an informed decision to be made. Hence it seems neither necessary nor desirable to delay action until those investigations could be completed. This would serve only to shelve the problem.

122. If Parliament should indicate a clear preference for one or other solution and the matter were then referred back to the Law Commission for action, we have no doubt that we could work out detailed legislative proposals.

123. We have not in this Report considered whether, if none of these solutions were adopted, any changes would be desirable in the present grounds for divorce. We are satisfied that, although minor changes might be made, no really worthwhile reform would thereby be achieved. Nor have we considered what changes in these grounds would be desirable should any of the additional grounds which we have discussed be introduced; this is premature until a decision has been reached on the major point. Certain changes would doubtless be requisite; for example, if the Separation Ground were added on the lines suggested and divorce became obtainable after two years' separation if the other party acquiesced, it would appear to be logical and sensible to reduce the presently prescribed period of desertion from three years to two.

124. In conclusion, we must express our sincere thanks to all those who have responded so generously to our requests for information. We are particularly indebted to the Department of the Attorney-General of the Commonwealth of Australia, to the Department of Justice of New Zealand, to the Principal Registry of the Probate, Divorce and Admiralty Division, and, above all, to Mr. John Boreham, the Chief Statistician of the General Register Office, and his staff, whose help with our statistical material has been invaluable.

LESLIE SCARMAN, *Chairman.*
L. C. B. GOWER.
NEIL LAWSON.
NORMAN S. MARSH.
ANDREW MARTIN.

HUME BOGGIS-ROLFE, *Secretary.*
October, 1966.

APPENDIX A

MATRIMONIAL PETITIONS FILED—ENGLAND AND WALES

TABLE 1

Total Number of Petitions Filed 1950–1965

Year	Petitions Filed	Increase/ Decrease
1950	29,868	
1951	38,551	+ 8,683
1952	34,753	− 3,798
1953	30,701	− 4,052
1954	29,184	− 1,517
1955	28,495	− 689
1956	28,640	+ 145
1957	28,062	− 578
1958	26,444	− 1,618
1959	26,561	+ 117
1960	28,790	+ 2,229
1961	32,152	+ 3,362
1962	34,892	+ 2,740
1963	37,548	+ 2,656
1964	41,780	+ 4,232
1965	42,070	+ 290

TABLE 2

Petitions Filed 1954–1964 by suits

Year	Divorce	Nullity	Judicial Separation	Restitution
1954	28,347	689	104	44
1955	27,656	658	130	51
1956	27,753	673	153	61
1957	27,210	648	146	58
1958	25,584	658	158	47
1959	25,689	638	183	51
1960	27,870	672	200	48
1961	31,124	781	200	47
1962	33,818	807	215	52
1963	36,385	919	206	38
1964	40,621	847	253	59

Source: Civil Judicial Statistics for England and Wales.

APPENDIX B

TABLE 1

Petitioners Legally Aided 1950–1965

Year	Those Legally Aided	Decrease/ Increase
1950	2,003	—
1951	24,865	+ 22,862
1952	21,076	− 3,789
1953	18,091	− 2,985
1954	15,805	− 2,286
1955	13,844	− 1,961
1956	12,981	− 863
1957	11,427	− 1,554
1958	9,936	− 1,491
1959	10,078	+ 142
1960	14,265	+ 4,187
1961	20,276	+ 6,011
1962	23,384	+ 3,108
1963	26,195	+ 2,811
1964	28,778	+ 2,583
1965	29,507	+ 729

TABLE 2

Comparative Table of Petitions and Legally Aided Petitioners

Year	Petitions	Legally Aided Petitioners	Legally Aided Petitioners as Proportion of all Petitioners
1950	29,868	2,003	6·7
1951	38,551	24,865	64·5
1952	34,753	21,076	60·6
1953	30,701	18,091	58·9
1954	29,184	15,805	54·2
1955	28,495	13,844	48·6
1956	28,640	12,981	45·3
1957	28,062	11,427	40·7
1958	26,444	9,936	37·6
1959	26,561	10,078	37·9
1960	28,790	14,265	49·5
1961	32,152	20,276	63·1
1962	34,892	23,384	67
1963	37,548	26,195	69·8
1964	41,780	28,778	68·9
1965	42,070	29,507	70·1

