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(Scot Law Com No 116)

Report on Reform of the Ground for Divorce

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The Scottish Law Commission was set up by section 2 of the Law Commission Act 1965 for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

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Scottish Law Commission

Item 14 of our Second Programme of Law Reform

Reform of the Ground for Divorce

*To: The Right Honourable the Lord Fraser of Carmyllie, QC,
Her Majesty's Advocate*

We have the honour to submit our Report on Reform of the Ground for Divorce.

(Signed) C K DAVIDSON, *Chairman*
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KENNETH F BARCLAY, *Secretary*
13 February 1989

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Part I Recommendation

1.1 The Divorce (Scotland) Act 1976 provides that the only ground for divorce is that the marriage has broken down irretrievably. Irretrievable breakdown can be established only by proving (a) adultery (b) intolerable behaviour (c) desertion followed by separation for two years (d) separation for two years plus the other party's consent to divorce or (e) separation for five years.¹ For the reasons given later in this report, we recommend that:

The ground for divorce in Scotland should continue to be the irretrievable breakdown of the marriage. It should be possible to establish irretrievable breakdown only by proving

- (a) adultery**
- (b) intolerable behaviour**
- (c) separation for one year plus the other party's consent to divorce, or**
- (d) separation for two years.**

The draft Bill appended to this report would, if enacted, give effect to this recommendation.

1.2 It will be seen that our main recommendation is that the periods of separation referred to in the Divorce (Scotland) Act 1976 should be reduced to one year and two years respectively. The disappearance of divorce for desertion is consequential on this.²

1.3 The recommendation which we now make is less radical than the main options for reform on which we sought views in the discussion paper on the ground for divorce published in May 1988.³ The purpose of a discussion paper is to elicit comments and it is clear from the comments which we received⁴ and from the results of a public opinion survey which we commissioned⁵ that more radical reform, while it would be strongly supported by many, would be equally strongly opposed by many others. No reform of the divorce law will please everyone. We received, for example, comments suggesting, at one extreme, divorce on demand in a registrar's office and, at the other extreme, a return to the pre-1938 position where the only grounds for divorce were adultery and desertion and where not even extreme cruelty was a ground for divorce. We believe that the modest reform which we recommend in this report will go a long way to meet the main criticism of the present law and will meet with general support from a broad middle band of responsible opinion.

1. This is slightly simplified. The actual words of the Act are set out in Appendix A. It should be noted in particular that we use "intolerable behaviour" as a short description of the fact referred to in s 1(2)(b) of the Act—namely that "since the date of the marriage the defender has at any time behaved (whether or not as a result of mental abnormality and whether such behaviour has been active or passive) in such a way that the pursuer cannot reasonably be expected to cohabit with the defender."

2. See para 2.16.

3. *The Ground for Divorce: should the law be changed?* (Discussion Paper No. 76).

4. A list of those who submitted comments is given in Appendix C. We are most grateful to all who responded.

5. The survey was carried out by System Three Scotland. Their *Report of a Survey on Proposed Changes to the Divorce Law* (1988) is reproduced in Appendix D, without the detailed tabulations.

Part II Reasons

Why reform?

2.1 In the light of our consultation we are satisfied that the main criticism of the present law is that the separation periods are too long. This in turn leads to an excessive use of the behaviour ground, with the undesirable consequences noted below. There are other criticisms of the present law, but these are less important.¹

2.2 The extent of use of the different grounds² for divorce is shown by the following table.

Divorces Granted in Scotland by Grounds³

	Behaviour	2 years separation	5 years separation	Adultery	Desertion	Total
1979	3,454	1,934	1,572	1,486	235	8,681
1980	4,189	2,479	1,555	1,940	305	10,468
1981	4,133	2,437	1,370	1,703	230	9,873
1982	4,814	2,812	1,524	1,873	244	11,267
1983	4,674	4,214	2,350	1,789	200	13,227
1984	4,351	4,250	1,741	1,415	142	11,899
1985	5,020	4,665	1,791	1,760	120	13,356
1986	4,523	4,856	1,700	1,569	128	12,776
1987	4,180	4,738	1,591	1,531	79	12,119

It is clear that many divorce actions are still based on the behaviour of the defender. In many cases the behaviour of the defender will be the real cause of the breakdown of the marriage and will be felt by the pursuer to justify an immediate action for divorce. There is reason to believe, however, that many actions are raised on the ground of behaviour simply because of the length of the separation periods.⁴ The pursuer would prefer not to make allegations against his or her spouse but is advised that unless behaviour is used there will be a delay of at least two years from the date of separation and that even then the defender may make difficulties over giving consent. The result is an action on the ground of behaviour in circumstances where the defender's behaviour would not be founded on if a separation ground provided an equally acceptable remedy.

2.3 In the discussion paper we suggested that the unnecessary use of the behaviour ground was undesirable.⁵

“There may, in some cases, be an unnecessary dredging up of incidents which would be best forgotten, an unnecessary emphasis on blame and recrimination and an unnecessary increase in bitterness and hostility.... Even if the pursuer's case is justified it may not help the relationship between the parties to have it set out in detail. If the pursuer's case is exaggerated, or unfairly one-sided, or not entirely

1. See paras 2.14, 2.15 and 2.18 below.

2. We refer to adultery, behaviour etc. as “grounds” for the sake of convenience. Strictly, the irretrievable breakdown of the marriage is the only ground for divorce.

3. Sources: Civil Judicial Statistics, and, for 1986 and 1987, Annual Report of the Registrar General for Scotland 1987, Table R 1.2.2. We have omitted divorces on “other” grounds which apparently include divorces on a combination of grounds. This means that the annual totals are very slightly understated, but never by more than 15 in any year.

4. See Davis and Murch, *Grounds for Divorce* (1988) pp 81-84. Some of our consultees also made the point that in many cases the choice of grounds for divorce depends more on what is available to the parties than on what constituted the real cause of the breakdown of the marriage.

5. Pp 2-3. See also Davis and Murch, *Grounds for Divorce* (1988) pp 87-99.

true, the position is worse. The defender may resent the allegations made against him or her but may well be advised that there is no point in defending. To a feeling of bitterness may be added a feeling of injustice. Of course, if the defender decides to defend or to raise a cross action for divorce on the basis of the pursuer's behaviour (which nowadays is unusual) the scene is set for an unsavoury, destructive and costly process of mutual recrimination."

We were careful to point out that this criticism was likely to apply in only some cases and that, quite apart from cases where the atrocious behaviour of the defender was the real cause of breakdown and bitterness, there were likely to be cases where the defender was unconcerned about allegations made against him or her (even if incidents were exaggerated or taken out of context) being content to regard them as part of the paperwork necessary for a quick divorce. Nonetheless we thought that *some* defenders were likely to feel understandable resentment at the allegations made against them,¹ and that, quite apart from the defender's attitude, it was not very constructive or civilised for the pursuer in a divorce case to be asked by his or her solicitor to recount the worst things the other spouse had done in the marriage to see if a behaviour case existed. We suggested that a good divorce law would try to minimise aggression in the interests of the parties and, very importantly, their children. Later in the paper, we referred to the increased awareness, since 1976, of the benefits of conciliation in divorce² and quoted the view of a leading exponent of conciliation that:

"A legal process which facilitates agreement can help couples to re-organise their lives and relationships in a humane and civilised way, whereas a process which concentrates on establishing which spouse is the guilty party increases antagonism and discourages constructive solutions."³

2.4 The length of the separation periods required by the present law means not only that there is unnecessary use of the behaviour ground but also that there may be a considerable delay in regulating the property consequences of a marriage breakdown. This is particularly obvious if there is substantial property involved, if the defender refuses consent to a divorce, and if intolerable behaviour or adultery cannot be proved. One woman who wrote to us said that she had been ill-treated by her husband for years but could not use his behaviour as a ground for divorce because she had no witnesses.⁴ He owned substantial property (all in his name) to which she had contributed by hard unpaid work.

