



Scottish Law Commission

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The Ground for Divorce: Should the law be changed?

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The Commission would be grateful if comments on this Discussion Paper were submitted by 31 October 1988. All correspondence should be addressed to:-

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NOTES

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THE GROUND FOR DIVORCE: SHOULD THE LAW BE CHANGED?

Introduction

The Divorce (Scotland) Act 1976 says that the only ground for divorce is that the marriage has broken down irretrievably. It also says that a pursuer can only establish irretrievable breakdown by proving (a) adultery (b) intolerable behaviour (c) desertion (d) separation for two years plus the other party's consent to divorce or (e) separation for five years.¹

The purpose of this paper is to ask whether the law should be changed and to set out some options for reform. The Law Commission for England and Wales is publishing a discussion paper² on this subject and it seems desirable that the possibility of reform should be considered for Scotland at the same time. We would not wish to see a repeat of the experience of the 1970s when seven unsuccessful Private Member's Bills were introduced in an attempt to achieve for Scotland a reform similar to that introduced in England in 1969. In the preparation of this paper we have been greatly assisted by the English paper. We have deliberately kept this paper brief. Our main object is to seek a preliminary view on the desirability of any reform at all. We are not, at this stage, concerned with working out proposals for reform in any detail.

Possible criticisms of the present law

Misleading. One criticism of the present law is that it is misleading. It pretends that there is one ground for divorce - irretrievable breakdown -

¹ This is slightly simplified. The actual words of the Act are set out in the Appendix.

² Discussion Paper on The Ground for Divorce (1988).

whereas in reality there are five grounds for divorce - three based on matrimonial offences and two based on periods of separation.¹ The reason for this is well-known. Scots law followed English law on this point and English law was based on a compromise worked out between a Church of England group and the English Law Commission. The compromise achieved its purpose and led to the (English) Divorce Reform Act 1969. This was a much-needed reform, but perhaps now, almost twenty years later, the law could and should be put on a more honest and straightforward basis.

Too much emphasis on fault. It can be argued that the retention of three fault-based grounds in the law - adultery, intolerable behaviour and desertion - is undesirable.² 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. The behaviour ground is particularly open to criticism. 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 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

¹ In this paper we refer to the grounds for divorce in the plural. Although this is technically inaccurate it corresponds to reality and is shorter and more understandable than referring to "the five facts by means of which the irretrievable breakdown of a marriage can be established".

² The first two of these grounds are widely used. See table on p.16.

basis of the pursuer's behaviour (which nowadays is unusual) the scene is set for an unsavoury, destructive and costly process of mutual recrimination. A good divorce law, it might be argued, would not encourage the parties to emphasise each other's faults: it would try to minimise aggression in the interests of the parties and, very importantly, their children.

We have been careful to say that this criticism is likely to apply in only some cases. This qualification is important. There are cases where the conduct of one, or both, of the parties has been so atrocious, and where the relationship between them is so bad, that nothing in the divorce process could increase existing levels of hostility and bitterness. There are also cases where the parties are not greatly concerned about what is in the divorce papers, being content to leave all this to their lawyers. It must be remembered that there are stringent restrictions on reporting divorce cases, so that in practice no publicity is given to allegations in undefended cases. The introduction of affidavit evidence means that most cases do not even come up in open court. All of this should make it easier for a defender to take an unconcerned attitude to allegations made against him or her. Not all defenders will, however, realise the true nature, purpose and likely effect of allegations made against them and some may feel understandable resentment. And, quite apart from the defender's attitude, it is not very civilised or constructive for the pursuer in a divorce case to be asked by his or her solicitor to recount the worst things the other spouse has done in the marriage to see if a behaviour case exists.

Separation periods too long. A person who has to wait two years, or five years if the other party does not consent, for a divorce on one of the separation grounds may be tempted to resort to a divorce for behaviour with the possible consequences mentioned earlier. Quite apart from this, it is arguable that the periods are too long. They prolong the period when the parties are separated in fact but unable to regulate their position properly in law. The parties may, for example, be unable to resolve disputes about the division of any property built up during the marriage. They may be unable to regulate the succession to their property after their death in the way they would wish: in Scots law a separated spouse retains legal rights in the other spouse's estate which cannot be defeated by will.

Encourages separation. The separation grounds may, by their very nature, encourage parties to separate in order to obtain grounds for divorce.

