

THE LAW REFORM COMMISSION OF HONG KONG

REPORT

**GROUNDS FOR DIVORCE
AND
THE TIME RESTRICTION ON PETITIONS FOR DIVORCE
WITHIN THREE YEARS OF MARRIAGE**

(TOPIC 29)

August 1992

THE LAW REFORM COMMISSION OF HONG KONG

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Introduction

Why consider the law on divorce?

1. The number of marriages ending in divorce has risen dramatically in recent decades.¹ As a consequence, those who must undergo the legal divorce process are no longer the "deviant" few, but a large and ever-increasing sector of our community. This dramatic rise in the number of people affected, and the unhappy social consequences which every divorce leaves in its wake, have led many jurisdictions in recent years to implement major reforms of their law in this area.² In Hong Kong however the law of divorce has remained largely static for nearly twenty years, the last major reforms having taken place in the early 1970s.

2. In 1991 the Secretary for Health and Welfare released a government White Paper on social welfare services in Hong Kong.³ The paper emphasised the importance of the stability of the family unit to the welfare of Hong Kong society at large.⁴ One of the challenges to that stability identified by the paper is the increase in single parent families "as marital separations and divorces become more common."⁵ In its chapter entitled "The Way Forward," the paper declared the family as a unit to be one of its priority programmes and urges "different policy makers" to take "greater

¹ For example, figures for Europe show that the increase in the rate of divorce for the period 1960-1984 was: UK 460%, France 200%, Germany 133%, Netherlands 380% and Belgium 280%: see Law Commission of England and Wales, "Facing the Future – a Discussion Paper on the Ground for Divorce" (1988) Law Com No 170, at 8 n 54.

In Hong Kong the rise has been similarly dramatic. There were 809 decrees absolute granted here in 1976; in 1986 the figure was 4,257 – an increase of over 425%: see Appendix A at the end of this paper.

² Several of these reform models are examined in detail in the later chapters of this report. For present purposes these reforms may be summarised briefly as follows: in the area of grounds for divorce a number of countries or states have reformed their systems of mixed "fault" and "no-fault" grounds for divorce to systems of "no-fault only":

(a) where a period of separation is the only ground/fact relied on: Australia (1 year) (1975); New Zealand (2 years) (1980) and in the US – Arkansas (3 years), Louisiana (1 year), Maryland (1 year), North Carolina (1 Year), Ohio (1 year) and Vermont (6 months);

(b) other no-fault grounds, including "mutual consent": Sweden (1974) and in the US – Arizona, California, Colorado, Florida, Kentucky, Michigan, Minnesota, New York and Wisconsin: see "Facing the Future", op cit n 1, nn 2, 24 and 33.

More recently the Law Commissions of both England and Scotland have made strong recommendations for major changes to their existing systems of ground for divorce (upon which our own system in Hong Kong is based): see Law Commission of England and Wales, "The Ground for Divorce" (1990) Law Com No 192 and Scottish Law Commission, "Report on Reform of the Ground for Divorce" (1989) Scot Law Com No 116.

In the area of time restrictions on divorce where the marriage is one of short duration, in Australia, New Zealand, Canada and Scotland, any such restrictions which might formerly have existed have now been abolished. In England the equivalent of Hong Kong's three-year time restriction was replaced in 1984 by a one-year time bar: see Matrimonial and Family Proceedings Act 1984, s 1, which amended s 3 of the Matrimonial Causes Act 1973.

³ "Social Welfare into the 1990s and Beyond" (March 1991).

⁴ Ibid, at 19 and 51.

⁵ Ibid, at 19.

cognizance of welfare concepts such as the family unit and the welfare of the child when formulating policies."⁶ In the light of these comments, it is particularly timely to re-examine the state of Hong Kong's legislation on divorce in order to determine what, if any, reforms may be appropriate.

Terms of reference

3. This report relates to two areas of the law which have been referred to the Law Reform Commission for its consideration. The Commission is required to consider:

"the ground for divorce prescribed in section 11 [of the Matrimonial Causes Ordinance⁷] and the facts which establish that ground prescribed in section 11A of that Ordinance" and

"the existing restriction on petitions for divorce within 3 years of marriage imposed by section 12 of the [Matrimonial Causes] Ordinance"

and to *"recommend such changes in the law as may be thought appropriate"*.⁸

Seeking views: a process of consultation

4. This is an area of the law fraught with social issues. Should the law punish parties to failed marriages by continuing with fault-based criteria for divorce? What is the minimum period of separation for the spouses to fully consider what they are doing? How can we regulate personal relationships to minimise the consequences, both to the individuals concerned and to society at large, of the "broken home"? Should conciliation efforts be mandatory? If the law's function is to preserve social order – and "the family" is the primary structure of that order – how much further can we "liberalise" divorce law before we threaten social stability?

5. The Law Reform Commission, recognising that issues such as these were the context in which any proposals for reform would need to be considered, took the view that consultation would be necessary, both with experts in the field and with the general public, before finalising its recommendations in this area.

6. Accordingly, in the latter part of 1990, the Commission put forward its preliminary proposals in two consultation papers, one dealing with grounds for divorce⁹ and the second with the time restriction on divorce early

⁶ Ibid, at 51.

⁷ Cap 179 ("MCO").

⁸ Terms of reference signed by the Attorney General, Mr Jeremy Mathews and the Chief Justice, Sir T L Yang, December 1989.

⁹ Entitled "Consultation Paper on Grounds for Divorce" (September 1990).

in marriage.¹⁰ These were distributed to approximately one hundred "special interest" groups and individuals. The list of consultees in these initial exercises included lawyers, social workers, counsellors, women's groups, educational institutions and religious organisations. The responses received covered a wide range of viewpoints and greatly assisted the Commission in giving further consideration to its proposals for reform.

7. After determining its provisional recommendations, the Commission carried out a final consultation exercise towards the end of 1991. A private market research firm was engaged on behalf of the Commission to conduct a public telephone survey involving 1,000 respondents from the general public. The findings of both this, and the earlier consultation exercises, are discussed in detail in Chapter 8.

8. In arriving at the recommendations contained in this Report, the Commission has taken careful account of all of the responses it received during these consultation processes and is most grateful to all of the consultees concerned.

Format of the report

9. This report is in four parts. Part I states the "case for reform" of our present law on grounds for divorce. It commences with a discussion of the social and legal background to the relevant provisions and proceeds to examine the arguments in favour of reform. Many of these same arguments have resulted in major changes to similar divorce systems in other jurisdictions. Part II deals in the same way with the law restricting the right to petition for divorce within the first three years of marriage.

10. Part III outlines the various options for reform which have been considered by the Commission and examines the appropriateness of each for Hong Kong. Part IV summaries the Commission's conclusions and sets out its specific recommendations.

11. Appendix A to the report includes tables which relate to various Hong Kong divorce statistics. At Appendix B is a list of the persons and organisations who responded during the Commission's earlier consultation exercises involving "special interest" groups. Appendix C includes extracts from the principal findings of the public telephone survey conducted by a market research firm on behalf of the Commission.

¹⁰ "Consultation Paper on Time Restrictions on Petitions for Divorce within Three Years of Marriage" (December 1990).

PART I - GROUNDS FOR DIVORCE: THE CASE FOR REFORM

Chapter 1

Background to grounds for divorce

1.1 We have seen in this century a relative liberalisation in the laws of divorce; we have also witnessed what would appear to be an exponential increase in the rate of divorce.¹¹ Some might argue that developments in the law of divorce have to some extent contributed to this.

"It is conventional wisdom that the rapidly escalating divorce rate, resulting from the legislative reforms of this century, indicates that the sanctity and permanence of the marriage relationship are being undermined, that moral standards are deteriorating and family life as we know it is being jeopardised."¹²

1.2 Another view is that rather than exacerbating or even leading the situation, the law of divorce, in becoming increasingly more liberal, has merely reflected natural social development during this period. The statement quoted above continues:

"But ... divorce statistics in themselves are neutral as a guide to marriage breakdown. They merely show that a certain number of people have gone through a particular legal process. And there is every indication that before the present legislation facilitated the availability of divorce there were just as many broken marriages as at present – either actual separations or ... 'empty shells', ie the parties living together in total disharmony behind a facade of respectability".¹³

1.3 In the light of this divergence in public attitudes, it is important, before considering further reforms to our laws on divorce, to examine how we have arrived, sociologically and legally, at where we are today.

1.4 Hong Kong's society is a mixture of East and West, with a dual system of divorce law to deal separately with Chinese customary marriage

¹¹ For example, see figures given, op cit n 1, for various European states in the 1960-1984 period, which range from a "low" in Germany of 133% to 460% in the UK. In Hong Kong, the figure for 1976 to 1986 alone is over 425%: op cit n 1 and Appendix A.

¹² Phillips, "Marriage Breakdown", Divorce and Property Adjustment" (1980) Law Lectures for Practitioners 1, at 23.

¹³ Idem.

and modern Western-style marriage. The discussion below examines first the social and legal factors which have led to our present Western style of divorce. Although the dissolution of Chinese customary marriage does not fall directly within the ambit of this report, an outline of the historical and legal background to it is given later below, by way of information.¹⁴

The social background

1.5 The Hong Kong legislation which regulates Western style divorce closely resembles the equivalent English provisions.¹⁵ It is therefore appropriate to consider the social background to the law of divorce in England in order to understand the origins and development of our present Hong Kong legislation.

1.6 In its discussion paper, the English Law Commission identified a number of factors which may have led to the high rate of divorce in England in modern times.¹⁶ Four main demographic factors were cited.¹⁷ First, a change in the balance of the sexes over the last one hundred years (from a large surplus of women in the marrying age groups, to a small surplus of men), combined with a general increase in prosperity, have meant that most people who wish to marry may do so. Secondly, the reduction in the major causes of death and the general increase in longevity have meant however that these marriages are "at risk" for a much longer period of time. Thirdly, the widespread availability of contraception "has led to smaller, more consciously planned families, leaving a much longer period of active life after child-bearing and child-rearing."¹⁸ A fourth factor has been the rapid growth of urbanisation. With urban living has come, ironically, "greater social isolation"¹⁹ which has increased the vulnerability of marriages.²⁰

1.7 The English Law Commission also identified a number of relevant socio-economic factors.²¹ The rise of trade and industry brought with it a shift in the West from inherited wealth to industrial wealth. Prosperity became more generalised. This in turn seemed to cause a shift in focus away from the traditional interests, of the state and the church, to those of the individual; ie, to his "pursuit of personal happiness." Increased employment and consequent earning and spending power in modern times have contributed greatly to the relative emancipation of women and young people generally. Young people are now able to set up households independently of their parents, either as single adults or as "young marrieds."

¹⁴ Hong Kong's current system of divorce of Chinese customary marriages is outlined later in Chapter 2.

¹⁵ Hong Kong's law on grounds for divorce is contained in the Matrimonial Causes Ordinance, Cap 179 ("MCO"). The equivalent English provisions are contained in the Matrimonial Causes Act 1973 (formerly the Divorce Reform Act 1969).

¹⁶ "Facing the Future", op cit n 1, para 2.18 – 2.21.

¹⁷ Ibid, para 2.18.

¹⁸ Idem, citing the Finer Report: "Report of the Committee on One-Parent Families" (1974) Cmnd 5629, paras 3.3 et seq.

¹⁹ "Facing the Future", op cit n 1, para 2.20.

²⁰ Idem.

²¹ Ibid, paras 2.19 – 2.21.