"He won't consent after two years so that means 5 more years to wait. How long then before a settlement? I left home as I stood with no money.... I've been in Women's Aid Refuges, etc. . . . Push with *all your might* to change the Divorce laws. I'm an honest to goodness woman and its shocking being treated so unfairly. I'll be fifty in six years' time. Will I get a mortgage then I wonder!"

2.5 The purpose of the separation periods in the present law is to provide a reasonably reliable indication that the marriage has in fact irretrievably broken down. It seems to us that the present periods of two or five years are much longer than is necessary for that purpose.

2.6 It appears from our consultation and public opinion survey that shorter separation periods would now be generally acceptable. Many consultees favoured much more radical reform such as divorce on the sole ground of a short period of separation or notice. Many consultees (including most legal consultees) even when opposed to more radical reform favoured a shortening of the separation periods. The respondents in the public opinion survey were not asked what would be appropriate separation periods if adultery and behaviour were to be retained as grounds for divorce but they

1. This was confirmed by comments received on consultation. See also Davis and Murch, *Grounds for Divorce* pp 87-99.

2. P 17.

3. Parkinson, *Conciliation in Separation and Divorce* (1986) 11.

4. In order to preserve anonymity the name of this commentator has been omitted from the list in Appendix C. The Civil Evidence (Scotland) Act 1988 removes the need for corroboration in civil cases. However, in an action for divorce for behaviour the evidence of someone other than the pursuer is still required.

were asked what would be an appropriate period if a period of separation were to be the sole ground for divorce. The options presented were 3 months, 6 months, 9 months, 1 year, 2 years, more than 2 years and "Don't know". Respondents had already been shown a card which pointed out that an argument for a long period of separation was that it would not make divorce seem too quick and easy and that arguments against a long period of separation (as the sole ground for divorce) were that it could force people to raise extra legal proceedings to make temporary arrangements about custody or finance during the period of separation, could delay the final settlement of finance and property and might be difficult for people who wanted to remarry. The breakdown of responses was as follows¹

3 months	7%	1 year	27%
6 months	14%	2 years	19%
9 months	3%	More than 2 years	14%
Don't know		16%	

2.7 We accept, of course, that the arguments for a very short period are much stronger if there are no fault grounds to provide an immediate remedy. Nevertheless we think that these figures suggest that there would be public support for a shortening of the present separation periods. There is, to put it at its lowest, no overwhelming objection to the idea that someone might be divorced, or might obtain a divorce, after, say, a period of separation of one or two years.

2.8 The answer to the question "Why reform?" is, in short, that the separation periods in the present law are too long. Their length encourages an over-use of the behaviour ground, which is undesirable for the reasons given above, and may cause hardship in some cases by delaying the regulation of the economic aspects of the marriage breakdown. The periods are longer than is necessary to establish irretrievable breakdown. Our consultation and research suggest that a shortening of the periods would be widely supported.

Why reform now?

2.9 In our discussion paper we set out not only criticisms of the present law but also arguments for retaining it. We pointed out that the present law was considered satisfactory by Parliament in 1976 and that, arguably, not much had changed. We noted that in recent years there had been a number of important changes in relation to divorce procedure and the financial consequences of divorce and that the courts, officials and the legal profession were still in the process of adapting to these changes. We asked whether it was sensible to change divorce law again so soon. This question was asked in all seriousness. We thought that a general view might be that, while the present law on the ground for divorce could be criticised, there was no need for reform at the present time. The first question in the discussion paper was therefore:

"Is it worth proceeding further with consideration of possible reform of the ground for divorce at this time?"

The responses to this question indicate that there is strong support for proceeding further with consideration of reform at the present time. We were particularly interested to note the support for early reform from the Law Society of Scotland and other legal bodies and groups,² from the judges who commented, from the Convention of Scottish Local Authorities (commenting from a social work point of view), from the Scottish Marriage Guidance Council and from the Director of the Scottish Association of Family Conciliation Services. Most of these comments were from people with direct personal experience of dealing with divorce and its effects. We were also particularly interested to note the support for reform expressed by a number of

1. These figures are taken from the tables annexed to System Three Scotland's *Report of a Survey on Proposed Changes to the Divorce Law* (1988). The report (without tables) is reproduced in Appendix D.

2. The Society of Solicitors in the Supreme Courts; the Scottish Law Agents' Society; the Scottish Legal Action Group; Aberdeen University Law Faculty's Working Party.

organisations representing women's interests,¹ and by organisations with a special interest in the problems of divorced people.² The responses from those churches which commented were more varied. All were opposed to the more radical options for reform mentioned in the discussion paper but not all excluded the possibility of minor modifications to the present grounds.³ Two were strongly opposed to any liberalisation of the grounds for divorce and believed the present grounds were too wide.⁴ The responses from individual commentators were also varied. Some favoured early reform of a radical nature. Others favoured more limited reform. Others opposed any liberalisation of the present law. A petition signed by 76 signatories disapproved of the more radical options mentioned in the discussion paper.⁵

2.10 The results of the public opinion survey were interesting. Respondents were presented with a brief written statement of the present law and of some criticisms of it.⁶ They were then asked

“In your opinion, should there be any change in the law on the ground for divorce?”

At this stage they had not been given any options for reform. 40% thought there should be no change. 39% thought there should be and the rest were undecided. Among those with personal experience of divorce 56% favoured a change in the law.⁷ Later in the interview, after respondents had been asked for their views on two options for reform (divorce on the sole ground of a period of separation: divorce on the sole ground of a period of notice) they were asked a “summing up” question as to their preference between various options. 34% favoured a period of separation, 14% favoured a period of notice, 15% favoured either of these but had no preference for one or the other, 5% supported some other reform, 21% thought there should be no change in the present law, and 11% were undecided.⁸ Of those with personal experience of divorce only 11% thought there should be no change in the law.⁹ We were anxious to give respondents the type of information they would have received on reading our discussion paper, so that we could compare the results of the survey of a representative sample of the adult population with the responses from the self-selected respondents to the discussion paper. This is why respondents were given the information set out in the report of the survey.¹⁰ The fact that this information was given must, of course, be taken fully into account in assessing the results but we nonetheless think it is significant that, after being presented with certain criticisms of the present law and certain options for reform, 68% of the respondents favoured a change.¹¹ Of those with personal experience of divorce 81% favoured a change.¹²

2.11 To sum up, we thought at the time of our discussion paper that there might well be a general view that the present law on the ground for divorce was open to criticism but that the time was not yet ripe for reform. There turned out to be much more support for early reform than we had anticipated. In the light of the responses received on consultation and the results of the public opinion survey we conclude that there is substantial support for early reform of the ground for divorce, particularly from those who have personal or professional experience of the working of the present law.

1. Including the Women's National Commission; the Mother's Union (Diocese of Glasgow and Galloway; Edinburgh Diocese; Young Family Representative); the Scottish Convention of Women; Scottish Women's Aid; and the British Federation of University Women (Dundee and St Andrews Association; Edinburgh Association; Inverclyde Association).
2. Campaign for Justice in Divorce Scotland; Gingerbread Scotland.
3. This was the view of the Presbytery of Edinburgh (Church of Scotland) and of the United Free Church of Scotland. Although the Church of Scotland's Board of Social Responsibility answered question 1 in the discussion paper in the negative we do not read their detailed comments and arguments as expressing or implying opposition to all reform at the present time.
4. This was the view of the Religion and Morals Committee of the Free Presbyterian Church of Scotland and of Cupar Baptist Church.
5. The wording of the petition is set out in Appendix C, part (4).
6. See Appendix D, Card F3.
7. See Appendix D, para B2.
8. Appendix D, para B5.
9. Appendix D, para B5.
10. Appendix D, Cards F3, F4 and F5.
11. See Appendix D, para B5.
12. See Appendix D, para B5.

Why the particular reform recommended?

2.12 A reduction of the periods of separation to one year (with the defender's consent to divorce) or two years (even without such consent) would meet the criticism that the periods of separation required by the present law are too long but would not alter the fundamental nature and structure of the present divorce law, would not make things more difficult for the victims of serious matrimonial offences, and would not, we believe, go beyond what is acceptable to a broad spectrum of responsible opinion. It should channel many actions from the behaviour ground to the less recriminatory separation grounds.