In some cases a ground for divorce may be lost unless the parties separate. A person, for example, who has a ground for divorce because of adultery or desertion can lose that ground by cohabiting with the other spouse for more than three months. As the end of this period approaches the law provides an incentive to separate. A similar effect can be seen when a couple have been separated for two years and have then resumed cohabitation. If they cohabit for more than six months they can no longer use the two years separation as a ground for divorce. In such cases the law may tend to push them apart.

Distorts bargaining position. The spouse who controls the availability of divorce is placed in a strong bargaining position. The most obvious example is where the party who wants the divorce has to found on one of the separation grounds. If the other party consents to the divorce a period of two years' separation is enough. If he or she does not consent, the period is five years. Clearly the giving of consent can be used as a bargaining counter to extract some advantage or concession. It can also happen that a spouse who has committed adultery, or behaved badly, wants a divorce quickly but the other spouse, while recognising that the marriage is dead, is in no hurry for a divorce. In this situation the innocent spouse may be able to extract concessions (for example, abandonment of a claim for financial provision or for access to children) in exchange for agreeing to raise a divorce action. It might be argued that it is quite right that the spouse who does not want a divorce should be in a stronger bargaining position, but the matter is not as simple as that. Both spouses may actually want a divorce but one may want it sooner than the other. It may not be reasonable to allow this to have a significant effect on bargaining power particularly when that may affect what would otherwise be a fair settlement between the parties or the best arrangements for the children.

May encourage perjury. For some couples the choice is between being honest and getting a divorce after two years or telling lies and getting a divorce immediately. The law therefore provides an incentive to commit perjury.

Too complicated and technical. The law on the grounds for divorce is more complicated and technical than it seems at first sight. The concepts of adultery, intolerable behaviour, desertion and even separation all conceal legal difficulties. A simpler and less technical divorce law could easily be devised and could save some time and expense.

Arguments for retaining the present law

Some of the above arguments could be met by counter arguments. It could be said that it does not matter if the law is misleading. The fact that it says that there is one ground when there are really five is just a matter of words which does not affect what actually happens. The law works. It could be said that the availability of fault grounds is both morally right and practically useful. It helps to reinforce the moral structure of the law of marriage and divorce if matrimonial offences are singled out for disapproval. Some spouses are violent or unfaithful. Some walk out on their families for no good reason. The law, it might be said, should not ignore breaches of marital obligations. Indeed it might even be argued that the law has a useful function to serve in enabling pursuers to have their grievances vindicated by a court so that they can then begin to put the experience behind them and look to the future. The practical advantage of adultery and intolerable behaviour as grounds for divorce is that they enable a wronged spouse to obtain an immediate dissolution of the marriage and settlement of financial and custody claims. The availability of separation-based grounds is also useful. A couple who want an amicable divorce do not need to use fault grounds. They can obtain a divorce by consent after two years of separation. The main defect of the old law - that a dead marriage could be kept in existence indefinitely if the innocent spouse refused to

take proceedings - is remedied by allowing divorce on the application of either spouse after separation for five years. No-one who wants a divorce, and who can survive for five years, is denied one. This mix was considered satisfactory by Parliament in 1969 (for England and Wales) and again in 1976 (for Scotland). What has changed? The law is admittedly a compromise, but this is a subject on which people hold strong views and a workable compromise is perhaps as much as can be expected. There are also questions of priorities and timing. The present law in Scotland dates from 1976. Since then there have been important procedural changes, including the introduction of divorce in the sheriff courts, the introduction of affidavit evidence in undefended divorce actions and the introduction of a simplified ("do-it-yourself") procedure for certain types of divorce. There have also been fundamental changes in the law on financial provision on divorce. The courts, court officials and legal profession have had to adapt to all these changes. Is it sensible to change divorce law again so soon? Moreover divorce law reform would certainly be controversial. Would available resources not be better spent on other reforms?

These seem to us to be the main arguments for and against reform of the grounds for divorce at the present time. Before they can be assessed it is necessary to consider what the main options for reform might be.

What are the alternatives?

The main alternatives to the present law on the ground for divorce are:-

- (a) divorce after a period of separation, and
- (b) divorce after the lapse of a period of time from the giving of notice of intention to divorce.