1.8 In its wake, this radical restructuring of the traditional social order has brought major challenges to "traditional" social values, including those related to marriage. The concept of marriage has shifted away from the view of it as a "duty" necessarily "for life". No longer is marriage seen primarily as a viable economic institution to safe-guard the upbringing of children; today it is perceived much more as a partnership of equals, whose expectations for personal fulfillment from the marriage are very high. In the words of the English Law Commission:

"What has been called 'institutional' marriage, which largely entails economic functions and the provision of domestic services, has been replaced by what may be called 'companionate' marriage, which requires a continuing successful emotional relationship. The latter is obviously far more difficult to sustain than the former."²²

1.9 A major factor leading to this change in attitude in the West appears to have been the emergence of "female autonomy".²³ The new-found financial independence of women, through their greater participation and more equal footing in the work-force, has meant a change in their expectations (and consequently those of society in general) of what "marriage" means and what it should provide. A woman today is far less dependent on her husband financially than was the case in former times and therefore has a realistic choice to leave if she is unhappy. Her grandmother rarely had such choice.

1.10 The social acceptability of divorce has undoubtedly increased.²⁴ With the common expectation that marriage should be emotionally rewarding, it would seem that individuals are inclined to feel justified these days in leaving an unsatisfying relationship in order to search for another holding more promise. As a result, the marital status of "divorced" no longer seems to carry the social stigma it once did.

1.11 The discussion in the preceding paragraphs has focussed on social development trends in the West generally and in England in particular. Although Hong Kong's historical background and existing social conditions vary greatly from that in England, it is arguable that similar social trends in relation to marriage and divorce are evident here to some degree also.²⁵

Legal development

1.12 As stated above, the mixture of Chinese and Western cultures in Hong Kong has resulted in the development of a dual system of divorce law:

²² Ibid, para 2.19.

²³ Ibid, para 2.20.

²⁴ Ibid, para 2.17.

²⁵ As an indication of these trends, see the results of a recent public telephone survey on the topic of divorce (carried out on behalf of the Law Reform Commission of Hong Kong by a private market research firm) discussed in Chapter 8 and at Appendix C, *infra*.

- (a) divorce on the ground of irretrievable breakdown under Part III of the Matrimonial Causes Ordinance;²⁶ and
- (b) divorce by mutual consent under Part V of the Marriage Reform Ordinance.²⁷

1.13 An outline of the background to the latter is given later in this chapter. However it is the former system which is the subject of this report. As stated above, the provisions of the Matrimonial Causes Ordinance are based to a large extent on equivalent English legislation. One therefore needs to look again to England in order to trace the legal history of our present legislation.

1.14 Early divorce law in England was based heavily on religious tenets and was originally administered by the ecclesiastical courts.²⁸ Prior to the Divorce Reform Act 1969, the law of divorce was entirely "fault based".²⁹ One could only obtain a divorce by proving that a "matrimonial offence" had occurred. It was thought that establishing a standard of moral behaviour would be the best way to protect the institution of marriage and discourage the "setting up of extra-marital unions."³⁰

1.15 The relevant "offences" included adultery, cruelty and desertion for three years. Relief could be refused to a petitioner who had himself committed such an offence, or, indeed, if he were guilty of "condonation", "connivance" or "conduct conducing to" the matrimonial offence of the respondent.³¹ As a consequence, theoretically there was no such thing as "consensual divorce". The divorce was sought by one spouse against the other in circumstances which were necessarily adversarial (at very best uncontested), with all the attendant bitterness and distress to the parties and their children which this would invoke.

1.16 Over time, as the demand for divorce increased, the shortcomings of this regime became manifest. Essentially, the fault-based system "did not accord with social reality."³² Even though a marriage might truly have broken down, if one of the specific matrimonial offences had not been committed, or could not be proved, the divorce was refused. On the other hand, "there was no real barrier to consensual divorce where both parties wanted it and one was prepared to commit, or perhaps appear to commit, a matrimonial offence to supply the necessary ground."³³ The main

²⁶ Cap 179 ("MCO").

²⁷ Cap 178 ("MRO").

²⁸ Rayden and Jackson on Divorce, 15th ed (1988), at 1.

²⁹ See supra n 15.

³⁰ "Facing the Future", op cit n 1, para 3.6. On the contrary however, Phillips has stated: "Indeed one of the less desirable effects of a law under which it was difficult to obtain a divorce was the growth of illicit unions and often the birth of illegitimate children... It was withdrawal of that choice in the past [to marry or not to marry] that was responsible for much unhappiness," op cit n 12, at 23.

³¹ Rayden, op cit n 28, at 307.

³² "Facing the Future", op cit n 1, para 2.3.

³³ Ibid, para 2.2.

failing of the system must surely have been this artificiality: was the court in any real position to allocate blame when often "both parties were at fault, and ... matrimonial offences were often merely symptomatic of the breakdown of the marriage rather than the cause"³⁴?

1.17 In 1966, a group set up by the Archbishop of Canterbury, which had been looking into the then current law of divorce for some two years, issued a report entitled "Putting Asunder – A Divorce Law for Contemporary Society."³⁵ Later that same year the English Law Commission produced its report in response: "Reform of the Grounds of Divorce – The Field of Choice."³⁶ It seems that the arguments and recommendations contained within these two reports prompted the reforms of the law of divorce which now constitute our present legislation.

1.18 In essence, the reports of both groups were in agreement: that a fault-only basis for the law of divorce did not work satisfactorily. The main criticisms cited in both reports were that: the parties and the court were obliged to dwell on past delinquencies while ignoring the current state of the marriage, only exacerbating the bitterness and distress already felt by the parties; many spouses who could not get out of their marriages legally simply left them to form "stable illicit unions" with new partners; on the other hand, divorces were readily available to parties willing to commit or to appear to commit a matrimonial offence. Both groups agree that the law should be reformed to allow marriages which had irretrievably broken down to be dissolved in a humane fashion.

1.19 In "The Field of Choice", the English Law Commission went on to consider what should be the primary objectives of a good divorce law. These "Field of Choice criteria"³⁷ can be summarised as "the support of marriages which have a chance of survival", but "the decent burial with the minimum of embarrassment, humiliation and bitterness of those that are indubitably dead."³⁸

1.20 The recommendations put forward by the Commission to meet these aims resulted in the Divorce Reform Act of 1969. Its main reform was to remove the old "matrimonial offence" grounds for divorce (along with the former bars to relief of connivance, collusion and condonation) and to replace these with a new sole ground for divorce: "irretrievable breakdown" of the marriage. Breakdown was to be proved by the existence of one of five "facts". Despite the apparent departure from the former wholly fault-based regime, three of these "facts" bore a striking resemblance to the former matrimonial offence grounds, namely adultery, behaviour and desertion. However the legislation did introduce two new, "no fault" facts as a basis for

³⁴ Idem.

³⁵ (1966) SPCK (Chairman: The Rt Rev RC Mortimer, Lord Bishop of Exeter). The group was initially appointed to the task in January 1964.

³⁶ (1966) Law Com No 6, Cmnd 3123.

³⁷ Coined as such by the Commission in its later discussion paper, "Facing the Future", op cit n 1, para 3.1.

³⁸ "The Field of Choice", op cit n 36, para 120(1). The more specific criteria which the Commission discussed were adopted again by the Commission in "Facing the Future", op cit n 1, paras 2.3 and 3.1 – 3.47. They are also considered later in this paper, at Chapter 3.

divorce: two years separation with the other spouse's consent to the decree, or five years separation without it. The detailed workings of these reform provisions, upon which our own system is also based, are discussed later in this chapter.

1.21 Since the advent of these reforms (and their subsequent adoption in Hong Kong) the divorce rate in England (and Hong Kong) has risen quite dramatically.³⁹ The English Law Commission acknowledged that this was a matter to concern.⁴⁰ "It is tempting to blame the large increase in the number of divorces upon the reform of the law by the 1969 Act and to suggest that it has fundamentally weakened the institutions of marriage and the family."⁴¹ The Commission noted however that there were two factors in particular⁴² which may have led to the evident "jump" in the divorce figures after the 1969 reforms.⁴³

1.22 Prior to the reforms, many marriages, although permanently broken, did not end in formal divorce but in permanent separation. If formalised, these arrangements were dealt with in the magistrates court in judicial separation proceedings. This was a common resort for those in lower socio-economic groups who could not afford the expense of a full court divorce. Nowadays, with a more simplified procedure available,⁴⁴ divorce has become more affordable for all levels of society. Consequently, such marriages today usually end in divorce.

1.23 The other important factor was that alternatives to the fault grounds were now available. Apparently in former years "many cases of matrimonial breakdown did not come before the courts at all, perhaps because no matrimonial offence had been established or because the potential petitioner could not face the ordeal of proving one."⁴⁵ When the fact of separation become available as a basis for divorce, this no longer had to be the case.

1.24 The Commission concluded that the increase in the rate of divorce was "not as dramatic as the divorce figures would suggest"⁴⁶; that it had actually taken place over a long period of time and for reasons largely

³⁹ "Since the beginning of 1971, when the 1969 Act came into force [in England and Wales], the number of divorces each year has more than doubled": "Facing the Future", op cit n 1, para 2.10. The figures for England and Wales, given by the Commission at Appendix A of its report, show that (per thousand married persons) decrees absolute were granted to 25 in 1961, 74 in 1971 and 154 in 1986.

Figures for Hong Kong appear at Appendix A of this report.

⁴⁰ "Facing the Future," op cit n 1, paras 2.14 – 2.22.

⁴¹ Ibid, para 2.14.

⁴² For the Commission's full discussion of all the various factors which have been identified, see ibid, paras 2.14 – 2.22.

⁴³ Idem.

⁴⁴ In particular, we now have the "special procedure" provisions which allow certain undefended divorces to be processed essentially 'on the documents': Matrimonial Causes Rules ("MCR") Cap 179 (subsid legis), r 33(2A). It appears that this procedure is used in approximately one-third of all undefended divorces in Hong Kong: Pegg, *Family Law in Hong Kong* (2nd ed, 1986) Butterworths, at 117. The current matrimonial proceedings legislation is discussed in more detail in the next chapter.

⁴⁵ "Facing the Future", op cit n 1, para 2.15.

⁴⁶ Idem.

independent of changes to the law on divorce.⁴⁷ The introduction of the 1969 reforms had suddenly provided a means of satisfying the "pent-up demand for divorce" in cases where it had previously been unavailable or too difficult to obtain, but where nonetheless the marriage had irretrievably broken down.

1.25 In the Commission's view, the phenomenon of increased marital breakdown was principally attributable to "the demographic, socio-economic and attitudinal changes which have taken place throughout Western society during this century."⁴⁸ In one respect, however, they acknowledged that changes to the divorce laws might have had an effect on the rate of divorce.

"It seems likely that divorce laws contribute to 'an increasing disposition to regard divorce, not as the last resort, but as the obvious way out when things begin to go wrong.'⁴⁹ If so they may have contributed to some extent to the increased rate of marital breakdown."⁵⁰

Background to dissolution of Chinese customary marriages

1.26 The preceding paragraphs have traced the development in England of our western-based law of divorce. By contrast, the divorce law relating to Chinese customary marriages and Chinese "modern marriages" has very different origins.