2.13 The periods chosen are, of course, arbitrary within a certain range. Various suggestions were made to us. The Law Society of Scotland suggested 6 months with consent and 2 years without consent. The Scottish Law Agents' Society suggested 1 year with consent and 3 years without consent. The Society of Solicitors in the Supreme Courts of Scotland suggested 1 year with consent and 2 years without consent. Some members of the Council of the Society of Writers to Her Majesty's Signet favoured 6 months with consent and 2 years without consent: others favoured 1 year with consent and 2 years without consent. Various other consultees suggested either 6 months with consent and 2 years without consent, or 1 year with consent and 2 years without consent. The public opinion survey showed that, in relation to separation as the sole ground for divorce, 51% of respondents favoured 1 year or less and 70% favoured 2 years or less. Some consultees expressed the view that a period of about a year was necessary for separated spouses to adjust to the new situation. The advantage of a period of 6 months, in cases where the defender consents, is that this would enable more cases to proceed on the separation ground rather than on the behaviour ground. If the parties have been separated for 6 months and if they are agreed that there should be a divorce then it seems reasonably safe to assume that the marriage has irretrievably broken down. We can, therefore, see considerable attractions in the Law Society's proposal. Nonetheless, in the light of the comments received by us, we believe that a period of 1 year with consent would be likely to command wider public support and approval at the present time. There is clearly a fairly widespread concern that to allow divorce after a period of separation of less than a year would alter the public perception of marriage as a serious long-term commitment. This concern may or may not be justified but it undoubtedly exists and has to be taken into account.

2.14 A few consultees suggested that the period of separation required should be the same (say, 1 year) whether or not the defender consented to divorce.¹ The Royal Commission on Legal Services in Scotland suggested in 1980 that the two separation grounds should be replaced by one, so as to eliminate "the opportunity for what amounts to 'blackmail' in the present arrangements".² We ourselves referred in the discussion paper to the distortion of bargaining power caused by the requirement of consent for the use of the shorter separation period. We thought this might be a possible criticism of the present law.³ Few consultees, however, seemed to regard this as a serious criticism. One view expressed was that it was perfectly legitimate for a spouse who had not contributed to the marriage breakdown in any significant way and who did not wish a divorce to be able to negotiate his or her consent in exchange for some financial advantage. The bargaining power of the spouse who is asked to consent would, in any event, be reduced considerably if he or she could delay a divorce for only one year. It is, of course, arguable that if a couple have been separated for a year then it is reasonable to conclude that the marriage has irretrievably broken down, whether or not the other party consents. We can see force in that argument. There is also, however, some force in the argument that if separation for 2 years is required before it can safely be assumed that a marriage has irretrievably broken down where one party refuses to consent to divorce, then a shorter period may suffice where both parties agree to a divorce. This is the justification for the short

1. This is the solution adopted in Canada where the Divorce Act 1985 makes the grounds for divorce adultery, cruelty or separation for 1 year.

2. Report (Cmnd 7846) (1980) pp 156-157.

3. Discussion Paper No. 76, p 5.

period of 6 months suggested by a number of consultees for the case where the defender consents. Although there is clearly a case for having only one separation period, as suggested by the Royal Commission on Legal Services, our consultation suggests that the retention of two periods is likely to be more generally acceptable at the present time.

2.15 In the discussion paper we said that one possible criticism of the present law was that it was misleading. It pretended that there was one ground for divorce—irretrievable breakdown—whereas in reality there are five. We observed, however, that this criticism could be met by the argument that it did not matter if the law was misleading in this respect. It was just a matter of words which did not affect what actually happened. Of those consultees who commented on this point few seemed to be concerned about it. Indeed some thought that there were advantages in the irretrievable breakdown formula and were anxious to retain it. Thus, the Church of Scotland's Board of Social Responsibility considered that

“the conception of irretrievable breakdown as the sole ground for dissolving a marriage captures conceptually something which is central to most people's view of marriage, and which is of value, that is that marriage of its essence involves a kind of permanence and/or unconditional commitment such that marriage is to be persisted in unless it has irretrievably broken down”.

We agree that there is value in the idea of irretrievable breakdown as the sole ground for divorce. We would add that the use of this concept provides an underlying principle which makes clear the purpose of the specific “facts” of adultery, intolerable behaviour and separation. Adultery and intolerable behaviour are mentioned in the legislation, not to enable one party's faults to be publicly established or exposed, but simply because, when coupled with an application for a divorce, they provide a reasonably reliable indication that the marriage has irretrievably broken down. Periods of separation are mentioned, not to make divorce difficult, but simply because, when coupled with an application for a divorce, they also provide a reasonably reliable indication that the marriage has irretrievably broken down. It would be possible to retain the idea of irretrievable breakdown as the underlying policy of the law while not mentioning it in the legislation. This would avoid the rather odd effect of saying in the Act that “The sole ground for divorce is X. X is established if, and only if, the pursuer proves A, B, C or D”. It seems preferable, however, to retain a statement of the underlying principle in the Act so that there can be no argument about it and it is not forgotten, even if this does produce a rather odd verbal formula. It is for these reasons that we recommend the retention of the irretrievable breakdown formula in the law on the ground for divorce.

2.16 We are recommending the deletion of desertion followed by separation for two years as a ground for divorce. There is no place for it if a divorce can be obtained in any event after a separation for two years. One consultee suggested that desertion by itself (without any subsequent period of separation) should be a ground for divorce. This would, we think, give rise to very difficult questions as to whether a separation was desertion by one party or the other or was by mutual consent. It would also be open to abuse. It would be very easy to stage a collusive case of desertion. Above all, desertion which was not followed by an adequate period of separation would not, in our view, provide a reasonably reliable indication that a marriage had broken down irretrievably. Those who leave home in situations of stress or conflict often return. We do not therefore think that there is any justification for retaining desertion as a ground for divorce, even with a shorter period of separation or none at all. The statistics quoted above show that the use of desertion as a ground has declined dramatically since the introduction of the separation grounds.¹ It has always been a difficult ground legally, largely because the attitudes and intentions of *both* parties are relevant, and its removal now, in the context of a reduction in the length of the separation periods, would simplify the law without causing any hardship or difficulty.

2.17 A few consultees suggested minor changes in the behaviour, adultery or separation grounds. It was suggested, for example, that the behaviour ground should be

1. See para 2.2.

described as “inharmonious” or “unacceptable” behaviour, that adultery should not be mentioned separately, but should just be regarded as one type of behaviour justifying a divorce, and that separation should be defined so as to exclude separation under one roof and separation for some reason other than the breakdown of the marriage. We think that each of these suggestions could prove controversial and that the last could give rise to as many difficulties as it would solve. So far as we are aware the existing concepts of adultery, behaviour and separation¹ have worked reasonably well since the 1976 Act and we do not recommend any change in them at this time.

2.18 In the discussion paper we suggested that a possible criticism of the present law was that it might actually encourage a married couple to separate, or remain apart, in order to obtain or retain grounds for divorce. This did not seem to be regarded by our consultees as a serious criticism. We also suggested in the discussion paper that the co-existence of the separation grounds and the fault grounds provided an incentive to commit perjury in order to obtain an earlier divorce. Again this did not seem to be regarded as a serious criticism. One comment was that it was not a valid criticism of the law that some people abused it. A third possible criticism of the present law mentioned in the discussion paper was that the law on the grounds for divorce was more complicated and technical than it might be. A single ground for divorce based on, say, separation or a period of notice would remove some legal problems. Again this did not seem to be regarded as a serious criticism by our consultees. The recommendation made in this report would not meet the minor criticisms mentioned in this paragraph so well as the more radical options put forward for consideration in the discussion paper. The criticisms, however, were not thought to be very weighty and our recommendation would help to reduce still further such weight as they may have. Thus there would be less of a disincentive to resume cohabitation for a few months² if a new ground for divorce could be established after a period of one year’s separation (plus consent) instead of two as at present. There would be less of a temptation to present a false case based on behaviour or adultery if a divorce could be obtained after separation for one year (plus consent) instead of two. And the removal of the desertion ground would simplify the law to some extent.