Divorce after a period of separation. A number of jurisdictions now have a period of separation as the sole ground for divorce. This solution (with a period of two years) was recommended by the General Assembly of the Church of Scotland in 1969.¹ More recently this solution has been strongly urged by the Standing Committee on Family Law of the Law Society in England and Wales, which favours a one year period.² This ground has a number of advantages. It eliminates the fault grounds. It eliminates the bargaining distortion which arises if there is a shorter period of separation where the defender consents. If a short enough period is chosen, it meets the criticism that existing separation periods are too long. It reduces the temptation to commit perjury. It simplifies the law considerably, although there can still be difficult questions relating, for example, to whether there must be a mental element in separation and when parties can be regarded as separated while still living under the same roof. On the other hand it still may encourage people to separate in order to obtain or retain a ground for divorce and it still may encourage people to lie about how long they have been separated. Another possible objection to a period of separation as the sole ground for divorce is that divorce would not be available immediately to, say, a wife who has been the victim of cruelty. But how weighty is this objection? Most divorcing couples have been separated for months, or years, by the time of the divorce. In any event, divorce is concerned with breaking the legal tie of marriage. It is not itself a

¹ The Assembly accepted the Report of the Social and Moral Welfare Board which dealt with this subject.

² See their publications A Better Way Out (1979) and "A Better Way Out" Reviewed (1982).

protective remedy. Other protective remedies are available in this situation.¹ There is no reason, it might be said, why the person whose spouse has been guilty of intolerable behaviour should be able to remarry or obtain a division of property any earlier than any other divorcing spouse. Moreover to allow a behaviour ground to co-exist with a simple separation ground would re-introduce many of the defects of the present law.²

Yet another possible objection to a period of separation as the sole ground for divorce is that it might cause hardship in those cases where the pursuer needs to obtain a divorce in order to obtain suitable alternative accommodation. This could happen if the spouses were in an owner-occupied house, the husband had substantial capital and the wife had little or none. In this type of case the wife may need to obtain a capital sum on divorce in order to acquire a house of her own.³ It is difficult to assess how weighty this objection is. Indeed its weight may vary from one part of the country to another, depending on the housing situation. Although housing is clearly a matter of crucial importance on separation and divorce the indications from Scottish research are that most separating couples manage

¹ In particular, the spouse who is the victim of violence may be able (a) to have the other spouse excluded from the matrimonial home (b) to obtain an interdict prohibiting the other spouse from continuing the violence or coming near the matrimonial home (c) to have a power of arrest attached to the interdict so that a police constable can arrest the other spouse without warrant if he has reasonable cause for suspecting that spouse of being in breach of the interdict, and (d) to obtain a transfer of the tenancy of the matrimonial home. See the Matrimonial Homes (Family Protection) (Scotland) Act 1981, ss4, 13, 14 and 15.

² It is interesting to note, however, that the Canadian Divorce Act of 1985 retains adultery and cruelty as grounds for divorce while introducing a ground based on separation for one year.

³ In relation to local authority housing it is worth noting that under section 20 of the Housing (Scotland) Act 1987 a local authority is not allowed, in allocating housing, to impose a requirement that an applicant obtain a divorce.

to solve their housing problems without undue difficulty.¹ Very often an initial move to live with parents or other relatives provides time for arrangements to be made.

A further objection to a lengthy period of separation (say, one or two years) as the sole ground of divorce is that it could lead to an unnecessary and wasteful duplication of proceedings. A pursuer who at present would proceed straight to a divorce for adultery or behaviour might be advised to raise separate proceedings relating to aliment, custody and the occupancy of the matrimonial home so as to regulate the position during the prescribed period of separation.

There is, of course, no reason why the separation period should be as long as one year. It could be, say, three months. That would be adequate to eliminate cases of impulsive divorce and it would reduce the strength of some of the objections to having a period of separation as the sole ground for divorce. It might be suggested that that would make divorce "too easy" but divorce after separation for three months is no "easier" than divorce after separation for a year. It is just more quickly available. It is hard to see what good is done by requiring a longer period of separation. Delaying a divorce is not likely to save a marriage. It is just likely to delay the final regulation of the parties' affairs. In any event the argument against easy divorce seems misconceived. The divorce process is not a punishment for having failed in marriage. It is not something which should be deliberately made painful, prolonged and expensive. The experience of marriage breakdown is likely to be painful and difficult enough without adding unnecessary legal difficulties. The question of what is an appropriate period of separation, if this were to be the sole ground of divorce, is in

¹ See Mitchell, Someone to Turn To (1981) 54.

our view an open one. It is one on which we would particularly welcome views, as much depends on public attitudes and perceptions. If a short period of, say, three months were acceptable to public opinion then we can see considerable advantages in adopting it.