1.27 In traditional Chinese society, the interests of the family were paramount and dominated over the interests of the individual. In particular, it was the parents who had "customary legal rights to choose the spouses of their children and to control their family affairs, including marriage, maintenance and (so far as the law permitted) divorce."⁵¹

1.28 Pre-1949, marriage in China was "a very formal business."⁵² There were two classes of 'wives': the "tsai" or first wife and subsequent "tsips" or concubines. Marriage to the "tsai" was preceded by a formal betrothal which was initiated by the respective parents and was negotiated through intermediaries. Betrothal was concluded by the exchanges of symbolic gifts. At the marriage itself, the bride was usually carried to her new home in a ceremonial red chair. A public dinner followed and the bride would pay formal respects to the ancestors of her new family. The taking of a "tsip" was generally less formal and by custom required the consent of the "tsai".

1.29 Other than by death, marriage in traditional China was usually dissolved by "mutual consent between the parties".⁵³ However it could also

⁴⁷ Ibid, para 2.15.

⁴⁸ Ibid, para 2.17.

⁴⁹ "Report of the Royal Commission on Marriage and Divorce" (1956) Cmd 9678, para 70(v) (Chairman: Baron Morton of Henryton).

⁵⁰ "Facing the Future", op cit n 1, para 2.17.

⁵¹ Greenfield, "Marriage by Chinese Law and Custom in Hong Kong" (Vol 7) ICLQ 437, at 443.

⁵² Idem.

⁵³ A traditional practice apparently dating back to the Han dynasty: see Pegg, op cit n 44, at 110.

be dissolved unilaterally, though by the husband only, on the following grounds:⁵⁴

- unfilial behaviour, or disrespect shown by the wife to the husband's parents
- the wife's barrenness
- the wife's adultery
- some repulsive disease suffered by the wife
- the wife's jealousy
- her garrulousness, or loquacity
- theft of her husband's goods.

1.30 Although these grounds were wide in scope, apparently divorce was not common.⁵⁵

1.31 With the advent of reformist ideas in China in the twentieth century, the "modern form" of marriage developed which did away with much of the old formality of the traditional marriage. The Marriage Laws of the People's Republic, originally drafted in 1950 and revised in 1980,⁵⁶ espouse the principles of free choice of partners, strict monogamy, equality between spouses and the necessity for states registration of marriage.

1.32 In relation to grounds for divorce, the Marriage Law states:

"Article 24 Divorce shall be granted if the husband and wife both desire it. Both parties shall apply to the marriage registration office for divorce. The marriage registration office, after clearly establishing that divorce is desired by both parties and that appropriate arrangements have been made for the care of any children and the disposition of property, shall issue the divorce certificates without delay.

Article 25 If one party alone desires a divorce, the organisation concerned may carry out mediation or the party may appeal directly to a people's court to start divorce proceedings. In dealing with a divorce case, the people's court should carry out mediation; divorce shall be granted if mediation fails because mutual affection no longer exists."

1.33 There are two restrictions on these grounds for divorce provided in the Articles: consent must be obtained if the spouse is a soldier on active

⁵⁴ These grounds would seem to have been available under traditional law since ancient times: see *idem*.

⁵⁵ *Ibid*, at 111.

⁵⁶ Marriage Law of the People's Republic of China (adopted at the Third Session of the Fifth National People's Congress and promulgated by Order No 9 of the Chairman of the Standing Committee of the National People's Congress on September 10, 1980, and effective as of January 1, 1981). Although termed "the Marriage Law" it was intended to provide a code governing "family relations" generally: see Art 1.

duty⁵⁷ and a husband may generally not divorce his wife if she is pregnant or within one year of her giving birth.⁵⁸

1.34 The articles go on to provide that, despite any custody arrangements, children of the marriage remain the responsibility of both parents, who both "have the right and duty to bring up and educate their children."⁵⁹ Both are responsible for "the child's necessary living and educational expenses."⁶⁰

1.35 With regard to the couple's property, if they fail to reach agreement at the time of their divorce, the people's court will decide the disposition of the property between them.⁶¹ Either party may be called to "render appropriate financial assistance" to the other if, at the time of divorce, the other "has difficulty in supporting himself or herself."⁶²

1.36 The developments outlined above would appear to indicate that the law in China has taken a major shift away from the old, broad, husband-oriented grounds for divorce, to a system where "fault" as such no longer has relevance. The situation may be more complex in fact however. One writer has commented that -

"... family law [in the PRC] does not comprise a rigorously applied corpus of detailed provisions but, rather, provides general models of correct conduct. These idealizations ... must cope with the realities of dominance, inequality and conflict within the family, regional variations in social practice, and the vicissitudes of government policy."⁶³

1.37 A Notice of the Supreme People's Court, dated 13 December 1989,⁶⁴ would appear to have laid a limiting gloss over the expansive provisions of the Marriage Law. The Notice provides specific criteria for the assessing of whether mutual affection between the husband and wife has sufficiently broken down to permit divorce. Included within these guidelines are (inter alia): cases of separation for three years because of broken

⁵⁷ Ibid, Art 26.

⁵⁸ Ibid, Art 27.

⁵⁹ Ibid, Art 29. The provision goes on to state that in principle the mother should have custody of breast-fed children after divorce. However, once the child has been weaned, if a custody dispute arises between the parties, the people's court will determine the issue "in accordance with the rights and interests of the child and the actual conditions of both parents."

⁶⁰ Ibid, Art 30.

⁶¹ Ibid, Art 31.

⁶² Ibid, Art 33.

⁶³ Palmer, "The Peoples Republic of China: Some General Observations on Family Law" (1986-87) 25 Journal of Family Law 41, at 42. In relation to government policy, for example, "a family member who placed undue emphasis on her or his legal rights *vis-a-vis* other members is considered to be acting in a manner typical of the "bourgeoisie" ... Despite the provisions of the Marriage Law of 1950, divorce was discouraged throughout most of the period of socialist rule. "Mediation" generally resulted in "reconciliation" an even very unhappy couples have invariably been forced to remain married in order to promote a sound socialist family system" (ibid, at 43).

⁶⁴ Entitled "Some Specific Suggestions Regarding the Definition of Genuine Alienation of Mutual Affection Between Husband and Wife in Divorces Cases Tried by the People's Courts": see the discussion of Palmer, "The Peoples Republic of China: more rules but less law" (1990-91) 29 Journal of Family Law 325, at 334-336.

affection with no prospects of reconciliation; cases where one party commits adultery and, "after education," shows no repentance; cases where the marriage has been arranged or there has been "marriage by purchase" and one party requests divorce immediately after marriage or the couple have lived together for many years without establishing conjugal affection.

Chapter 2

The current law on grounds for divorce

Irretrievable breakdown and the five facts

2.1 The law of divorce as a whole is a broad subject, consisting of complex rules and case law. The discussion below focusses specifically on one aspect, that of grounds for divorce. The relevant legislation is contained in the Matrimonial Causes Ordinance⁶⁵ and Rules.⁶⁶

2.2 Section 11 of the Ordinance states that the sole ground upon which a petition for divorce may be presented is that "the marriage has broken down irretrievably". Proof of this can only be given by establishing one or more of the facts set out in section 11A(1), as follows:

- "(a) that the respondent has committed adultery and that the petitioner finds it intolerable to live with the respondent;*
- (b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;*
- (c) that the respondent has deserted the petitioner for a continuous period of at least 2 years immediately preceding the presentation of the petition;*
- (d) that the parties to the marriage have lived apart for a continuous period of at least 2 years immediately preceding the presentation of the petition and the respondent consents to the decree being granted;*
- (e) that the parties to the marriage have lived apart for a continuous period of at least 5 years immediately preceding the presentation of the petition."⁶⁷*

2.3 There is a duty upon the court to inquire, "so far as it reasonably can", into the facts alleged by the parties. If the court is satisfied on the evidence that any of the facts mentioned in section 11A(a) have been established, then the court shall grant the decree nisi, unless on all the evidence it is satisfied that the marriage has not irretrievably broken down.⁶⁸

⁶⁵ Cap 179 ("MCO").

⁶⁶ Cap 179, subsid legisl ("MCR").

⁶⁷ Each of these five "facts" is considered in more detail later in this chapter.

⁶⁸ MCO, s 15(1) and (2), though note also the exception under s 15(3).

In practice though, this latter may be difficult to prove. As observed by one learned writer:

*"The true position in most cases is that however relenting and desirous of reconciliation the respondent spouse may be, the marriage cannot be said to have not irretrievably broken down when the petitioner is not prepared to continue cohabitation."*⁶⁹

However, the converse is also true: that even if "the marriage has clearly broken down irretrievably, the court is not able to hold such unless one or more of the five facts is proven to the court's satisfaction."⁷⁰

Adultery

2.4 In order to establish this as evidence of irretrievable breakdown, there are two facts which must be present. The first is the fact of "adultery" itself. Adultery may be defined as "consensual sexual intercourse between a married person and a person of the opposite sex, not the other spouse, during the subsistence of the marriage."⁷¹ The burden of proof throughout is on the person alleging adultery, as there is a presumption of innocence.⁷² As divorce proceedings are civil proceedings the adultery need not be proved beyond reasonable doubt but by "a preponderance of probability."⁷³ Where there is no confession it may be inferred from established facts (for example, the content of love-letters,⁷⁴ a stay in a hotel room with a third party⁷⁵ or a blood test showing the husband could not be father of the wife's child⁷⁶). Evidence of strong passion or inclination on the part of the persons concerned, combined with evidence of opportunity, affords strong prima facie evidence of adultery.⁷⁷ Only one act of adultery is needed for the purposes of the provision.⁷⁸

2.5 The second limb of the "adultery fact" is that "the petitioner finds it intolerable to live with the respondent". It is interesting to note that these conditions apparently are not co-dependent.⁷⁹

"The intolerability need not arise out of adultery but may be simply a dislike of the other spouse's personal habits, eg snoring, nagging or just the realisation that he is not the Knight in Shining

⁶⁹ Pegg, op cit n 44, at 72. See also Lindsay v Lindsay, DC, Div Jur, Action No 1569 of 1982.

⁷⁰ Pegg, idem.

⁷¹ Rayden, op cit n 28, at 228. However in Hong Kong we must also note the "customary marriage" exception to this contained in MCO, s 2.

⁷² Rayden, op cit n 28, at 232.

⁷³ Ibid, at 233.

⁷⁴ Wong Chan Ying Hon v Wong Chik Wai, SC, Div Jur, Action No 236 of 1971.

⁷⁵ Blum v Blum (1963) 107 Sol Jo 512 (CA).

⁷⁶ E v E [1968] P 506.

⁷⁷ Rayden, op cit n 28, at 235.

⁷⁸ See Pegg, op cit n 44, at 73-74.

⁷⁹ Cleary v Cleary [1974] 1 All ER 498 (CA).

Armour or she is not the Beauty Queen he/she originally appeared."⁸⁰

Nonetheless, the court must satisfy itself that the intolerability is real and not merely the petitioner's bare assertion.⁸¹

2.6 Further, although the old bars to divorce of connivance, collusion and condonation have been abolished, should the parties continue to live together for a period longer than six months after the petitioner learns of the spouse's adultery, the petitioner will no longer be able to rely on that adultery for the purposes of seeking divorce.⁸²

2.7 A petitioner may claim damages against a third party for the alleged adultery with his or her spouse.⁸³ At common law and under the former English legislation⁸⁴ this action was available only to the husband against the "adulterer" and not to the wife against the "adulteress." The reason for this was the apparent "quasi-proprietary interest that a husband had in his wife and her services at common law."⁸⁵ The measure of damages was "the loss sustained by the husband through the deprivation of his wife and the indignity inflicted upon him."⁸⁶

2.8 This anomaly was removed in England by the abolition of the claim to damages for adultery in 1970.⁸⁷ In Hong Kong however, the course adopted was to retain the right of action to the husband⁸⁸ but to extend it also to the wife.⁸⁹

2.9 In a petition for damages for adultery the court may direct how the damages recovered are to be applied; for example, "as a provision for the maintenance of the wife," or "to be settled for the benefit of the children."⁹⁰

⁸⁰ Evans, "Recent Developments in Family Law" (1978) Law Lectures for Practitioners 87, at 90.