1. See Appendix A for the statutory wording. The 1976 Act does not actually refer to separation. It refers to there being “no cohabitation between the parties” for the requisite periods and then in s 13(2) provides that, for the purposes of the Act, the parties to a marriage will be held to cohabit with one another only when they are in fact living together as man and wife.

2. See the Divorce (Scotland) Act 1976 s 2(2)(3) and (4).

Part III Rejected options

Introduction

3.1 One option which we have rejected, for the reasons given above, is retention of the present law unaltered. In this part of the report we explain why we are not recommending various other options on which we sought views in the discussion paper.

Period of separation as sole ground for divorce

3.2 In the discussion paper we invited views on the possibility of having a period of separation as the sole ground for divorce. This has a number of advantages but we pointed out that, unless the period of separation were short, it would also have disadvantages. There could be a long wait for a divorce even for a spouse who was the victim of extreme cruelty, or a spouse whose husband or wife was openly living in adultery. There could be a duplication of proceedings in some cases because, instead of proceeding straight to a divorce for adultery or behaviour, it would be necessary to obtain orders relating to custody or aliment or the occupancy of the matrimonial home to regulate the position during the period of separation. There could also be difficulties for some spouses in finding separate accommodation for a lengthy period prior to a divorce. The weight of these objections would be less if the period of separation were, say, three months but it is clear from our consultation and survey that such a short period would be unacceptable. There would be objections to the idea of a spouse who had committed no matrimonial offence being divorced against his or her will after such a short period. Although a period of separation as the sole ground for divorce attracted considerable support from the respondents to the public opinion survey, and indeed emerged as the preferred solution in the answers to the last question asked,¹ it attracted little support and a good deal of opposition from those who responded to the discussion paper. There was a widely held view that, while the unnecessary use of the behaviour or adultery grounds was to be deplored, there were cases where the use of these grounds was not only unobjectionable but also necessary if the interests of the pursuer were to be properly protected. There were cases where the defender's behaviour had been such that it was unnecessary to wait for one or two years before concluding that the marriage had broken down irretrievably, and where delay in raising a divorce action would mean either delay in regulating questions of accommodation and finance or an undesirable duplication of proceedings. We think that there is a great deal of force in these arguments. We have more doubts about some of the other arguments that were put to us for retention of the fault grounds for divorce—for example, that an innocent spouse should be able to have his or her innocence and the other spouse's guilt publicly affirmed by a court of law—but we need not go into that. We are persuaded that it would be undesirable to have a period of separation of a year or longer as the sole ground for divorce and have therefore rejected this option.

1. See Appendix D, para C1 and 2.

Period of notice as sole ground for divorce

3.3 Another option on which we invited views in the discussion paper was that the sole ground for divorce should be a period of notice. One spouse would give notice to the other party and to the court of an intention to divorce. After the lapse of a specified period of time, without any need for the parties to have been separated during the time, a divorce could be obtained. Again we pointed out that if the period of time were long there would be grave disadvantages in this option. The arguments on this point are much the same as in the case of a period of separation as the sole ground for divorce except that, as the parties could still live together during the running of the period, there would not be the same problems in relation to obtaining separate accommodation. There might, however, be other problems in such cases. The atmosphere in the household after notice of divorce has been given does not need much imagining. Another difficulty with the period of notice ground is that it could either delay a divorce unnecessarily in a case where the parties had already been separated for some time prior to the giving of notice or else force a spouse into giving precipitate notice in order to keep his or her options open. Separating spouses are often unclear about their position and their intentions.¹ They may take a long time to decide on a divorce. A period of notice as the sole ground for divorce does not seem well-adapted to this very common type of situation. It was for these reasons that we thought that a period of notice as the sole ground for divorce would be a realistic option only if the period were short.

3.4 There was a good deal of support on consultation for a period of notice as the sole ground for divorce. The main reasons given for supporting it were that it would take fault out of the grounds for divorce, would help to minimise bitterness and hostility, and would be an honest recognition that if one spouse wants a divorce, and persists in that stance after an adequate period for reflection, then the marriage is effectively over. The period favoured by the respondents to the discussion paper was often 6 months, although a number preferred a year. Nonetheless, although the amount of support was such as to justify our decision to put forward this option for consideration, it fell well short of majority support. Most consultees, and an overwhelming majority of legal consultees, were against this option. The most fundamental objection was that divorce on demand, after a period of notice, would weaken the institution of marriage. This point of view was expressed by many consultees. Whether it is right or wrong as a matter of fact—and many would argue that it is not from a strict law of divorce that the institution of marriage derives its great strength—the point of view is undoubtedly widely held, and very strongly held, and must be taken fully into account in any consideration of reform. The other commonly stated objections to a period of notice as the sole ground for divorce were concerned with the effects, which we have already mentioned, of depriving pursuers of an early remedy by way of divorce in cases of intolerable behaviour, adultery or long-standing separation. In terms of an underlying policy of irretrievable breakdown as the justification for divorce, it could be said that one concern was that a period of notice would not provide a sufficiently weighty indication of irretrievable breakdown,² and another concern was that a period of notice would be an unnecessary and undesirable impediment in cases where there was already a sufficiently serious indication of irretrievable breakdown. There is no inconsistency between these two concerns: a period of notice could be insufficient in some cases and unnecessary and undesirable in others. Another objection put to us concerned the timing of the notice and the effects of this on some recipients. It was pointed out that a spouse who had just been abandoned for someone else would feel an understandable sense of anger and bitterness if he or she received an immediate notice from the guilty spouse of intention to divorce. We think there is some force in this point and that in this respect a period of notice ground could be more damaging than a separation ground. In the case of a separation ground the basis of the divorce is the neutral fact of separation, rather than, as it were, unilateral repudiation, and the legally effective divorce papers arrive after a year or more of adjustment to the fact of separation and breakdown. This

1. Ann Mitchell in her research for *Children in the Middle* (1985) found that nearly half of the cross-section of couples had separated more than once, and nearly a third had separated more than twice.

2. Particularly if the period were short and the parties had been living together until the eve of the divorce.

is likely to be much less hurtful than the receipt of an immediate notice of intention to divorce. Yet another objection was that the threat of a notice of intention to divorce would be used by dominant spouses against more vulnerable spouses.

3.5 The period of notice option attracted a good deal of support from the respondents to the public opinion survey, particularly from those with personal experience of divorce.¹ So far as the length of the period was concerned the responses were as follows.²

3 months	8%	1 year	25%
6 months	14%	2 years	18%
9 months	3%	More than 2 years	13%
Don't know	20%		

In the responses to the final “summing up” question, however, the period of notice option was less favoured than the period of separation option and attracted only minority support.

3.6 It seems very clear from our consultation and public opinion survey that there would be little support for, and very strong opposition to, a short period of notice (say, 3 or 6 months) as the sole ground of divorce. There would be more support for a period of notice of about a year, but there would be serious objections to this as the sole ground for divorce and very strong opposition from some quarters. Our conclusion is that we cannot recommend a period of notice as the sole ground for divorce in Scotland at the present time.

Other options

3.7 We mentioned various other options in the discussion paper. Some, such as the Canadian solution,³ we have already referred to in passing. None received much support on consultation. A few consultees referred to the “process over time” option suggested by the English Law Commission in their discussion paper on the ground for divorce.⁴ This is conceptually similar to the period of notice option discussed above, although it is only fair to add that the English Commission envisaged a period of at least nine or twelve months and saw the period not only as a time for reflection but also as a time during which positive steps would be taken to resolve all the practical consequences of the marital breakdown. This is an area where legal and procedural differences in the two countries could well be important. A few consultees suggested options not mentioned in the discussion paper. Some of these suggestions—such as divorce on demand in a registrar’s office—would, we think, meet with even stronger opposition at the present time than the options mentioned in the discussion paper. Our recommendation in this report is based very largely on the results of our consultation. Opinions may change over the years in the light of experience. In rejecting other options and suggestions we do not mean to imply that they must be rejected for all time.

1. Appendix D, para B4.

2. Derived from detailed tabulations not reproduced in Appendix D. Figures, here and elsewhere in the report, may not add up to exactly 100 because of rounding up or down.