Divorce after the lapse of a period of time from the giving of notice of intention to divorce. Under this option the sole ground for divorce would be that a certain period of time had elapsed after one of the spouses, or both, had given notice to a court of intention to divorce.¹ There would be no requirement of separation and no requirement of consent from the non-applicant spouse. To prevent notices being given early in a marriage just to retain an option of immediate divorce it could be provided that the notice would lapse if divorce proceedings were not begun within, say, three months after the expiry of the period of time prescribed. A solution on these lines has been suggested by various commentators from time to time and has recently been put forward for consideration by the Law Commission in England and Wales who tentatively suggest a period of nine months between the giving of notice and the availability of divorce.² It has many advantages. It would eliminate fault grounds and minimise bitterness and hostility. It would save a pursuer, who wanted an early divorce but who preferred to keep his or her marital difficulties private, from having to recount them to a solicitor and see them set out in a summons: this could be a matter of some importance to those concerned, particularly in a small community. It would meet the criticism that the separation periods are too long. It would not encourage separation or make things difficult for the spouse who needs to obtain a divorce in order to obtain a capital sum in order to acquire separate accommodation. It would not provide any incentive to perjury: the giving of notice would be a matter of public record. It would not give either party the power to use refusal of consent

¹ If only one spouse gave notice, a copy would be sent to the other spouse.

² Discussion Paper on The Ground for Divorce (1988).

to divorce as a bargaining counter. It would be civilised, simple and economical: there would be no need for affidavits or witnesses to prove the existence of grounds for divorce. At the same time there would be no possibility of a hasty divorce.

One possible objection to divorce after a period from the giving of notice is that divorce would no longer be immediately available to the victims of violence. However, as we have seen in relation to a separation ground, divorce by itself is not a protective remedy. Another objection is that a couple may have been separated for a year or more before thinking of divorce. To expect them to wait for a further period from the date of giving notice might be unreasonable. The force of this objection is affected by the length of the period of notice, to which we now turn.

The main purpose of a period of notice is to ensure that people have time to consider their position. It is designed to prevent divorces being obtained in haste where the difficulty in the marriage is only temporary. A secondary, but important, purpose is to allow a reasonable minimum time to sort out financial and other arrangements. For both purposes a period of three months would probably be adequate. The arguments in favour of a short period are the same as in relation to the separation ground with the added consideration that in the case of a period of notice the parties may already have been separated for a long time. In particular, a short period of notice, which could start running even before the parties separated, would reduce the need for people to apply for orders relating to custody and aliment and the occupancy of the matrimonial home in separate proceedings so as to regulate these matters while waiting for a divorce. If three months were thought to be too short then consideration could be given to six months, nine months or a year. Anything over a year would, in

our view, be unnecessary and excessive. Again the length of the period of notice is a question on which we would particularly welcome views.

Other options. The two options mentioned above would meet most or all of the criticisms of the present law. Other options would not. The retention of any fault grounds, for example, would have the disadvantages mentioned earlier.¹ Divorce by mutual consent could not be the sole ground of divorce because in many cases one party would not consent. A combination of divorce by consent with, say, a separation ground or a lapse of time ground would introduce the distortion of bargaining power mentioned earlier. In any event divorce by immediate consent would run the risk of making hasty divorces too easy while if a period of delay is necessary there seems no reason why this should not apply in all cases. The only other option, apart from fault or consent, would be divorce on proof of actual irretrievable breakdown of the marriage. This is attractive in principle but to have a full inquest in every case would be totally impracticable while to accept the realistic proposition that a marriage has broken down if one party is determined that it has broken down would be to reduce divorce for irretrievable breakdown to a form of divorce on application without any required period for reconsideration. It would be possible to combine a period of notice ground with a separation ground by providing for example, that a divorce could be obtained either after a period of notice or after a period of separation. This would have obvious advantages if public opinion were strongly against short periods of notice or separation. It would prevent a couple who had already been separated for, say, two years from having to wait for, say, a further year before obtaining a divorce. It would also cater for those who find it difficult to obtain separate accommodation. However, if a short period of notice were acceptable to public opinion the addition of a separation ground, with its inevitable difficulties and temptations, would probably not be worthwhile.