⁸¹ Pegg, op cit n 44, at 75.

⁸² MCO, s 15A(3)(b). However, in pursuance of the reconciliation provisions discussed later in this chapter, the Ordinance preserves the right to rely on the adultery in cases where the period of cohabitation is six months or less.

⁸³ MCO, s 50(1). The issue of whether this cause of action should be retained is discussed in Chapters 3 and 8, infra.

⁸⁴ Matrimonial Causes Act 1950, s 30, re-enacted in the Matrimonial Causes Act 1965, s 41(1). This statutory provision replaced the common law action for "criminal conversation" (whereby a husband could sue the man he accused of committing adultery with his wife) which was abolished in England in 1857: Matrimonial Causes Act 1857, s 59. (There is some suggestion however that the action for "crim con", as it was commonly referred to, is still available in Hong Kong until such time as it is expressly repealed: see Phillips, "Damages for Adultery" (1980) HKLJ 54, at 55-60; Pegg, op cit n 44, at 76-77, where the implications of Gensberger v Gensberger [1968] HKLR 403 (FC), and the subsequent amendment to the Application of English Law Ordinance in 1971, are discussed.)

⁸⁵ Phillips, op cit n 84, at 54.

⁸⁶ Idem.

⁸⁷ Law Reform (Miscellaneous Provisions) Act 1970.

⁸⁸ See the case of Gensberger v Gensberger [1968] HKLR 403 (FC) where a husband was awarded \$20,000 against his wife's lover. This case also considered whether the old common law action of "criminal conversation", abolished in England in 1857, was still available in Hong Kong. The court concluded that it was not. However, subsequent commentators and a 1971 amendment to the Application of English Laws Ordinance, Cap 88 LHK, have cast doubt on this point: see supra n 84.

⁸⁹ See Ord 35 of 1971, s 5.

⁹⁰ MCO, s 50(2).

Behaviour

2.10 It is not correct to refer to this fact as "unreasonable behaviour" as "reasonably" qualifies "expected" and not "behaviour."⁹¹

"The use of the word "reasonably" does not mean that the court is to consider whether the respondent has behaved unreasonably. It has to decide whether the petitioner can reasonably be expected to live with the respondent, a quite different question."⁹²

2.11 This fact differs from the adultery fact in one marked respect: "the question is not whether the petitioner finds it intolerable to live with the respondent, but whether he or she can be reasonably expected to do so."⁹³ The test is therefore objective to the extent that the court is to determine whether the petitioner can reasonably be expected to live with the respondent, though the subjective issue of what is reasonable for that particular petitioner is also relevant.⁹⁴ The accepted statement of the test is:

"Would any right-thinking person come to the conclusion that this husband has behaved in such a way that this wife cannot reasonably be expected to live with him, taking into account the whole of the circumstances and the characters and personalities of the parties?"⁹⁵

2.12 There is authority for "behaviour" to extend to the behaviour resulting from the mental or physical illness of the respondent. For example, in the case of Thurlow v Thurlow,⁹⁶ a decree was awarded against a respondent wife who suffered from epilepsy and was prone to violent behaviour. She was eventually confined to bed.⁹⁷

2.13 The relevant behaviour may also take the form of a number of isolated incidents which, when considered individually, might not be sufficient to constitute conduct within the terms of section 11A(1)(b) of the Ordinance, but which may do so when viewed cumulatively.⁹⁸

2.14 Although in general the type of behaviour cited in Hong Kong behaviour cases would be similar to that cited in England, sometimes special

⁹¹ Chang, "The New Law of Divorce in Hong Kong" (1973) 3 HKLJ 51, at 59.

⁹² Passingham, "The Breakdown of a Marriage" (1974) Law Lectures for Practitioners 1, at 4, citing Carew-Hunt v Carew-Hunt (1972) Times, 28 June 28.

⁹³ Pegg, op cit n 44, 77.

⁹⁴ Idem. See also the formulation of the test given in Balraj v Balraj (1980) 11 Fam Law 110, at 112 (CA).

⁹⁵ Livingstone-Stallard v Livingstone-Stallard [1974] Fam 47, at 54, per Dunn J; approved of in O'Neill v O'Neill [1975] 3 All ER 289 (CA) and in Hong Kong in Li Kao Feng Ning v Li Hung Lit, CA, Civ App No 58 of 1983.

⁹⁶ [1976] Fam 32, following Katz v Katz [1972] 3 All ER 219.

⁹⁷ The same principle has been applied in Hong Kong: see, eg, Lee Yuen Sam v Lee Tang Hop Wo, HC, Div Jur, Action No 14 of 1978.

⁹⁸ Livingstone-Stallard v Livingstone-Stallard [1974] Fam 47, Li Kao Feng Ning v Li Hung Lit, CA, Civ Action No 58 of 1983 and see the comments by Sussex (1979) 9 HKLJ 171 and Phillips (1984) 14 HKLJ 95.

circumstances of local life may give rise to a different approach. For example, in one local case, the divorce petition based on behaviour was refused because the court heard that the husband, the wife and their four teenage children, shared a small stone hut with eight other people.⁹⁹ It has been suggested that:¹⁰⁰

*"The extremely difficult living conditions for the majority of people in Hong Kong probably cause much more matrimonial discord that might not arise in a better environment, and in some cases cannot really be attributed to the unreasonable behaviour of either spouse."*¹⁰¹

Desertion

2.15 The law in this area is complex as there are a number of elements which must be established to prove desertion: the fact of separation; the intention to live apart permanently; the absence of the other spouse's consent to the separation; the absence of reasonable or just cause for the separation; and a period of not less than two years separation immediately prior to the presentation of the petition for divorce.¹⁰²

2.16 With regard to the element of separation, it has been said that "desertion is not the withdrawal from a place, but from a state of things."¹⁰³ It is the renunciation of conjugal duties or the common obligations of the married state.¹⁰⁴ Desertion may be established even where the parties remain living under the same roof, but they must nonetheless be living in "separate households."¹⁰⁵ The intention to live apart permanently must also exist, and this must be communicated to the other spouse.¹⁰⁶ This may however be negated by supervening events rendering the deserting spouse incapable of the requisite intention, for example, the onset of mental breakdown.¹⁰⁷

2.17 There is no desertion if the parties agree to separate,¹⁰⁸ and the agreement may be express or implied. The test is whether there is a causal link between the separation and the other party's consent to it; if there is, then

⁹⁹ Chan Cheng Siu Kun v Chan King Kan, HC, Div Jur, Action No 6 of 1979.

¹⁰⁰ Pegg, op cit n 44, at 82. The same writer has noted that it is apparently not unheard of for married couples in Hong Kong to cease having sex because there is so little privacy available in their homes: idem.

¹⁰¹ Idem.

¹⁰² Rayden, op cit n 28, at 272.

¹⁰³ Pulford v Pulford [1923] P 18, at 21, per Lord Merrivale P (DC).

¹⁰⁴ Idem.

¹⁰⁵ Eg, in Hopes v Hopes [1949] P 227 (CA), though the couple slept in separate rooms and the wife would not wash or mend for her husband, she was found not to have deserted him as he ate with the family and used rooms in common with them.

¹⁰⁶ Beeken v Beeken [1948] P 302 (CA).

¹⁰⁷ Pegg, op cit n 44, at 85. Though it remains open to the court to treat the period of desertion as continuing nonetheless: see MCO, s 11A(2).

¹⁰⁸ Rayden, op cit n 28, at 279.

the separation is consensual. However, if the consent is subsequently withdrawn, then "desertion will begin to run if other elements are present."¹⁰⁹

2.18 If the party who leaves has no reasonable cause for doing so, this may constitute desertion. However, "just cause" might be shown if the other party's conduct was "so grave and weighty as to make married life impossible."¹¹⁰ Also, a respondent would have had just cause to leave his spouse in order to protect himself or their children.¹¹¹ Even in cases where the respondent is mistaken about the truth of his "just cause" to leave, if his belief were honest and reasonable, then his leaving would not have been desertion. A common instance of this type of case is where the respondent believed mistakenly that his spouse had committed adultery.¹¹²

2.19 The minimum period of the desertion is two years, as with the "separation with consent" fact. If this were not the case, the petitioner alleging desertion would be disadvantaged in comparison to petitioners who can rely on separation with consent.¹¹³

2.20 There is also a separate form of desertion known as "constructive" desertion, where the spouse who actually leaves the matrimonial home does so because "he or she is driven out by the expulsive words or the expulsive conduct of the other."¹¹⁴ It is the spouse who remains in the matrimonial home, and not the spouse who leaves, who is said to be in "constructive" desertion. The expulsive conduct must be "grave and weighty"¹¹⁵ and must be intended,¹¹⁶ so that it would be reasonable for the spouse who leaves to believe he is being told to go. It seems also that the gravity of the conduct involved in constructive desertion (though not simple desertion¹¹⁷) would be sufficient for the petitioner to plead instead the behaviour fact referred to above. The significance of this is that there would be no need for the petitioner to wait the two years required to plead desertion.¹¹⁸

2.21 Desertion is said to be terminated once one of the elements described above no longer applies: the parties resume living together; the intention to desert is no longer present; the other party now consents to the separation; or, subsequent to the desertion, "just cause" for the party to have left arises.¹¹⁹

¹⁰⁹ Pegg, op cit n 44, at 86.

¹¹⁰ Dyson v Dyson [1954] P 198, per Bamard J.

¹¹¹ Eg, G v G [1964] P 133 (DC) (violent outbursts of anger which frightened the children).

¹¹² Pegg, op cit n 44, at 88.

¹¹³ Idem.

¹¹⁴ Ibid, at 89.

¹¹⁵ Saunders v Saunders [1965] P 449 (DC).

¹¹⁶ There has been some judicial controversy as to the burden of proof on this point. "For a long time, the courts supported the view that [intention] could be proved by the petitioner relying on a presumption that the respondent intended the natural and probable consequences of his conduct. The presumption was rebuttable, but the Privy Council in Lang v Lang ([1955] AC 402) considered that such was only rebutted on proof of a contrary intent, not merely on a hope or desire that the other would stay": Pegg, op cit n 44, at 89.

¹¹⁷ Stringfellow v Stringfellow [1976] 2 All ER 539 (CA).

¹¹⁸ Pegg, op cit n 44, at 90.

¹¹⁹ Idem.