3. See para 2.14 above.

4. *Facing the Future: A Discussion Paper on the Ground for Divorce* (Law Com No. 170, 1988).

Part IV Other matters

4.1 In this part of the report we discuss various matters other than the ground for divorce itself which were brought to our attention by consultees.

Children

4.2 Many consultees were concerned about the serious effects of marriage breakdown on children of the marriage. We share this concern. It is important to keep in mind, however, that it is the marriage breakdown, and not the legal divorce, which is important in this connection. Where a marriage has broken down, and the parties have been separated for one or two years, delaying a legal divorce for a further period will not help the children. We do not, therefore, believe that the recommendation in this report would have adverse effects on children. Indeed one of the main reasons for trying to reduce unnecessary use of the behaviour ground is to try to minimise unnecessary hostility in the interests of the children of the marriage.

Aliment and financial provision

4.3 The obligation of aliment between spouses ceases on divorce. It follows that an earlier divorce means an earlier cessation of aliment for a spouse who is in receipt of aliment. However, a claim for financial provision on divorce can be made and the law on financial provision on divorce is designed to enable a suitable award to be made whenever this is justifiable and the resources of the other spouse permit.¹ In some cases the award must take the form of a fixed sum (which might have to be payable by instalments out of income) rather than an indefinite and variable periodical allowance, but that seems irrelevant. Although one or two consultees expressed concern that a shortening of the 5-year separation period to two years would reduce the time during which a dependent spouse could receive aliment as a spouse (as opposed to financial provision on divorce) we do not think that it would be right to keep a dead marriage in existence for this purpose. In some cases the shortening of the separation periods would be positively advantageous from the point of view of financial provision on divorce in that it would allow an earlier settling up of the parties' affairs. It is worth noting, in particular, that under the Family Law (Scotland) Act 1985 the value of the matrimonial property which is subject to the norm of equal division on divorce is normally ascertained as at the date of the final separation of the parties.² A delay of five years in the actual making of an order for financial provision on divorce may merely lead to avoidable difficulties.

Occupancy rights in the matrimonial home

4.4 Although a spouse's statutory occupancy rights in the matrimonial home under the Matrimonial Homes (Family Protection)(Scotland) Act 1981 cease on divorce,³ the court on granting divorce has power to make an order giving that spouse occupancy rights after the divorce.⁴ Occupancy rights under such an order do not give rise to the conveyancing problems caused by section 6 of the 1981 Act (which protects occupancy rights against "dealings" by the entitled spouse) because this section does not apply to them. The court also has power to transfer a tenancy from one spouse to the other⁵ and, on divorce, to make an order for the transfer of an owner-occupied home from one spouse to the other.⁶ In short the court dealing with a divorce has adequate powers to deal with the occupancy, tenancy or ownership of the matrimonial home after divorce. In some cases the award of a capital sum on divorce enables alternative accommodation to be obtained. In many cases involving owner-occupied

1. Family Law (Scotland) Act 1985, ss 8-15.

2. Family Law (Scotland) Act 1985, s 10(3).

3. Matrimonial Homes (Family Protection) (Scotland) Act 1981 s1.

4. Family Law (Scotland) Act 1985, s 14(2) and (5).

5. Matrimonial Homes (Family Protection)(Scotland) Act 1981 s 13. This power can be exercised during the marriage or on divorce.

6. Family Law (Scotland) Act 1985, ss 8(1)(a) and 12.

matrimonial homes the home is in the spouses' joint names, so that statutory occupancy rights do not arise. For all these reasons we do not think that the shortening of the separation periods need give rise to problems in relation to occupancy rights. In some cases it will be beneficial. Statutory occupancy rights were never intended to enable a separated husband or wife to occupy the other spouse's house rent free for an indefinite period after separation and there will be some cases where the shortening of the separation periods will enable an unsatisfactory position to be resolved earlier than it could otherwise have been.

Matrimonial interdicts

4.5 A court granting a matrimonial interdict¹ must in certain circumstances attach a power of arrest to the interdict.² This enables a police constable to arrest without warrant the person interdicted if the constable has reasonable cause for suspecting that person of being in breach of the interdict.³ The power of arrest ceases, however, to have effect on the termination of the marriage. Moreover, a power of arrest cannot be attached to an interdict granted against a former spouse prohibiting conduct in relation to the other former spouse or the former matrimonial home. Such an interdict would not be within the definition of a matrimonial interdict.

4.6 In their comments on the discussion paper Scottish Women's Aid supported, subject to important reservations, the idea of removing so far as possible the friction and adversarial nature of divorce proceedings. They accepted the need to keep the time span of separation grounds short. However, they added this qualification.

“Our support for reform of divorce law which has the effect of shortening the period of separation required would be *solely conditional* on protective remedies being available for abused women after divorce. This would include the extension of powers of arrest, granted under the Matrimonial Homes (Family Protection)(Scotland) Act 1981, beyond the divorce, and also the possibility of having such powers of arrest attached to any interdict granted under the Act after divorce. Without these extensions women in abusive marriages might have no option but to stay married to violent men in order to retain the limited protection offered by the police and criminal justice system. In addition we would be concerned that violent men would be able to obviate protective measures which had been granted against them by applying for divorce.”

This is an important point. The arguments, however, are not entirely one way. It is clear, for example, that a divorced spouse has the same protection against assault or breach of the peace as any other citizen and we find it difficult to believe that someone who had been separated for one or two years would choose not to seek a divorce, which he or she wanted for other reasons, solely in order to retain the benefit of a matrimonial interdict with power to arrest. We are not convinced that this question is very closely linked to a shortening of the separation grounds, at least in the context of the modest reform which we are now recommending. People who are violent and abusive to their spouses will very often be divorced for behaviour and we are proposing no change in that respect. In our view the questions of the duration of a power of arrest attached to a matrimonial interdict and of attaching a power of arrest to an interdict against a former spouse are questions which arise independently of reform of the ground for divorce. Any examination of those questions should not delay implementation of the recommendation in this report. So far as duration is concerned, one possibility might be to provide that a power of arrest should not terminate on divorce but should cease to have effect, unless previously recalled, on the expiry of a specified time (say, five years) from the date when it was granted. This would have the added advantage of enabling the police records of matrimonial interdicts with powers of arrest to be cleared of interdicts which were no longer alive. Clearly, however, these questions relating to powers of arrest are important questions

1. Defined, for this purpose, as an interdict (including an interim interdict) which

“(a) restrains or prohibits any conduct of one spouse towards the other spouse or a child of the family, or

(b) prohibits a spouse from entering or remaining in a matrimonial home or in a specified area in the vicinity of the matrimonial home.”

Matrimonial Homes (Family Protection) (Scotland) Act 1981, s 14.

2. 1981 Act s 15(1).

3. 1981 Act s 15(3).

on which differing views might well be held. One question of principle which would have to be addressed is, for example, the justification for attaching a power of arrest to an interdict relating to conduct between former spouses but not to interdicts relating to conduct between other people. In the absence of consultation it would be inappropriate for us to make any recommendations on these matters in this report.

Conciliation 4.7 A number of consultees stressed the advantages of conciliation in divorce and the need for a properly funded and comprehensive conciliation service. A few advocated mandatory referral to conciliation in certain circumstances. While we can see the great advantages of conciliation and share the view that it should be available to all those who seek help in resolving the difficulties associated with marriage breakdown, particularly difficulties relating to children, we are aware that there are differing views as to the appropriateness and practicability of *mandatory* conciliation.¹ This is not something on which we would wish to make recommendations without the benefit of full consultation.

Judicial separation 4.8 The scheme of the Divorce (Scotland) Act 1976 is that the grounds for judicial separation should be the same as for divorce with the omission of the reference to irretrievable breakdown of the marriage. This is achieved by providing that section 1 of the Act (on the ground for divorce) is to apply to an action for separation with any necessary modifications. It follows that an amendment of section 1 of the Act would automatically affect the grounds for separation as well as the grounds for divorce. This seems to us to be appropriate.