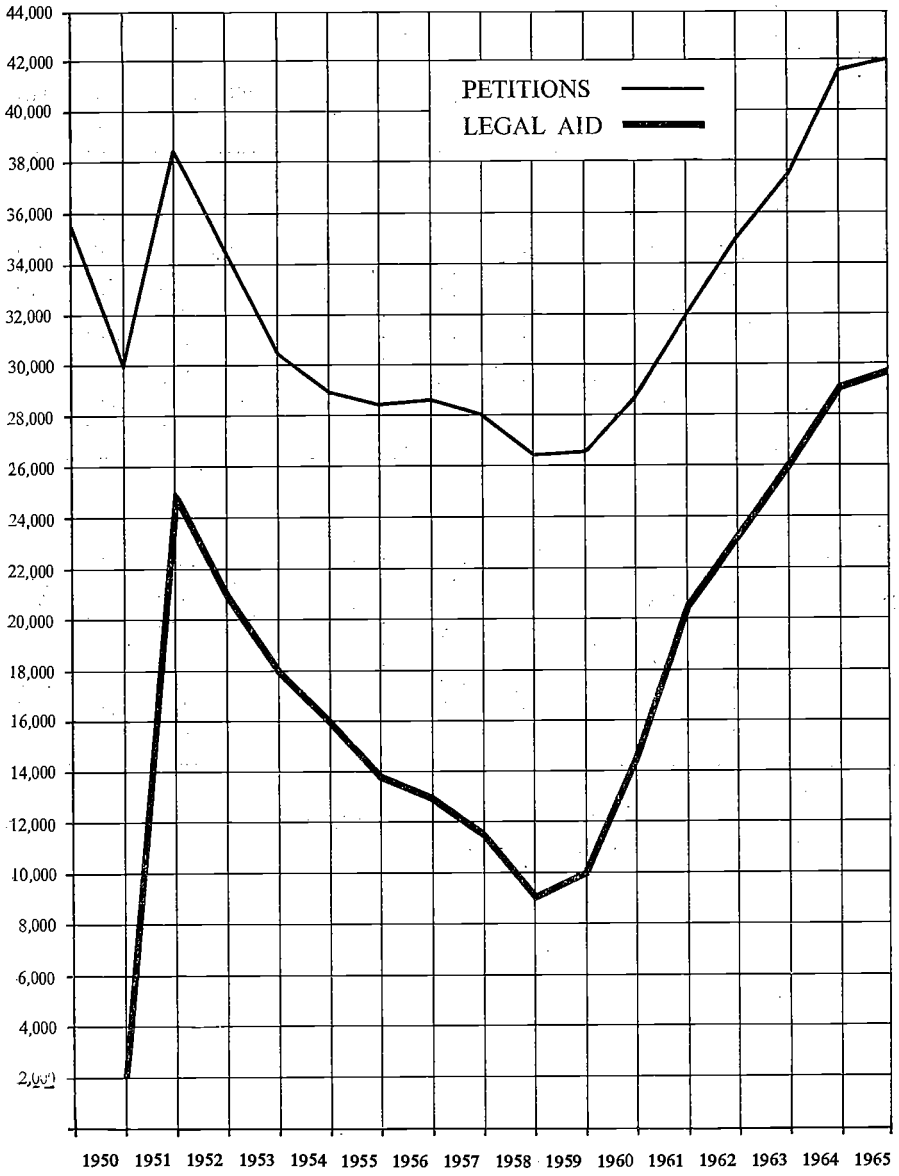
Source: Civil Judicial Statistics for England and Wales and Annual Reports on Legal Aid and Advice.

APPENDIX B

TABLE 3

Comparison between Total Number of Petitions Filed and those where Legal Aid Granted to Petitioners

(See Table 2)



APPENDIX C

DIVORCE RATES PER 1,000 MARRIED POPULATION BY AGE AT DIVORCE

1950 TO 1964, ENGLAND AND WALES

Age at date of Decree Absolute	Year										
	1950–1954*	1955	1956	1957	1958	1959	1960	1961	1962	1963	1964
	HUSBANDS										
All ages ...	2·7	2·4	2·3	2·1	1·9	2·1	2·0	2·1	2·4	2·7	2·9
Under 25 ...	2·1	2·0	1·9	1·1	1·0	1·1	1·0	1·4	1·7	2·0	2·2
25— ...	5·0	4·2	4·1	3·6	3·3	3·6	3·6	4·0	4·4	5·2	5·7
30— ...	5·0	4·4	4·2	3·7	3·5	3·9	3·8	4·1	4·7	5·2	5·8
35— ...	4·3	3·7	3·5	3·3	3·1	3·2	3·2	3·4	3·7	4·2	4·6
40— ...	3·4	3·0	3·0	2·6	2·6	2·9	2·7	2·8	3·2	3·4	3·4
45— ...	2·5	2·3	2·3	2·2	2·0	2·1	2·0	2·1	2·4	2·6	2·7
50— ...	1·4	1·3	1·3	1·3	1·2	1·3	1·2	1·3	1·4	1·5	1·6
60 and over	0·3	0·3	0·3	0·3	0·3	0·3	0·3	0·4	0·4	0·4	0·5
	WIVES										
All ages ...	2·7	2·3	2·3	2·0	1·9	2·1	2·0	2·1	2·4	2·7	2·9
Under 25 ...	3·1	3·0	2·9	2·0	2·0	2·1	2·2	2·4	2·8	3·2	3·6
25— ...	5·6	4·6	4·6	4·1	3·8	4·1	4·2	4·6	5·2	5·9	6·6
30— ...	4·8	4·2	4·0	3·6	3·3	3·7	3·5	3·9	4·3	4·8	5·2
35— ...	3·8	3·2	3·2	2·9	2·8	2·9	2·9	3·0	3·5	3·7	4·0
40— ...	2·9	2·6	2·6	2·3	2·3	2·5	2·2	2·4	2·8	2·9	3·1
45— ...	2·1	2·0	1·9	1·8	1·7	1·8	1·7	1·8	2·0	2·3	2·3
50— ...	1·0	0·9	0·9	0·9	0·9	1·0	0·9	1·0	1·1	1·2	1·3
60 and over	0·2	0·2	0·2	0·2	0·2	0·2	0·2	0·2	0·3	0·3	0·4

* Annual Average.