Separation for two and five years

2.22 To rely on the fact of separation, the petitioner must establish that the parties have been separated for at least two years and that the respondent consents to the decree being granted, or that the parties have been apart for at least five years where there is no such consent. In considering whether the separation fact is established, the court is not concerned with matters of fault between the parties.¹²⁰

2.23 The legislation states that "a husband and wife shall be treated as living apart unless they are living with each other in the same household."¹²¹ It seems that it is possible for the parties to be maintaining separate households while still living under the same roof.¹²² It has been stated that "the courts are examining a state of affairs which exists between the parties; and the question is, are they or are they not still living with each other in one household as a married couple, albeit in a state of chronic discord?"¹²³

2.24 In addition to factual separation, the party petitioning for divorce must also establish a certain mental element; ie, that he has "ceased to recognize the marriage as subsisting and never intends to return to the other."¹²⁴ Accordingly, "long periods of absence resulting from illness, business abroad or service abroad in the Armed Forces will not of themselves suffice."¹²⁵

2.25 This issue was considered by the Court of Appeal in the case of Santos v Santos.¹²⁶ The Court held that the petitioner was required to show that he had recognised the marriage to be at an end for at least two years prior to the proceedings, although he need not have communicated this to the respondent. The court acknowledged that it may be extremely difficult to establish when that unilateral decision was reached, but insisted that the court was nonetheless obliged to consider this aspect and not merely to "rubber stamp" the petitioner's assertions.¹²⁷

2.26 The consent required, if the two year separation period is to be sufficient for divorce, must be positive consent, not mere acquiescence.¹²⁸ In terms of the legislation, the consent required relates to the granting of the

¹²⁰ Chapman v Chapman [1972] 3 All ER 1089 (CA).

¹²¹ MCO, s 11A(3).

¹²² Hopes v Hopes [1948] P 227 (CA); Mouncer v Mouncer [1972] 1 All ER 289.

¹²³ Pegg, op cit n 44, at 92-93.

¹²⁴ See Santos v Santos [1972] Fam 247 (CA) and Pegg, ibid, at 94.

¹²⁵ Passingham, op cit n 92, at 6. This may be of particular significance in Hong Kong where the approach of 1997 has meant the proliferation of "astronaut marriages," where one spouse leaves Hong Kong to take up temporary residence overseas, but solely in order to acquire foreign citizenship. If the marriage breaks down during the time the spouses are apart, when might the separation period be said to have commenced?

¹²⁶ Passingham, idem.

¹²⁷ It has been noted by one writer that the advent of the Special Procedure Divorce in cases of two years' separation with consent (discussed later in this chapter) must surely limit the weight to be attached to the Court of Appeal's ruling in this regard. As Passingham states, "if that is not "rubber stamping" it looks very much like it," idem.

¹²⁸ McG (formerly R) v R [1972] 1 All ER 362.

decree absolute, not to the separation itself.¹²⁹ A specific form for the consent is provided in the Matrimonial Causes Rules.¹³⁰

2.27 Where the fact relied on is that the parties have been separated for a period of five years or more, no consent is required.¹³¹

The defence of "grave financial or other hardship"

2.28 Where five years' separation is the fact relied on by the petitioner,¹³² the respondent may oppose the grant of the decree nisi on the ground that: the dissolution of the marriage will result in grave financial or other hardship to him and that it would in the circumstances of the case be wrong to dissolve the marriage.¹³³ It is clear that there are two conditions which must be met, the first is to establish sufficiently "grave hardship," the second is to show also that it would be wrong to grant the divorce.¹³⁴

2.29 The words "grave financial hardship" mean exactly what they say and have to be considered subjectively in relation to the particular marriage and the circumstances in which the parties lived while it subsisted.¹³⁵ As the fact relied on is separation for five years, the defence is recognised as one of "last resort."¹³⁶ In cases of financial hardship it can operate as a bargaining tool to assist the respondent in obtaining improved financial assistance from the petitioner.¹³⁷

"Where grave financial hardship is established by the respondent in her answer, then the petition [for divorce] should be dismissed unless the petitioner can meet the answer in his reply by putting forward a proposal which is acceptable to the court as reasonable in all the circumstances and which is sufficient to remove the element of grave financial hardship which otherwise would lead to the dismissal of the petition."

2.30 The hardship alleged is "most commonly the loss of the prospect of a widow's pension which the respondent wife would lose if the marriage were dissolved."¹³⁸ In a case in Hong Kong it also concerned the loss of subsidised housing.¹³⁹ However, it has been stated that the defence has in

¹²⁹ Pegg, op cit n 44, at 91.

¹³⁰ Cap 179 (subsid legisl) ("MCR"), r 14(5) and form 4, cl 5.

¹³¹ MCO, s 11A(1)(e).

¹³² *Id.*, MCO, s 11A(1)(e).

¹³³ MCO, s 15B.

¹³⁴ *Bricknell v Bricknell* [1974] Fam 31 (CA).

¹³⁵ Rayden, op cit n 28, at 334. See also *Le Marchant v Le Marchant* [1977] 3 All ER 610 (CA).

¹³⁶ Pegg, op cit n 44, at 102.

¹³⁷ *Ibid.*, at 103.

¹³⁸ Passingham, op cit n 92, at 9. See *Le Marchant v Le Marchant* [1977] 3 All ER 610 (CA) where the wife alleged that she would lose an index-linked pension by reason of the divorce.

¹³⁹ *Yuen Yu Biu v Yuen Nip Yulandna*, HC, Div Jur, Action No 36 of 1978.

the past "always been very difficult to establish,"¹⁴⁰ especially in England¹⁴¹ and particularly where the respondent is still young, healthy and able to earn a living. The defence is more likely to succeed and the petition be dismissed where the couple are "elderly, in poor health and not well-off, so that the wife could not work and the husband could not off-set the grave financial hardship to be suffered by his wife."¹⁴²

2.31 In relation to "or other" grave hardship, there have been few successful cases.¹⁴³ That the divorce will cause the respondent unhappiness and shame is not enough, nor are religious objections.¹⁴⁴ However, if the respondent were able to show that, because of religious and social attitudes, the divorce would make him an outcast in his own community, the defence might succeed.¹⁴⁵

2.32 With regard to the second limb of the provision, in determining the issue of whether it would be wrong to dissolve the marriage, the court is directed to consider the following circumstances:

- (a) the conduct of the parties to the marriage (has the respondent, for example, committed adultery or been in desertion?¹⁴⁶);
- (b) their interests (what are their prospects of remarriage?);
- (c) the interests of the children (for example, an illegitimate child of the petitioner who would be legitimated if the petitioner were free to remarry); and
- (d) the interests of other third parties (such as the petitioner's prospective new husband or wife¹⁴⁷).

Consequently, even if a case for "grave financial or other hardship" has been made out, only if the court is of the opinion that, in all of the above circumstances it would be wrong to dissolve the marriage, may the respondent succeed and the petition for divorce be dismissed.

¹⁴⁰ Phillips, op cit n 12, at 13. See the Hong Kong case of Wong Tat Lun v Wong Chan Siu Ping, CA, Civ App No 111 of 1987 where the wife, who had lived for 14 years as a member of the husband's extended family, stood to lose not future pension rights but the present benefits she received from her father-in-law who supported her (and had always done so) out of the family business. Her appeal against the grant of the divorce was refused.

¹⁴¹ Phillips, op cit n 12, at 13. See also Pegg, op cit n 44, at 104.

¹⁴² Pegg, idem. See also Julian v Julian (1972) 116 Sol Jo 763.

¹⁴³ Pegg, op cit n 44, at 104.

¹⁴⁴ Idem.

¹⁴⁵ See Banik, v Banik [1973] 3 All ER 45 (CA). However, the court must be satisfied that the respondent "would in fact be ostracized, not merely feel ostracized," Pegg, op cit n 44, at 105. See also Rukat v Rukat [1975] Fam 73, where, despite 26 years' separation from her husband, a Roman Catholic wife alleged (but failed to establish) "grave hardship," on the grounds that she would be a social outcast in Sicily if the divorce decree were granted.

¹⁴⁶ Brickell v Brickell [1974] Fam 31 (CA).

¹⁴⁷ Though in Johnson v Johnson (1981) 12 Fam Law 116, the judge dismissed the husband's wish to remarry as being of little importance, as he only wished to remarry "for sentimental reasons": see the commentary on this apparently rather hard decision by Phillips, "Recent Developments in Family Law" (1983) Law Lectures for Practitioners 91, at 104-105.

Withholding of decree absolute – respondent's financial position

2.33 Further provisions to afford financial protection to the respondent are contained in section 17A of the Ordinance. In cases where the divorce petition is based on either of the two "non-fault" separation facts¹⁴⁸ and the decree nisi has been granted to the petitioner, the respondent may apply to the court under section 17A to have his post-divorce financial position considered.¹⁴⁹

2.34 Under this section the court may proceed in two ways.¹⁵⁰ Generally, it must withhold the granting of the decree absolute until it has made a full inquiry into the financial positions of both parties. It must satisfy itself either that the financial provision already made for the respondent is fair and reasonable or the best that can be made in the circumstances, or that the petitioner should not be required to make any financial provision for the respondent.¹⁵¹

2.35 The circumstances which the court is obliged to take into account when considering the respondent's financial position include: "the age, health, conduct, earning capacity, financial resources and financial obligations of each of the parties;"¹⁵² and "the financial position of the respondent as, having regard to the divorce, it is likely to be after the death of the petitioner should the petitioner die first."¹⁵³

2.36 The second way in which the court may proceed is to grant the decree absolute without making a full enquiry into the respondent's financial position, but only in case where circumstances exist making it desirable to grant the decree absolute without delay, and the court has obtained a satisfactory undertaking from the petitioner that acceptable financial provision will be made.¹⁵⁴ This approach was adopted by the court in the Hong Kong

¹⁴⁸ le, under s 11A(1)(d) or (e), MCO.

¹⁴⁹ MCO, s 17A(1). As with the protection afforded under s 15B, the provision of s 17A are supplemental to the court's powers to make orders in respect of financial provisions and property adjustment under the Matrimonial Proceedings and Property Ordinance, Cap 192. One writer has commented that: "The section [17A] does not now seem important in view of the fact that the court has full powers under the [MPP] Ordinance to make orders for financial provision. The similar section in the English legislation [Divorce Reform Act 1969, s 6, replaced by Matrimonial Causes Act 1973, s 10] was enacted before the court had wide powers over income and property that it now has": see Pegg, *op cit* n 44, at 108. See also the comment of Ormrod LJ in Hardy v Hardy (1981) 2 FLR 321, at 327–328 where he says that "it looks as though s 10 [Matrimonial Causes Act 1973] is falling into disuse."

¹⁵⁰ See Lau Chu v Lau Tang Su Ping [1989] 2 HKLR 470, at 489 *per* Hunter JA (CA).

¹⁵¹ MCO, s 17A(3).

¹⁵² MCO, s 17A(2)(a).

¹⁵³ MCO, s 17A(2)(b). Under this last head, see the unusual Hong Kong case of Wong Leung See v Wong Po Lung Kwan CA, Civ App No 121 of 1985, where a wife was granted a share of the lump sum pension which her former husband was to receive on retirement, even though he had already obtained his decree absolute and had since remarried. In this case the wife's notice of appeal under s 17A against the granting of the decree absolute had been overlooked by the court. The case is similar to Wright v Wright [1976] Fam 114 which was also "characterised by a series of mistakes all made in good faith": see Phillips (1986) 16 HKLJ 273-284, at 275.