United Kingdom context 4.9 We have kept in contact with the Law Commission for England and Wales on this subject. They published an extensive discussion paper in 1988² but it will be a little while before they are able to report, principally because the field work on a public opinion survey which they had commissioned took place only in December 1988. In these circumstances we have had to decide whether to hold up our report. As the results of our consultation and research seemed to us to point clearly in the direction of the recommendation made in this report and as, whatever happens in England and Wales, we could not ignore the weight of Scottish opinion, we have concluded that there would be no advantage in holding up our report. Indeed its early publication may be of value to those who are considering related areas of law and procedure.

4.10 Although one or two consultees stressed the desirability of having the law on the ground for divorce the same in Scotland and England, we do not believe that this is of great importance, provided that the availability of divorce is broadly equal in the two countries. There have been periods in the past when the divorce laws in the two countries were very different and even today there are minor differences of law and quite significant differences in procedure. We do not believe that this gives rise to any difficulty. The question of jurisdiction in divorce is regulated by the Domicile and Matrimonial Proceedings Act 1973, which provides that one of the parties must be domiciled in Scotland on the date when the action is begun or must have been habitually resident in Scotland for a year immediately prior to that date.³ A divorce granted by a court in one part of the United Kingdom is fully recognised throughout the United Kingdom.⁴

1. So far as practicability is concerned, one difficulty is that conciliation services are not available in all parts of Scotland.

2. *Facing the Future: A discussion paper on the Ground for Divorce* (Law Com No 170, 1988).

3. S 7(2). A sheriff court will have jurisdiction only if, in addition to the requirements stated in the text, either party was (a) resident in the sheriffdom for a period of 40 days immediately prior to the date of raising of the action or (b) had been resident in the sheriffdom for a period of not less than 40 days ending not more than 40 days before that date and has no known residence in Scotland at that date. S 8(1). There are provisions in the Act to deal with the case where competing actions are raised in both Scotland and England and Wales or Northern Ireland or the Channel Islands. Sch 3.

4. Family Law Act 1986 s 44(2).

Appendix A

Excerpt from Divorce (Scotland) Act 1976, sections 1 and 2

Irretrievable breakdown of marriage to be sole ground of divorce

1.—(1) In an action for divorce the court may grant decree of divorce if, but only if, it is established in accordance with the following provisions of this Act that the marriage has broken down irretrievably.

[Transitional provision omitted]

(2) The irretrievable breakdown of a marriage shall, subject to the following provisions of this Act, be taken to be established in an action for divorce if—

- (a) since the date of the marriage the defender has committed adultery; or
- (b) since the date of the marriage the defender has at any time behaved (whether or not as a result of mental abnormality and whether such behaviour has been active or passive) in such a way that the pursuer cannot reasonably be expected to cohabit with the defender; or
- (c) the defender has wilfully and without reasonable cause deserted the pursuer; and during a continuous period of two years immediately succeeding the defender's desertion—
 - (i) there has been no cohabitation between the parties, and
 - (ii) the pursuer has not refused a genuine and reasonable offer by the defender to adhere; or
- (d) there has been no cohabitation between the parties at any time during a continuous period of two years after the date of the marriage and immediately preceding the bringing of the action and the defender consents to the granting of decree of divorce; or
- (e) there has been no cohabitation between the parties at any time during a continuous period of five years after the date of the marriage and immediately preceding the bringing of the action.

(3) The irretrievable breakdown of a marriage shall not be taken to be established in an action for divorce by reason of subsection (2)(a) of this section if the adultery mentioned in the said subsection (2)(a) has been connived at in such a way as to raise the defence of *lenocinium* or has been condoned by the pursuer's cohabitation with the defender in the knowledge or belief that the defender has committed the adultery.

[Procedural provision omitted.]

(5) Notwithstanding that irretrievable breakdown of a marriage has been established in an action for divorce by reason of subsection (2)(e) of this section, the court shall not be bound to grant decree in that action if in the opinion of the court the grant of decree would result in grave financial hardship to the defender.

For the purposes of this subsection, hardship shall include the loss of the chance of acquiring any benefit.

(6) In an action for divorce the standard of proof required to establish the ground of the action shall be on balance of probability.

Encouragement of reconciliation

2.—(1) At any time before granting decree in an action for divorce, if it appears to the court that there is a reasonable prospect of a reconciliation between the parties, it shall continue, or further continue, the action for such period as it thinks proper to enable attempts to be made to effect such a reconciliation; and if during any such continuation the parties cohabit with one another, no account shall be taken of such cohabitation for the purposes of that action.

(2) Adultery shall not be held to have been condoned within the meaning of section 1(3) of this Act by reason only of the fact that after the commission of the adultery the pursuer has continued or resumed cohabitation with the defender, provided that the pursuer has not cohabited with the defender at any time after the end of the period of three months from the date on which such cohabitation as is referred to in the said section 1(3) was continued or resumed as aforesaid.

(3) The irretrievable breakdown of a marriage shall not be taken to be established in an action for divorce by reason of section 1(2)(c) of this Act if, after the expiry of the period mentioned in the said section 1(2)(c), the pursuer has resumed cohabitation with the defender and has cohabited with the defender at any time after the end of the period of three months from the date on which the cohabitation was resumed as aforesaid.

(4) In considering whether any period mentioned in paragraph (c), (d) or (e) of section 1(2) of this Act has been continuous no account shall be taken of any period or periods not exceeding six months in all during which the parties cohabited with one another; but no such period or periods during which the parties cohabited with one another shall count as part of the period of non-cohabitation required by any of those paragraphs.

Appendix B

DIVORCE (SCOTLAND) BILL

ARRANGEMENT OF CLAUSES

Clause

1. Restriction of periods of non-cohabitation required.
2. Repeal of desertion provisions.
3. Saving.
4. Citation, commencement and extent.

DRAFT
OF A
BILL

TO

A.D. 1989

Amend the law of Scotland as to certain of the facts to be established for the purpose of obtaining decree of divorce or separation of the parties to a marriage; and for connected purposes.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Divorce (Scotland) Bill

Restriction of periods of non-cohabitation required.
1976 c. 39.

1. Subject to section 3 below, section 1(2)(d) and (e) (periods of non-cohabitation) of the Divorce (Scotland) Act 1976 shall have effect as if for the words “two years” and “five years” there were substituted respectively the words “one year” and “two years”.

Repeal of desertion provisions.
1976 c. 39.

2. Subject to section 3 below, paragraph (c) of section 1(2) (desertion) and subsection (3) of section 2 (reconciliation after desertion) of the Divorce (Scotland) Act 1976 are hereby repealed and accordingly the reference in paragraph (4) of the said section 2 to the said paragraph (c) shall cease to have effect.

Savings.

3. Nothing in this Act shall apply in relation to any action for divorce or separation brought before the commencement of this Act.

Citation, commencement and extent.

4.—(1) This Act may be cited as the Divorce (Scotland) Act 1989.

(2) This Act shall come into operation at the end of the period of two months from the date on which the Act is passed.

(3) This Act shall extend to Scotland only.

EXPLANATORY NOTE

The draft Bill implements the recommendation in paragraph 1.1 of the report. It is largely self-explanatory. The only point which calls for comment is that the changes made by the Bill would apply to actions for separation as well as to actions for divorce. This is because section 4 of the Divorce (Scotland) Act 1976 says that sections 1 and 2 of the Act apply to an action for separation as they apply to an action for divorce subject to

- “(a) the modification that any reference to irretrievable breakdown of a marriage shall be construed as a reference to grounds justifying decree of separation of the parties to a marriage; and
- (b) all other necessary modifications.”

Appendix C

List of those submitting written comments.

(1) Organisations submitting written comments on Discussion Paper No. 76.