Source: Registrar General's Statistical Review for 1963, Part III, Table C30, with figures for 1964 supplied by General Register Office.

APPENDIX D

DISSOLUTIONS AND ANNULMENTS OF MARRIAGE: NEW PETITIONS FILED AND DECREES MADE ABSOLUTE

1945 TO 1965, ENGLAND AND WALES

Year	Petitions filed		Decrees absolute granted	
	Number	Per 1,000 married women aged 20–49	Number	Per 1,000 married women aged 20–49
1945	25,711	3·65	15,634	2·22
1946	43,163	6·09	29,829	4·21
1947	48,501	6·81	60,254	8·47
1948	37,919	5·28	43,698	6·08
1949	35,191	4·87	34,856	4·82
1950	29,729	4·09	30,870	4·24
1951	38,382	5·23	28,767	3·92
1952	34,567	4·69	33,922	4·60
1953	30,542	4·14	30,326	4·11
1954	29,036	3·93	28,027	3·79
		Average Rate =4·42		Average Rate =4·13
1955	28,314	3·83	26,816	3·62
1956	28,426	3·83	26,265	3·54
1957	27,858	3·74	23,785	3·19
1958	26,239	3·52	22,654	3·04
1959	26,327	3·52	24,286	3·25
1960	28,542	3·80	23,868	3·18
1961	31,905	4·31	25,394	3·43
1962	34,625	4·66	28,935	3·89
1963	37,304	5·02	32,052	4·32
1964	41,468	5·58	34,868	4·70
1965	42,070	5·77	37,084	5·07

Source: Registrar General's Statistical Review for 1963, Part III, Table C28, with figures for 1964 and 1965 supplied by General Register Office.

APPENDIX E

DIVORCE STATISTICS IN AUSTRALIA 1959-1965

Ground (*a*)	1959	1960	1961	1962	1963	1964	1965
	Dissolution of Marriage						
Single grounds—							
Desertion	4,492	3,873	3,600	3,505	3,324	3,468	3,762
Adultery	2,124	2,103	1,811	1,490	1,611	1,833	2,023
Separation(*b*)	136	133	342	1,159	1,342	1,685	1,704
Cruelty	209	216	231	204	240	316	375
Drunkenness	77	56	53	74	73	81	103
Frequent convictions	..	..	12	18	13	12	23
Imprisonment	25	19	9	3	3	5	6
Failure to pay maintenance	24	23	18	17	10	10	9
Non-compliance with restitution decree(*c*)	..	..	296	57	40	17	14
Insanity	19	12	12	36	21	16	13
Refusal to consummate(*d*)	1	5	8	16	14	22	24
Other single grounds	3	1	6	6	7	12	15
Dual grounds—							
Desertion and adultery	87	71	93	104	115	73	93
Desertion and separation	(*e*)	(*e*)	36	312	369	159	108
Desertion and cruelty	(*e*)	(*e*)	9	35	51	44	36
Desertion and drunkenness	(*e*)	(*e*)	5	22	18	13	26
Desertion and frequent convictions	(*e*)	(*e*)	3	12	2	4	—
Desertion and failure to pay maintenance	(*e*)	(*e*)	1	13	6	5	2
Adultery and separation	(*e*)	(*e*)	3	8	13	9	—
Adultery and cruelty	(*e*)	(*e*)	4	6	6	11	3
Adultery and bigamy(*f*)	1	1	6	2	..	..	—
Separation and insanity	(*e*)	(*e*)	1	4	..	..	—
Separation and failure to pay maintenance	..	..	..	..	7	..	—
Cruelty and drunkenness	117	120	97	63	65	69	76
Other dual grounds	(*e*)	(*e*)	2	16	17	30	29
Three grounds or more	(*e*)	(*e*)	15	38	42	21	13
TOTAL	7,315	6,633	6,673	7,220	7,409	7,915	8,457

(*a*) Statistics in respect of dissolutions of marriage for which petitions were lodged in or after February, 1961 are on a uniform basis in all States. Petitions lodged before that date were dealt with under the various, now superseded, State laws even if they were heard in 1961 or later years. Furthermore, there were changes made in some States regarding the way in which divorce statistics were compiled. For instance, dissolutions made on more than one ground were allocated to the more important ground in earlier years. For these reasons, comparisons from year to year of the figures shown in the above table should be made with caution.

(*b*) Separation was a ground for dissolution in only two States under the old legislation.

(*c*) This was a ground in one State only under the old legislation. Separate figures were not compiled before 1961, the dissolutions on this ground being included with desertion.

(*d*) This was a ground for dissolution in only one State under the old legislation.

(*e*) Not separately compiled before 1961. See note (*a*) above.

(*f*) "Adultery and Bigamy" is not a ground for dissolution under the new Commonwealth legislation.

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