¹⁵⁴ MCO, s 17(4).

case of Lau Chu v Lau Tang Su Ping,¹⁵⁵ where the petitioner husband wished to start a family with the woman he had been living with for nearly nine years, and his assets were valued at \$175 million. The court held that, even though the amount of the financial provision to be made for the respondent wife had yet to be fixed, the petitioner had made out a case for accelerating the making of a decree absolute and his undertaking to make financial provision was sufficient to allow the decree to be granted.¹⁵⁶

2.37 It has been stated of section 17A that, although it does not of itself empower the court to make financial orders, "the court may be able to ensure greater provision for the respondent than the court itself is able to order simply because of the pressure that can at [the decree absolute] stage be placed on the petitioner,"¹⁵⁷ and furthermore, it "prevents problems of enforcement from arising later, when the incentive to act has gone."¹⁵⁸ It must nonetheless be borne in mind that the purpose of the provision is "defensive" not "offensive;" it is meant to serve only as a shield for the respondent and not as a sword.¹⁵⁹

Special procedure divorce

2.38 The Matrimonial Causes Ordinance requires the court to inquire, so far as it reasonably can, into the facts alleged to constitute the irretrievable breakdown of the marriage.¹⁶⁰ In certain circumstances a special procedure is available for undefended divorces which allows them to be processed largely on the documents submitted by the petitioner, so that neither party need attend at court.¹⁶¹

2.39 Under this procedure, it is the registrar of the court who considers the petition and, if a prima facie case has been made out, issues a certificate that the petitioner has sufficiently proved the contents of the petition. The case then proceeds to open court, but solely for the decree nisi to be pronounced by a judge.

2.40 In England it has been recognised that the process of adjudication in divorce proceedings has now effectively been transferred from the judge to the registrar.¹⁶²

¹⁵⁵ [1989] 2 HKLR 470 (CA).

¹⁵⁶ Compare however the court's approach in Wilson v Wilson [1973] 1 WLR 555 (CA) where it was held that the decree absolute would not be granted until the petitioner's "mere proposal" (that the matrimonial home be sold and the proceeds divided between the parties) was first implemented.

¹⁵⁷ See Phillips, op cit n 153, at 279.

¹⁵⁸ Pegg, op cit n 44, at 108.

¹⁵⁹ See Lau Chu v Lau Tang Su Ping [1989] 2 HKLR 470, at 491 per Hunter JA (CA).

¹⁶⁰ MCO, ss 11 and 11A; see too Rayden, op cit n 28, at 221.

¹⁶¹ See MCR, rr 33(2A) and 47A: see Pegg, op cit n 44, at 116-117. See also Rayden, op cit n 28, at 221, for commentary on the equivalent English provisions.

¹⁶² See the Court of Appeal judgment in Day v Day [1980] Fam 29, esp per Ormrod LJ; and comment by Phillips, op cit n 12, at 7-8.

*"Once the registrar has certified that he is satisfied with the evidence and the petitioner is entitled to a decree then a decree must be granted on the date fixed for the hearing. It is thus impossible to regard the judge as anything more than a formality. The oft-heard judicial complaint that judges merely act as a robber stamp in pronouncing decrees nisi in bulk – 'I pronounce decrees nisi in cases 1 to 50,' for example, - is thus very real."*¹⁶³

2.41 It has also been commented that, in any event, the introduction of the procedure has "virtually eliminated any real inquiry into the facts save as set out by the petitioner in the documents before the court."¹⁶⁴ The procedure has been described by one writer as:

*"An unhappy compromise between those who felt it desirable to eliminate unnecessary and unnerving court appearances by the parties in undefended cases, and those who believe that marriage is still a sufficiently important social institution to warrant its termination by judicial rather than administrative process."*¹⁶⁵

2.42 In England, the Special Procedure applies to undefended cases regardless of the particular "fact" relied on and is now considered to be "the ordinary procedure" for dealing with undefended divorces.¹⁶⁶ It is estimated that 98 per cent of all undefended divorce petitions there are processed in this way.¹⁶⁷

2.43 In Hong Kong, however, the procedure is limited only to those cases where there are no minor children of the marriage and where facts other than the behaviour fact are relied on to establish irretrievable breakdown.¹⁶⁸ It has therefore been estimated that only about 30 per cent of Hong Kong marriages are dissolved using the Special Procedure.¹⁶⁹

Conciliation

2.44 There are various provisions in the legislation which aim to encourage reconciliation between the parties, both before and during the course of the proceedings.

2.45 At the earliest stages, before proceedings have even been instituted, "trial" reconciliation periods of up to six months are permitted in

¹⁶³ Phillips, *idem*.

¹⁶⁴ See *Day v Day* [1980] Fam 29 (CA), esp per Ormrod LJ; and comment by Phillips, *op cit* n 12, at 7-8.

¹⁶⁵ Phillips, *op cit* n 12, at 7.

¹⁶⁶ Rayden, *op cit* n 28, at 221.

¹⁶⁷ Phillips, *op cit* n 12, at 7.

¹⁶⁸ *Idem*.

¹⁶⁹ *Idem*, and Pegg, *op cit* n 44, at 117.

certain circumstances, without these affecting the parties' rights to later petition for divorce should such attempts prove unsuccessful.¹⁷⁰

2.46 Secondly, the petitioner is required to obtain a solicitor's certificate as to whether, prior to the commencement of proceedings, the solicitor discussed the possibility of reconciliation with the petitioner.¹⁷¹ However, as one writer has observed, the solicitor does not have to discuss this with the client, as indeed he may consider it futile, especially if the parties have been separated for some time.¹⁷²

2.47 A third provision is section 15A(1) of the Ordinance, which empowers the court to adjourn the proceedings at any stage if it feels that "there is a reasonable possibility of a reconciliation between the parties to the marriage." The court "may adjourn the proceedings for such period, as it thinks fit to enable attempts to be made to effect such a reconciliation". Arguably though, by the time the case has reached the hearing stage chances of a reconciliation are remote. Furthermore, it is asking a great deal of the court to perceive, particularly where the proceedings are conducted by way of written statements from the parties, whether a real chance of reconciliation exists.¹⁷³

Dissolution of Chinese customary marriage – the law

2.48 It was noted in the earlier discussion in Chapter One regarding Chinese customary marriage, that Hong Kong has a dual system of divorce law; One writer has observed:

*"This is because the matrimonial jurisdiction of the Hong Kong courts is based on the old division between, on the one hand, marriage under Chinese law and custom and its accompanying stigma of polygamy, and, on the other, the English type church or registry marriage endowed with the aura of monogamy. And it seems that never the twain shall meet, at least in the divorce courts."*¹⁷⁴

2.49 The principle of divorce by mutual consent "is an immemorial part of the Chinese way of marriage, dating back at least as far as the Han Dynasty [206 BC – 220 AD]".¹⁷⁵ The Marriage Reform Ordinance,¹⁷⁶

¹⁷⁰ MCO, s 15A (3)-(6).

¹⁷¹ MCO, s 18B(b) and MCR, r 12(3) and form 2A.

¹⁷² Pegg, *op cit* n 44, at 96.

¹⁷³ The adequacy of these provisions in meeting their designed objective is discussed in the next chapter of this report. See also the comments on conciliation matters generally, *infra*, Chapter 8.

¹⁷⁴ Pegg, "Chinese Marriage, Concubinage and Divorce in Contemporary Hong Kong" (1975) 5 HKLJ 4, at 10.

¹⁷⁵ Chang, *op cit* n 91, at 52. See the discussion on the history of marriage and divorce in China, *infra*, Chapter 1.

¹⁷⁶ Cap 178 ("MRO"). The original ordinance (No 68 of 1970) "was preceded by what was described by the Secretary of Home Affairs when moving the second reading of the Bill as a 'melancholy progression' of White Papers and Reports [commencing in 1953]": Chang, *idem*.

introduced in 1970¹⁷⁷ and applying to Chinese customary marriages¹⁷⁸ and Chinese "modern marriages,"¹⁷⁹ gave some recognition to this principle.

2.50 Chinese customary marriages were potentially polygamous and, although a wife could not seek dissolution of a marriage without her husband's consent, the husband was entitled unilaterally to divorce his wife on a number of grounds.¹⁸⁰ The effect of Part II of the Marriage Reform Ordinance was to proscribe polygamy for the future from "the appointed day," namely, 7 October 1971.¹⁸¹ The relevant provision states that from that day forwards, "no man may take a concubine and no woman may acquire the status of concubine,"¹⁸² but without affecting status or rights of a concubine lawfully taken before the appointed day, or her children.¹⁸³

2.51 In relation to existing marriages, the effect of the legislation was to transform the existing potentially polygamous marriages, which were monogamous ones in fact, into monogamous ones in law; by declaring them to be "valid" marriages.¹⁸⁴

2.52 These prior, customary and validated modern marriages may be registered under Part IV of the Ordinance,¹⁸⁵ with or without the consent of the other party to the marriage.¹⁸⁶ The registration process has particular significance for marriage dissolution. If one or both parties to the marriage has a substantial connexion with Hong Kong, the registered marriage may dissolved either in accordance with the mutual consent procedure in Part V of the Ordinance, or under the provisions of the Matrimonial Causes Ordinance.¹⁸⁷

¹⁷⁷ Although some of the provisions did not come into effect until "the appointed day," ie – 7 October 1971: see MRO, s 3 and LN 187/70.

¹⁷⁸ Defined as a marriage "celebrated in Hong Kong before the appointed day in accordance with Chinese law and custom": MRO, s 7(1). The required constituents of a Chinese customary marriage were considered in Fan Kam Ching v Yau Shiu Hing [1986] HKDLR 14, though it is widely accepted that "customary law is not static and may develop with the passage of time": see Pegg (1987) HKLJ 237-242, at 240 and Wong Kam Ying v Man Chi Tai [1967] HKLR 201, at 211, per Huggins J. Note however that both Chinese custom and law must be complied with: In re the Estate of Ng Shum (No 2) [1990] 1 HKLR 67.

¹⁷⁹ Defined as "a marriage celebrated in Hong Kong before the appointed day by open ceremony as a modern marriage and in the presence of 2 or more witnesses": MRO, s 2.

¹⁸⁰ These are given, supra, Chapter 1.

¹⁸¹ MRO, s 4.

¹⁸² MRO, s 5(1).

¹⁸³ MRO, s 5(2).

¹⁸⁴ See MRO, s 7(3), which declares customary marriages to be "valid," and s 8 which "validates" modern marriages.

¹⁸⁵ MRO, s 9(2).

¹⁸⁶ Though, where there is no consent, a declaration of the subsistence of the marriage must be obtained from the District Court: MRO, s 9(3) and (7).

¹⁸⁷ See MRO, s 15.

Chapter 3

Criticisms of the current law

3.1 In our consultation paper on grounds for divorced,¹⁸⁸ the law in this area was examined in the light of the established "Field of Choice criteria." These were advanced by the English Law Commission in its 1966 report¹⁸⁹ as being appropriate guidelines for determining the constituents of a good divorce law. The findings of the 1966 report ultimately led to the Divorce Reform Act of 1969.¹⁹⁰ These same guidelines were adopted by the English Law Commission in its most recent review of law in this area,¹⁹¹ and are again applied below to our equivalent Hong Kong provisions. In this discussion, the general commentary on the law is combined with the related observations of our various consultees.

Does the law meet its objectives?

"To buttress the stability of marriages"

3.2 The main failure of the former "fault only" law was identified as being its artificiality.¹⁹² Although it was ostensibly a "fault only" regime, couples could effect immediate consensual divorce by either "volunteering" to commit the required offence or by "dressing up" innocent circumstances so that a relevant offence (for example, adultery) could be inferred. In the present legislation, the emphasis on the "irretrievable breakdown" of the marriage is intended to prevent this abuse. Accordingly, in addition to alleging the fact of adultery, the petitioner must find it intolerable to live with the respondent. Similarly in behaviour cases, the petitioner must allege that he cannot reasonably be expected to live with the respondent.