Aberdeen University Law Faculty (Working Party)
British Federation of Univeristy Women (Dundee and St Andrews: Edinburgh:
Inverclyde)
Campaign for Justice in Divorce, Scotland
Church of Scotland: Board of Social Responsibility
Church of Scotland: Presbytery of Edinburgh
Citizens Advice Scotland
Convention of Scottish Local Authorities
Cupar Baptist Church (Comments accompanied by petition bearing 23 signatures)
Divorce Law Reform Association
Family Charter Campaign
Free Presbyterian Church of Scotland: Religion and Morals Committee
Gingerbread Scotland
Law Society of Scotland
Married Women's Association
Mothers' Union (Diocese of Glasgow and Galloway: Edinburgh Diocese: Young
Family Representative)
National Family Trust and National Campaign for the Family
Ross and Cromarty Citizens Advice Bureau
Scottish Convention of Women
Scottish Council for Single Parents
Scottish Humanist Council
Scottish Law Agents' Society
Scottish Legal Action Group
Scottish Women's Aid
Sheriffs' Association
Society of Solicitors in the Supreme Courts of Scotland
Soroptimist International of Scotland North
United Free Church of Scotland: Public Questions Committee
Wilson and Raitt, Solicitors, Dundee
Women's National Commission

(2) Individuals submitting written comments on Discussion Paper No. 76.

M Abbott
J Adey
A Brown
J A Cathie
R C Connal
L R Cox
The Hon Lord Dervaird
J S Doig
The Hon Lord Dunpark
J Harrison
J Hepburn
The Rt Hon Lord Kilbrandon
P Logan
A J Loudon, WS
S M G Matheson, Director, Scottish Association of Family Conciliation Services

A Mitchell
M Nicholson
P Nicholson
The Rt Hon Lord Murray
Y Osman
K Parker
G Pontiero
T S Rait
H D Ralston
J Robinson
T G Salmon
C M Sturrock
G A Watt
M H Wilson

(3) Solicitors and trainees returning questionnaire issued at Law Society of Scotland's Post Qualifying Legal Education course on Family Law, 13-15 October 1988

I W Anderson
A T Cordner
H C Couchlin
A L Cowan
C Craig
A Dick
A Dickson
L Dunipace
J Fotheringham
M Gimblett
L Graham
M L Grieve
G Henderson
A Kennedy
J N Kennedy
S R Leeman
M Liddell
M Macaulay
J P Maguire
D J Mair
I McColl
M McCulloch
J A McGoogan
R McIntosh
K McMahan
A McTaggart
T S Millar
A Oag
H Philcox
F Quirk
K R Robb
L Welsh
A J P Wilson

(4) The Commission also received a petition, bearing 76 signatures, to the following effect.

"We, the undersigned, wish to make known to the Scottish Law Commission our disapproval of the proposals contained in Discussion Paper No. 76, 'The Ground for Divorce: Should the Law be Changed?'.

"We are concerned at the apparent erosion of the legal and moral institution of marriage.

“We consider the proposed period of separation/notice of three months to be unacceptably short and believe that the present period of two years should be retained.”

Appendix D

Excerpt from a report of a survey by System Three Scotland on Proposed Changes to the Divorce Law dated 13 September 1988.

- A. Background** In May 1988, the Scottish Law Commission published a discussion paper (No. 76) entitled, "The Ground for Divorce: should the law be changed?". The aim of this discussion paper was to stimulate debate on whether the current divorce law should be changed, and to propose some options for reform. A similar discussion paper is being published by the Law Commission for England and Wales.

To gauge public opinion on this subject, the Scottish Home and Health Department, on behalf of the Scottish Law Commission, appointed System Three Scotland to undertake an opinion survey amongst a representative sample of the Scottish adult population. Questions were inserted on the Scottish Opinion Survey, the monthly omnibus survey undertaken by System Three Scotland, during the period 28 June to 5 July 1988. A sample of 969 adults was interviewed in-home, in 38 sampling points throughout Scotland.

To ensure that there was an adequate base for analysis amongst those respondents with personal experience of divorce, the same questions were repeated in the omnibus survey at the end of July, 21-26 July. However, in this survey, only those respondents with direct experience of divorce were asked all the questions—the remainder were "filtered out" after the first 2 questions.

Both data-sets were weighted using the JICNARS National Readership Survey of July 1986— June 1987, to ensure that the sample was representative of the Scottish adult population in terms of age, sex and social class.

A copy of the questionnaire used in the survey is appended.

[**Note by Scottish Law Commission.** The detailed tabulations appended to System Three Scotland's Report are not reproduced in this Appendix.]

- B. Summary of main findings** The following paragraphs highlight the main findings from this analysis of the survey data:

1. The profile of the sample in terms of current marital status was as follows:

	N=1940 (%)
Married	58
Single	22
Widowed	11
Divorced	4
Separated	2
Co-habiting	2

In terms of the respondents' experience of divorce, the distribution was as follows:

	N=1940 (%)
I have had no direct experience of divorce	64
I have a close friend/relative who has been through a divorce or is currently getting divorced	25
I have been through a divorce	8
I am currently getting divorced	2
My partner/spouse has been through a divorce or is currently getting divorced	2
I have to deal with divorce in the course of my work	1

The sub-sample (n = 190) of those with personal experience of divorce was defined as:

- those respondents who have been through a divorce (n = 154);
- those respondents who are currently getting divorced (n = 38).

More than 1 answer was allowed for this question, consequently, a minority of respondents may have described themselves as belonging to both these categories.

2. 40% of all respondents believed that there should be no change in the law on the ground for divorce; 39% thought that there should be, with over a fifth (22%) claiming to be undecided.

Certain "segments" of the population were more likely to believe that the present law should be changed, including:

— those in the AB social classes	(44%)
— those who are currently divorced or separated	(53%) (51%)
— females (non-housewife)	(46%)
— respondents with children in household (14 and under)	(44%)
— those with personal experience of divorce	(56%)
— or indirect experience	(44%)

It should be noted that this question was asked after the respondent had been provided with some information on the current law and ground for divorce.

3. Information on 2 proposed options for amending the law was provided to respondents prior to them being asked for their opinion of these options, and a preference, if any, between them.

First of all, opinion was evenly divided on an amendment to the law which would make the only ground for divorce, a period of separation between the 2 partners—46% in favour, with 43% opposed, and 11% claiming to be undecided.

Those more likely to favour such an option included:

- those who are divorced (51%) or separated (56%);
- those aged 35-54 years;
- those with personal experience of divorce (54%).

As regards the period of separation, the distribution was as follows:

- 24% favoured less than 1 year;
- 27% favoured 1 year;
- 19% favoured 2 years;
- 14% favoured more than 2 years.

Those with personal experience of divorce tended to favour a shorter period of separation, as did those who favoured such a proposal:

	Personal experience of divorce	In favour of separation proposal
	(%)	(%)
Less than 1 year	33	31
1 year	33	40
2 years	15	18
More than 2 years	9	9

4. The second option considered was that the only ground for divorce should be the passing of a period of time after one party had given official notice of an intention to seek a divorce. 49% of all respondents were in favour of such an option, with 37% opposed to it—14% claimed to be undecided.

Those more likely to favour this option included.

- those who are divorced (60%) or separated (62%)
- those aged 18-54 years (56%)
- females (non-housewives) (55%)
- those with children in the household under 14 years (54%)
- those with personal experience of divorce (62%)

As regards the period of notice required under this proposal:

- 25% said less than 1 year;
- 25% said 1 year;
- 18% said 2 years;
- 13% more than 2 years.

Once again, those with personal experience of divorce favoured a shorter period of notice as did those who supported this proposed change to the law:

	Personal experience of divorce	In favour of period of notice proposal
	(%)	(%)
Less than 1 year	36	35
1 year	27	36
2 years	15	17
More than 2 years	10	10

It is evident that, in considering the 2 proposed options independently of each other, there is no significant difference in the level of support for one, as opposed to the other.

5. However, on being asked to choose between the 2 proposed options, the “separation” proposal was preferred by a third of all respondents, compared to 14% selecting the “notice” option. A fifth (21%) felt that there should be no change to the current law—a proportion which is significantly lower than the 40% who previously believed that there should be no change to the divorce law. 15% believed that either of the 2 options would be acceptable, without expressing a preference and a minority 5% thought that some other option would be preferable. 11% claimed to be undecided.

Examining the preference for one option as opposed to the other, across the population, revealed the following points:

- those in the AB social class were a little less likely to favour the “separation” option and a little more likely to prefer the “notice” option;
- while divorced respondents were likely to favour both of the options, compared to the population as a whole, separated respondents were more inclined to favour the “separation period” rather than “period of notice”.