¹ Nonetheless a law on the lines of the Canadian Divorce Act 1985 (one year's separation, or adultery, or intolerable behaviour) would still be an advance on the present law in some respects and could be worth considering if other options fail to meet with approval.

Procedural points. We do not propose to discuss procedure in detail at this stage. If there is significant support for reform of the ground for divorce then procedural questions would be discussed in analysing the options for reform in more detail. It is worth observing, however, that either of the main options mentioned (ie divorce on the ground of a period of separation or divorce after the lapse of a period from the giving of notice) would enable divorce procedure to be greatly simplified. It would be for consideration whether certain categories of divorce could be dealt with administratively without any need for court procedure at all, although this could apply only if there was no dispute in relation to the arrangements for children or financial provision.

Relevant considerations

In assessing the case for a change in the law on the ground for divorce it is important to bear in mind the nature of divorce. Divorce is concerned with dissolving the legal tie of marriage. It is not the same as marriage breakdown or factual separation. An unhappily married person does not need a court's permission to separate. Making divorce more difficult would not prevent couples separating. The options for reform discussed in this paper could, depending on the period of separation or notice selected, make divorce less quickly available for those who could immediately raise an action based on behaviour or adultery under the present law but who would have to wait for, say, some months or a year under the new proposals. We do not believe this would have any significant effect in preventing marriage breakdown. Conversely we do not believe that allowing divorce after months or a year, instead of two or five years, in the absence of a matrimonial offence, would have any significant effect in encouraging marriage

breakdown. We are not aware of any evidence that changes in the grounds for divorce significantly affect rates of marriage breakdown, although the possibility of some indirect effect on general attitudes to marriage cannot be ruled out.¹ In the present situation commonsense suggests that changes of the type discussed are unlikely to affect the stability of marriage in general. The truth of the matter is that, under the present law, anybody who wants a divorce can eventually get one. Making divorce less quickly available to some and more quickly available to others is unlikely to affect marriage breakdown rates one way or the other. The options for reform mentioned above should, we suggest, be assessed by asking whether they would make the law more honest, humane and efficient, and less likely to promote hostility, than the present law. We believe they would be neutral so far as rates of marriage breakdown are concerned.

The statistics on the use made of the various grounds of divorce are also relevant to a consideration of the options for reform. The first year in which actions raised under the pre-1976 law had worked themselves out of the system was 1979. From then until 1985 (the last year for which statistics are available) the figures are as follows.

¹ An extension of the grounds for divorce may, of course, affect divorce rates, as people whose marriage had broken down but who could not obtain a divorce under the old law take advantage of the new law, but that is a different matter.

Divorces granted in Scotland by grounds ¹

	Behaviour	2 years separation	5 years separation	Adultery	Desertion	Total
1979	3454	1934	1572	1486	235	8681
1980	4189	2479	1555	1940	305	10468
1981	4133	2437	1370	1703	230	9873
1982	4814	2812	1524	1873	244	11267
1983	4674	4214	2350	1789	200	13227
1984	4351	4250	1741	1415	142	11899
1985	5020	4665	1791	1760	120	13356

It is clear from these statistics that behaviour and adultery still account for a large proportion of divorces. Replacing them with a non-fault ground could have a significant effect in reducing the number of "adversarial" divorces. It is interesting to note that desertion, which accounted for over 1200 divorces a year on average in the years from 1972 to 1976, is now little used. To be a ground for divorce desertion has to be followed by two years' separation. So there is no time advantage in using desertion rather than two years' separation plus the defender's consent. The rise in 1983 in

¹ Source: Civil Judicial Statistics, Scotland. The tables in this source sometimes include and sometimes exclude a few divorces on "other" grounds (which apparently include actions for declarator of nullity and actions on a combination of grounds). In the interests of consistency these "others" (never more than 16 a year in the relevant years) have been omitted. This means that the totals are very slightly understated. The figures for 1985 were supplied by Scottish Courts Administration from unpublished data.