3.3 It has been noted however that "virtually any spouse can assemble a list of events, which, taken out of context, can be presented as unreasonable behaviour sufficient on which to found a divorce petition."¹⁹³ In adultery cases, a respondent's admission in respect of even an unnamed third party is sufficient. This is why, in England, adultery is considered to be an "easy option" for many divorcing couples.¹⁹⁴

¹⁸⁸ Op cit n 9.

¹⁸⁹ "Reform of the Grounds for Divorce – The Field of Choice," op cit n 36.

¹⁹⁰ The precursor to our present MCO.

¹⁹¹ See its initial discussion paper, "Facing the Future," op cit n 1 and its subsequent recent report, "The Ground for Divorce," op cit n 2.

¹⁹² "Facing the Future," op cit n 1, para 3.8.

¹⁹³ Idem.

¹⁹⁴ Idem. Even though this may be true, adultery does not appear to be a fact commonly cited by divorce petitioners in Hong Kong: note the figures at Appendix A, supra, which reveal a very low annual average.

3.4 When one considers the English statistics, the magnitude of the potential for abuse becomes evident. In 1985, petitions based on behaviour constituted 40% of total petitions, while those based on adultery accounted for 29.7%. The median time for the processing of these petitions, from petition to divorce, was 8 months and 7.2 months respectively. These figures would tend to indicate that, in England at least, the efforts of the 1969 reforms to buttress the institution of marriage in this respect have made little difference in practice. The English Law Commission has observed:

*"Experience from abroad, together with that in this country would tend to suggest that it is not possible to prevent parties obtaining immediate consensual divorce so long as immediate divorce is available upon fulfillment of certain requirements, because determined parties will succeed in satisfying the conditions."*¹⁹⁵

3.5 It is interesting to note however that the same indication of potential abuse is not made out in the Hong Kong statistics. By comparison, for the years 1982 and 1988, the average number of petitions citing the behaviour fact in Hong Kong was 20%, while the figures for adultery average only 4%. The reason for this much lower use of the fault facts in Hong Kong than in England and other countries is not evident, (although one possibility may be the more stringent requirements applying to parties here wishing to use the simplified special divorce procedure¹⁹⁶).

3.6 Another mechanism by which the present law endeavours to meet the objective of buttressing the institution of marriage is contained in its provisions to promote reconciliation between the parties. The intention here is to "ensure that the legal process of divorce does not deter the parties from attempting reconciliation or diminish any chance, however small, of its success."¹⁹⁷ This particular area was of concern to a large number of consultees. On the whole, their comments echo the findings of the English Law Commission, that certain aspects of the present law doom this particular objective of the legislation to failure.

3.7 The requirement that a solicitor file a certificate stating whether or not he has discussed the possibility of reconciliation with his client does not actually impose an obligation on the solicitor to do so! Theoretically he could simply certify that he has not discussed reconciliation with his client and still satisfy the requirement.¹⁹⁸

3.8 This, combined with the advent of the special procedure divorce,¹⁹⁹ has led the English Law Commission to recommend the repeal of their equivalent certificate provisions, as serving no useful purpose.²⁰⁰ This would seem also to be the opinion of a number of our own consultees, one of whom described the solicitor's certificate provisions as "feeble." Opinions

¹⁹⁵ "Facing the Future" op cit n 1, para 3.8.

¹⁹⁶ See discussion of this divorce procedure in Chapter 2.

¹⁹⁷ "Facing the Future," op cit n 1, para 3.11.

¹⁹⁸ Ibid, para 3.9.

¹⁹⁹ Discussed, supra, Chapter 2.

²⁰⁰ "Facing the Future," op cit n 1, para 3.9.

were expressed by some consultees that it was not the role of solicitors in any event to give conciliation counselling, as they were not properly qualified in this respect; further, that solicitors themselves tended to consider it of little use, as it was felt that by the time parties came seeking legal advice they were already committed to obtaining a divorce.

3.9 The court is obliged, if there is evidence to suggest that reconciliation between the parties is a possibility, to adjourn the proceedings until that avenue has been explored. In practice however there is usually little opportunity for the court to do more than look at the documents placed before it in order to assess the possibility of a reconciliation, particularly where the divorce proceedings have been brought under the special procedure. This, again, was an area of the present legislation which was expressed as ineffectual by some consultees.

3.10 Another method by which the present legislation seeks to facilitate reconciliation is by allowing parties to attempt trial reconciliation for up to six months, without it cancelling out the time which may have already "accrued" towards a separation period required for divorce. Similarly, periods of living together which are less than six months since the last act of adultery or incident of behaviour are discounted. The English Law Commission described the effectiveness or otherwise of these reforms as "impossible to estimate"²⁰¹ (though they must certainly have been a considerable improvement on the earlier law, which effectively prohibited such attempts at reconciliation as perhaps risking the loss of any right of action at all). Nonetheless, as the Scottish Law Commission has noted, it is still unfortunately the case that "as the end of this [six month] period approaches the law provides an incentive to separate."²⁰²

3.11 In its working paper, the English Law Commission identified a number of aspects of the present divorce process in general which, even if the above provisions to encourage reconciliation were in themselves more effective, would tend strongly to discourage it:

"First, the need to prove a fact, particularly if behaviour is used, can force the petitioner into an entrenched and hostile position from the outset. If the marriage has not broken down already, the allegations made may alienate the respondent to such an extent that irretrievable breakdown then occurs. Secondly, once the petition is filed the divorce may be obtained relatively quickly with little opportunity for reflection... the proceedings can develop a momentum of their own. Thirdly, some spouses may be unable to find alternative accommodation or rearrange the occupation of their existing home unless they are divorced. Some, perhaps especially wives, may therefore be driven to divorce simply in order to achieve a separation. Any chance, however small, of reconciliation after a cooling-off period is lost. Finally, any time limit on the period during which the parties may

²⁰¹ Idem.

²⁰² "The Ground for Divorce: Should the Law be Changed? (1988) Scot Law Com DP No 76, at 4.

*live together after a fact has arisen can cause difficulties for a spouse who is genuinely ambivalent about ending the marriage.*²⁰³

3.12 The issue of accommodation was one raised by several consultees. Although the Hong Kong statistics would seem to indicate that the majority of divorcing parties separate and use this fact in petitioning for divorce, it is likely that the high cost of accommodation in Hong Kong makes effecting separation very difficult, particularly for the less well-off.

3.13 Within the context of the "buttressing of marriage," the consultation paper noted the more philosophical question of whether this was still a proper objective of the law. With the modern movement away from the State-endorsed "religious duty" notion of marriage, to one of it being part of "the individual pursuit of personal happiness," does the State any longer have a valid role in endeavouring to buttress the institution of marriage? A few of the consultees were emphatic that it did, and that buttressing the institution of marriage should be a primary consideration of any legislative reform in this area. The importance of the role of the State in helping to preserve family life was also reflected in the government policy document on social welfare services, referred to at the commencement of this report.²⁰⁴

3.14 This is a relevant issue, because the modern rise in the divorce rate can often lead to calls from some quarters to "toughen up" the divorce laws and to make them more, not less, restrictive, so that divorces are not so "easy to get" as they are now. The divorce rate appears to be seen as certain evidence of modern moral decline and the thinking appears to be that if people who wish to divorce can be obliged to stay together, then "marriage" and society in general will return to its former "stability." In the English Law Commission's consultation paper it was argued that the fallacy of this view was that: "divorce laws as such can never prevent spouses who have the means to do so from leaving home or couples who wish to do so from separating by consent."²⁰⁵ (However, as one consultee has cautioned, there is an educative process involved in changing the law and a danger that the law itself might encourage parties to consider divorce as a first, not last, resort.)

3.15 The argument also has been put that, "in today's plural and secular society, many people will respect the value of family life without subscribing to Christian system of morality which formed the basis of the earlier law."²⁰⁶ This argument would appear to be particularly appropriate for Hong Kong. Indeed, as we have seen in the earlier discussion, there may be many factors underlying the rise in the divorce rate, most of which appear to stem, paradoxically, from a higher expectation than ever of the satisfaction to be derived from the marriage state.

²⁰³ "Facing the Future," op cit n 1, para 3.11.

²⁰⁴ Op cit n 3.

²⁰⁵ "Facing the Future," op cit n 1, para 3.6.

²⁰⁶ Idem.

"To enable the 'empty shell' of the marriage to be destroyed"

3.16 The substance of the law of divorce is the dissolution of the legal tie of marriage. No matter how restrictive a divorce law might be, it cannot prevent couples separating if a marriage has irretrievably broken down. The present law recognises this fact by allowing one party to obtain a divorce without the consent of the other or without any "matrimonial offence" if the couple have been separated for five years or more.²⁰⁷ Five years however is a very long time to wait for the finalising of the divorce decree and ancillary matters. Amongst our written consultee responses, more than half supported recommendations which would see this period substantially reduced. The results of the public telephone survey were more conclusive, with 80% of the respondents expressing the view that the period should be cut to three years or less.²⁰⁸

3.17 Furthermore, "whether a spouse can succeed in ending a marriage without waiting may well depend on a wholly arbitrary range of factors, unrelated to whether the marriage has irretrievably broken down or which of them is more to blame for the fact that it has done so."²⁰⁹ It would seem also that the "unhappy marriage" of the fault and no-fault criteria for divorce has sometimes resulted in perverse rulings in divorce proceedings."²¹⁰

3.18 For example, in one case a petition was refused in circumstances where it was not in dispute that the marriage had irretrievably broken down, but "in truth, what has happened in this marriage is the fault of neither party; they have just grown apart. They cannot communicate. They have nothing in common."²¹¹ Nonetheless, the parties were unable to obtain a divorce based on the fact that one could not reasonably be expected to live with the other. Cases such as this are support for the conclusion that although the present law ultimately may meet the objective of allowing the empty shell of the marriage to be destroyed, the manner in which it does so may no longer accord with social reality.

"To ensure marriages are dissolved with maximum fairness" and so as to "avoid injustice to an economically weak spouse"

3.19 One of the main motivations behind the introduction of the "irretrievable breakdown" formula was to overcome the unfairness of the earlier legislation which branded one of the parties to the marriage as "guilty," when in reality both were likely to have contributed to its demise. However,

²⁰⁷ Even this is not conclusive, the divorce may be refused if the respondent is able to establish that financial or other hardship would ensue and that in all the circumstances it would be wrong to dissolve the marriage. However this situation is rare: *ibid*, para 3.12.

²⁰⁸ See discussion of the survey results, *infra*, Chapter 8 and the relevant extracts from the survey report at Appendix C.

²⁰⁹ "Facing the Future," *op cit* n 1, para 3.12.

²¹⁰ Eg, see the discussion of the cases given, *ibid*, at 16 n 73.

²¹¹ *Buffery v Buffery* (1987) Times, 10 December.

in commenting on the success of this endeavour, the English Law Commission stated in its report:

*"The radical theoretical shift from the offence principle to the breakdown principle has not become apparent in practice. The law tells the parties, on the one hand, that the sole ground for divorce is irretrievable breakdown and, on the other hand, that unless they are able to wait for at least two years after separation, a divorce can only be obtained by proving fault. Not surprisingly, the subtlety that the facts are not grounds for divorce, but merely evidence of breakdown, is seldom grasped."*²¹²

3.20 This inherent potential for inconsistency seems to manifest itself in various ways. First, the view of the marriage taken by the present legislation may be too simplistic. It would seem that those parties who base their petitions on the fault criteria are somehow more "blameworthy" than those who cite separation. This may not be the case in practice, as the parties' choice of grounds may be influenced by factors quite outside the apparent facts relied on (for example, the particular socio-economic group to which the parties belong, as has been concluded by the English Law Commission).