The following table outlines some of the detailed responses to this question by those respondents directly involved or committed to some change in the current legislation:

	Personal experience of divorce	In favour of change in the law	In favour of period of separation	In favour of period of notice
	(%)	(%)	(%)	(%)
Divorce after period of separation	41	42	53	39
Divorce after period of notice	20	20	12	24
Either, but no preference	15	20	21	23
No change to current law	11	6	9	9
Something else	5	6	2	2

Amongst those respondents who believed that there should be some change in the current law, the proposal for a period of separation between the 2 partners appears to be the preferred choice.

C. Conclusions On the basis of the preceding analysis of the survey data, the following conclusions can be highlighted:

1. On exposure to some background information on the operation of the current law on the ground for divorce, it is evident that the majority of respondents believed that there should be some change to the legislation. Excluding those who claimed to be undecided, 76% expressed a preference for a change in the current legislation:
 - 38% favouring the period of separation option;
 - 16% the period of notice option;
 - 17% either of these;
 - 5% something else.
2. As would be expected, those respondents who have had personal experience of divorce are even more likely to support the need for a change to the existing law:
 - 45% preferring the period of separation;
 - 22% the period of notice;
 - 16% either of the options.
3. As regards the actual period of notice or separation, there was a strong tendency for around a year, in both proposals. Once again, those with personal experience of divorce are more likely than the population in general to support as short a time period as possible.

QUESTIONNAIRE USED

Research on Divorce

Name

Address

.....

**REMEMBER TO FILL IN NAME AND
ADDRESS ON THIS SECTION IMMEDIATELY
AFTER COMPLETION OF THE QUESTIONNAIRE**

The next few questions are all about the ground for divorce, that is, the basis on which people apply to the courts for a divorce. These are being asked because the Scottish Law Commission is seeking public views on whether there should be a change in the current ground for divorce. They are particularly interested in the views of those who have had direct experience of divorce themselves, or are about to do so.

SHOW CARD

This card sets out the present law on the ground for divorce and some criticisms that have been made of it. Could you take a minute or two to read it through?

- F.3 In your opinion, should there be any change in the law on the ground for divorce? (18)
- | | | |
|--|------------|---|
| | Yes | 1 |
| | No | 2 |
| | Don't know | 3 |
| | | 3 |

The Scottish Law Commission wants to find out the opinions of members of the public on *TWO* main suggestions for a new ground for divorce. These suggestions would only change the basis on which a person *applied* for a divorce. They would not change the law on custody of children or financial support.

IMPORTANT NOTE

THE ORDER OF ASKING F.4 AND F.5 SHOULD BE ROTATED. PLEASE TICK THE BOX TO INDICATE WHICH QUESTION YOU ASKED FIRST

- | | |
|------------|------|
| | (18) |
| F.4 [] | 4 |
| F.5 [] | 5 |

F.4 SHOW CARD

Could you read this card which explains one of the main suggestions being considered by the Scottish Law Commission.

- (a) Would you approve of a law under which the only ground for divorce was a period of separation? (19)
- | | | |
|--|------------|---|
| | Yes | 1 |
| | No | 2 |
| | Don't know | Y |
| | | Y |

(b) SHOW CARD

- If there were to be such a law, what period of separation would be the most appropriate? (20)
- | | | |
|--|-------------------|---|
| | 3 months | 1 |
| | 6 months | 2 |
| | 9 months | 3 |
| | 1 year | 4 |
| | 2 years | 5 |
| | More than 2 years | 6 |
| | Don't know | Y |
| | | Y |

F.5 SHOW CARD

Could you read this card which explains one of the main suggestions being considered by the Scottish Law Commission.

- (a) Would you approve of a law under which the only ground for divorce was the passing of a period of time after one party had given official notice of an intention to seek a divorce? (21)
- | | | |
|--|------------|---|
| | Yes | 1 |
| | No | 2 |
| | Don't know | Y |
| | | Y |

(b) SHOW CARD

- If there were to be such a law, what period of time would be the most appropriate? (22)
- | | | |
|--|-------------------|---|
| | 3 months | 1 |
| | 6 months | 2 |
| | 9 months | 3 |
| | 1 year | 4 |
| | 2 years | 5 |
| | More than 2 years | 6 |
| | Don't know | Y |
| | | Y |

F.6 SHOW CARD

Just to sum up, would you prefer the law on the ground for divorce to be	(23)
Divorce after a period of separation	1
Divorce after a period of notice	2
Either of these, but no preference for one or the other	3
The same as at present—no change	4
Something else (SPECIFY)	5
.....	Y
Don't know/no preference	

Divorce Law Reform

F.3

The present law At present, the only ground for divorce is that the marriage has broken down irretrievably, but this has to be proved in one of 5 ways. These are:

- (1) adultery;
- (2) intolerable behaviour;
- (3) desertion for 2 years; (4) 2 years' separation plus the other party's consent;
- (5) 5 years' separation (no consent needed).

- Criticisms of the present law**
- (a) *It is confusing.* The present law says that the only ground for divorce is irretrievable breakdown but then says that there has to be adultery, intolerable behaviour, desertion, 2 years' separation and consent or 5 years' separation.
 - (b) *The legal grounds for divorce do not necessarily reflect the real reasons for the breakdown of the marriage.* For example, a person may be divorced for intolerable behaviour or adultery when in fact both were at fault.
 - (c) *It places too much emphasis on fault.* A divorce on the "ground" of behaviour may involve a dredging up of incidents which would be best forgotten. It may increase bitterness and hostility and make it more difficult for the couple to agree on such things as finance, custody and access.
 - (d) *The separation periods are too long.* This encourages people to use the behaviour "ground" and sometimes to exaggerate or lie, in order to obtain an earlier divorce. A delay of two or five years may make it more difficult and expensive to deal with the legal consequences of marriage breakdown.
 - (e) *The need for consent to divorce after 2 years' separation may lead to unfair bargaining.* For example one party may only give consent if the other gives up any claim for finance.

Divorce after a Period of Separation

F.4

Under this suggestion, the *only* ground for divorce would be that the couple had been separated for a fixed period.

Advantages of "separation" ground It would remove the notion of blame or fault. This could help to make divorce less hostile and bitter.

There would be less risk of unfair pressure or bargaining because consent would not be needed.

The law would be simpler and less confusing.

- Disadvantages of “separation” ground** Divorce might not be so quickly available in cases of adultery or intolerable behaviour, but this would depend on the length of the period.
- There might be legal difficulties in some cases in deciding when a couple had separated.
- Arguments for a long period of “separation”** It would not make divorce seem too quick and easy.
- Arguments against a long period of “separation”** A long period could force people to raise extra legal proceedings to make temporary arrangements about custody or finance during the period of separation and could delay the final settlement of finance and property.
- A long period might be difficult for people who wanted to re-marry.

Divorce after a Period of Notice

F.5

Under this suggestion, either party could give notice, on a standard form, at the sheriff court of intention to apply for a divorce. A copy would be sent to the other party. If they wished the couple could give notice jointly. There would then be a fixed waiting period. At the end of that period a divorce action could be raised. The *only* ground for divorce would be that the notice had been given and the necessary period of time had passed. The couple would not need to be separated during the period.

- Advantages of “period of notice” ground** It would remove the notion of blame or fault. This could help to make divorce less hostile and bitter.

There would be less risk of unfair pressure or bargaining because consent would not be needed.

The law would be simpler and less confusing.

- Disadvantages of “period of notice” ground** Divorce might not be so quickly available in cases of adultery or intolerable behaviour, but this would depend on the length of the period.

- Arguments for a long “period of notice”** It would not make divorce seem too quick and easy.

- Arguments against a long “period of notice”** A long period could force people to raise extra legal proceedings to make temporary arrangements about custody or finance during the period of notice and could delay the final settlement of finance and property.

It would be unreasonable to expect a couple who had already been separated for a long time to wait for a further long period after giving notice.

A long period might be difficult for people who wanted to re-marry.