the number of divorces on the basis of two years' separation plus consent is also interesting. This is probably due to the introduction of a simplified ("do-it-yourself") procedure for divorces on the basis of two or five years' separation where there are no children under 16 years of age and no claims for financial provision. Research in England shows that there is no necessary correlation between the ground of divorce chosen and the marital history: in one study 32% of parties to petitions based on two years' separation claimed that there had been physical violence in the marriage, while 45% of parties to petitions based on behaviour did not claim that there had been physical violence (although clearly there must have been allegations of other forms of intolerable behaviour).¹ It seems reasonably clear that the choice of ground depends in many cases on tactical considerations, such as speed and the lack of any need to obtain the other party's consent. This weakens the argument that the retention of fault grounds gives divorce a sound moral basis. A person divorced on a fault ground may not actually have been mainly responsible for the breakdown of the marriage. Conversely a person divorced on a non-fault ground may have been guilty of grave matrimonial offences.

Another relevant consideration is the increased awareness, since 1976, of the benefits of conciliation in divorce. An amicable divorce is now perceived as better for the parties and, importantly, for their children than a hostile divorce. For this reason there is support within the conciliation movement for the elimination of fault-based grounds for divorce. As one leading exponent of conciliation has said

¹ Davis and Murch, Grounds for Divorce forthcoming in 1988.

"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."

Finally, it may be relevant to consider that several countries have moved over to entirely non-fault grounds for divorce in recent years. In Australia the only way of proving marriage breakdown for the purposes of divorce is to prove that the parties separated and thereafter lived separately and apart for one year. This seems simple enough but the interpretation of the relevant statutory provision has given rise to a great deal of difficulty, particularly where it is claimed that the parties have been living separately and apart while still under the same roof.² In New Zealand the principle is the same but the period is two years. In at least six states of the United States of America the sole ground for divorce is a period of separation, usually one year. In several other states of the United States of America the sole ground for divorce is that the marriage has irretrievably broken down. Generally, this means "that divorce is, in fact if not in form, available upon unilateral demand".³ In California, for example, all that is needed is one party's assertion of marital breakdown. It appears that this law enjoys widespread, but not unanimous, support from the public and the

¹ Parkinson, Conciliation in Separation and Divorce (1986) 11.

² Finlay, Family Law in Australia (3rd edn 1983) 182-194.

³ Glendon, State, Law and Family (1977) 229.

legal profession.¹ Sweden has openly introduced divorce by unilateral demand. Since 1973 either spouse has been able to obtain a divorce by applying for one, without having to establish any grounds. However, if there are children of the marriage under the age of 16 years, or if the application is opposed, there is a "period of reconsideration" of six months, unless the parties have been separated for two years or more. An experienced Swedish judge has reported that the 1973 reform has caused no major problems and indeed has had beneficial results in eliminating an unconstructive emphasis on blame.²

Conclusion and invitation for views

We have set out the arguments for and against changing the present law on the ground for divorce and have presented two possible options for reform:-

- (a) making the sole ground for divorce a period of separation, or
- (b) making the sole ground for divorce the lapse of a period of time from the giving of notice of intention to divorce.

Our preliminary view is that the law would be improved if either of these options were adopted, at least if the period of separation or notice were comparatively short. Either of these options would meet most of the criticisms of the present law mentioned earlier. Of the two options, the second would probably be better. It would not require proof of separation,

¹ Weitzman, The Divorce Revolution (1985) 20-28. For example over 85% of a sample of divorced men and women thought it was fair that one spouse should be able to get a divorce even if the other spouse did not want to be divorced.

² Tottie, "The Elimination of Fault in Swedish Divorce Law" in Eekelaar and Katz (eds) Marriage and Cohabitation in Contemporary Societies (1980) 131 at 134.

it would not cause hardship to those who would find it difficult to separate in advance of a divorce, it would not contain an incentive to separate and it would not contain an incentive to lie about the period of separation. It would not contain the seeds of legal difficulties about what is meant by separation. Provided the period is not too long we can see no serious disadvantages, and many advantages, in such a solution.

We would welcome views on the following questions.

1. Is it worth proceeding further with consideration of possible reform of the ground for divorce at this time?
2. (a) Would you approve of a law under which the sole ground for divorce was a period of separation?

(b) What do you think would be an appropriate period?
3. (a) Would you approve of a law under which the sole ground for divorce was the expiry of a period of time after one party had given official notice of an intention to seek a divorce?

(b) What do you think would be an appropriate period?
4. Have you any other comments relating to reform of the ground for divorce?

APPENDIX

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.