3.21 The fault ground/fact which stigmatises the respondent as the guilty party may be merely a symptom and not the cause of the breakdown. Also, the legislation as drafted and interpreted does not necessarily imply the extent of "moral" fault which the commonly ascribed labels "adultery" and "unreasonable behaviour" seem to infer. For example, petitions based on behaviour have been granted where the respondent has been suffering from physical or mental illness. "Thus, a finding that the behaviour ground is fulfilled is not necessarily a finding of fault on the part of the respondent, but rather a finding of the petitioner's inability to withstand this behaviour and hence of the incompatibility of the parties."²¹³ The same may be said to be applicable to petitions based on adultery.²¹⁴

3.22 Secondly, this inconsistency and apparent unfairness that the provisions may sometimes lead to is compounded by the fact that the respondent may not have the opportunity to 'give his side of the story' and explain or refute the allegations made against him. To defend a divorce would be a very expensive undertaking as legal aid is rarely available in these cases. Furthermore, the respondent may actually want the divorce, but resent having to accept the one-sided and possibly exaggerated picture of the facts presented to the court by the petitioner. This may adversely affect the parties' attitudes in the ancillary proceedings, and indeed in their post-divorce relationship generally. In the end, it is likely to be their children who will, as innocent by-standers, suffer from the hostility engendered between the parties.

²¹² "Facing the Future," op cit n 1, para 3.15.

²¹³ Ibid., para 3.17.

²¹⁴ Idem.

3.23 This leads to a consideration of how the legislation as presently drafted affects the respective bargaining powers of the parties. As the English Law Commission has stated:

*"A spouse who can present an immediate petition because the other's conduct falls within [the behavior or adultery facts] is in a strong bargaining position if the respondent wants an immediate divorce but has no fact upon which to rely. Similarly, where the parties have been separated for two years, the one who does not need a divorce is afforded a bargaining advantage by having the power to refuse consent. It is unfair that the law should distribute the 'bargaining chips' in this way when...the respondent is not necessarily more blameworthy than the petitioner."*²¹⁵

3.24 At the time of the 1969 reforms in England, one of the major areas of concern was the plight of the middle-aged dependent housewife whose husband had left her.²¹⁶ Certain provisions were therefore incorporated into the reform legislation in an effort to protect the "economically weak spouse."²¹⁷ These include the right of the court to dismiss the petition in cases where the divorce could cause grave financial or other hardship to the respondent and, in all the circumstances, it would be wrong to dissolve the marriage.²¹⁸

3.25 A second safeguard is that the court is able to postpone the granting of the decree absolute until it is satisfied, either that the petitioner should not be required to make financial provision for the respondent, or that financial provision, if required, is "reasonable and fair or the best that can be made in the circumstances."²¹⁹

3.26 It seems that in practice these protections are not often invoked by the court.²²⁰ There are other reasons also why their effect may be limited. First, it is usually the marital breakdown, and the separation which follows, rather than the divorce itself, which impose the financial hardship on the dependent spouse.²²¹ Secondly, the safeguards can only be invoked in cases where the petitioner has grounded the action on the "no fault" fact of separation. This seems to imply that protections should not be available to a dependent respondent where any other fact is alleged. This may not always be fair, for, as the English Law Commission states, "there is no guarantee at all that the apparently fault-based facts accurately represent the true responsibility for the breakdown of the marriage."²²²

²¹⁵ Ibid, para 3.20.

²¹⁶ See "The Field of Choice," op cit n 36, paras 38-46.

²¹⁷ See MCO, s 17A.

²¹⁸ Discussed in more detail, supra, Chapter 2.

²¹⁹ See MCO, s 17A(3).

²²⁰ "Facing the Future," op cit n 1, paras 3.28-3.34, esp n 149, see also Phillips, op cit n 12, at 13 and the discussion, supra, Chapter 2.

²²¹ Indeed, the intention behind the legislation appears to have been limited to the protection of, for example, the loss of the right to a widow's pension: "Facing the Future," op cit n 1, n 148.

²²² Ibid, para 3.31.

"To promote minimum bitterness, distress and humiliation"

3.27 A primary reason for the introduction of the "no fault" separation facts in the 1969 reforms was the hope that couples would now be able to avoid the acrimony present in "fault based" proceedings.²²³ The findings from England however, have shown that despite the initial promise of the legislation, the majority of couples still resort to basing their proceedings on allegations of fault,²²⁴ particularly "behaviour," in order to obtain a speedier divorce.²²⁵ (In Hong Kong, by comparison, the figures are not nearly so high.²²⁶)

3.28 The English Law Commission expressed great concern at this state of affairs, as research findings have indicated that this, more than any of the other facts on which to ground divorce, is the most likely to engender bitterness and hostility between the parties.²²⁷ Obliging one party to produce a list of incidents of past behaviour against the other, even if the allegations are true, "is to encourage her to dwell in everything about the marriage and the respondent which is bad and therefore to encourage a resentful and uncompromising attitude [on his part]."²²⁸ This is even more likely if the allegations made are one-sided or exaggerated or untrue. As the Scottish Law Commission has stated, "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."²²⁹

3.29 For the couple's sake, many of the incidents dredged up may best be forgotten. More importantly perhaps is the effect on their children. Again, evidence has shown that the nature of the post-divorce relationship between the parents is crucial in the adjustment of the children to the divorce.²³⁰ This being the case, it is most unfortunate if the legal process itself tends to "provoke or exacerbate unnecessary antagonism between the parties."²³¹

"To protect the interests of children"

3.30 In discussing the background to the 1969 reforms in this area, the English Law Commission has stated:²³²

²²³ See "The Field of Choice," op cit n 36, paras 92-3.

²²⁴ For example, 71% of the divorce petitions in England in 1985 were based on fault facts: "Facing the Future," op cit n 1, para 3.22.

²²⁵ For example, in 1985, 40% of divorce decrees (provisional) in England were based on this fact: *ibid*, n 128.

²²⁶ See Appendix A and the discussion earlier in this chapter.

²²⁷ "Facing the Future," op cit n 1, para 3.25.

²²⁸ *Ibid*, para 3.27.

²²⁹ "The Ground for Divorce: Should the law be changed?" op cit n 202, at 2-3.

²³⁰ "Facing the Future", op cit n 1, paras 3.22, 3.27 and 3.39.

²³¹ *Ibid*, para 3.22.

²³² *Ibid*, para 3.37.

"The need for the law to protect the interests of children whose security and stability is threatened by their parents' divorce has long been recognised. This is one of the reasons why the Morton Commission did not recommend relaxation of divorce laws. However by the 1960s the 'general orthodoxy' among social scientists was that 'a bad marriage was worse for children than the divorce.' The Law Commission in The Field of Choice was careful to reject any generalisation on this point and to conclude that in some cases it would be better if their parents were to stay together and in other cases if they were to divorce. It was recognised however that restrictive divorce laws did not make the parents stay together and that it was the separation rather than the divorce which was usually damaging to the children... Thus, restrictive grounds for divorce do not necessarily safeguard the interests of the children of the parties."

3.31 It may be argued however the state of the law can, as mentioned in the preceding section, have considerable influence on the post-divorce relationship of the parents, which in turn affects the children's adjustment to the divorce. A law which promotes bitterness between the parents cannot be in the best interests of the children.

3.32 Particularly in cases where a fault fact is the basis of divorce, the adversarial nature of the proceedings not only obliges of the parents to take sides but is likely to draw the children into this as well, particularly where custody battles ensue.²³³ Not only may custody contests increase the insecurity felt by children, but the conflict of loyalties which may arise might damage their relationship with both parents. A further disturbing consequence might be that the parent who loses the contest for custody in an adversarial atmosphere, may feel so resentful as to decide thereafter to cut himself off from his children.

"To be understandable and respected"

3.33 In its discussion paper on the topic, the Scottish Law Commission put forward the argument that the present law is misleading:

"It pretends that there is one ground for divorce – irretrievable breakdown – whereas in reality there are five grounds – three based on matrimonial offences and two based on periods of separation ... the law could and should be put on a more honest and straight forward basis."²³⁴

²³³ It is significant that custody or access is more likely to be contested in behaviour cases than in all others: *ibid*, para 3.25.

²³⁴ "The Ground for Divorce: Should the law be changed?" *op cit* n 202, at 1-2.

The Commission concluded in its report however that "it did not matter if the law was misleading in this respect"; that "it was just a matter of words which did not affect what actually happened."²³⁵

3.34 Nonetheless, both the Scottish Law Commission and the English Law Commission have argued that the present divorce regime may encourage the parties to commit perjury.

*"The fact need bear no relationship to the real reason why the marriage broke down. Petitioners will choose a particular fact for practical reasons or on legal advice ... Thus, it is clear that the law in practice is quite different from the law on the statute book. This is not simply an academic problem because the inconsistency is apparent to and causes confusion to litigants."*²³⁶

*"For some couples the choice is between being honest and getting a divorce after two years or telling lies and getting a divorce immediately."*²³⁷

As the English Law Commission concludes on the point:

*"This clear divergence between law and practice can only bring the law of divorce and the administration of justice generally into disrepute."*²³⁸

Collateral matters

3.35 Within the general ambit of the law on grounds for divorce certain related issues arise which may require further consideration. As these matters are really only collateral to the terms of reference of this report, they are included here by way of observation.

Conciliation

3.36 A significant number of consultees expressed concern at the inadequacy of the legal framework designed to encourage conciliation between the parties. As noted in the discussion above, the six-month time limit contained in the provisions permitting trial reconciliations has the unfortunate potential to encourage the parties to separate again as the time limit approaches in order to reserve their rights of action. The difficulty is, of course, that if the law only prescribes either separation or a fault fact on which to establish matrimonial breakdown, how long can the parties continue to stay together before the evidence of that breakdown is lost?

²³⁵ "Report on Reform of the Ground for Divorce," op cit n 2, para 2.15.

²³⁶ "Facing the Future," op cit n 1, para 3.46.

²³⁷ "The Ground for Divorce: Should the law be changed?" op cit n 202, at 5.

²³⁸ "Facing the Future," op cit n 1, para 3.46.

3.37 A number of consultees emphasised the crucial element of timing in the success of conciliation efforts. It was commented that unfortunately most of the provisions of the legislation come into operation too late in the proceedings to be of any real help; for example, the court's power to adjourn the case if there is evidence to suggest a reconciliation might be possible.

3.38 A further issue of importance in this area appears to be that relatively few couples in Hong Kong seek the assistance of conciliation services when their marriages run into difficulties. This may be because of the fact that at present these services remain limited here, however it would also appear that, in any event, the Hong Kong population are largely unaware that these services exist. In the Commission's public telephone survey, for example, only one-third of the respondents indicated that they knew about conciliation services, while a small five per cent said that they actually knew of someone who had made use of one.²³⁹

Damages for Adultery

3.39 The legal provisions relating to adultery were discussed in Chapter Two. An area of the law where reform may be called for is in the continued existence of an action for damages in such cases.

3.40 As already noted, the action for damages for adultery originated out of the notion that the wife was property of the husband stolen by the third party adulterer. Although in Hong Kong this right of action has been extended so as to be available also to the wife, one wonders whether, in the context of modern divorce law, such a cause of action remains appropriate at all. As one writer has stated:

"it is submitted that section 50 of the Matrimonial Causes Ordinance should be repealed and not replaced since its presence on the statute book is in flagrant contradiction of the spirit behind the 'new divorce law' which enabled divorce on the basis of irretrievable breakdown rather than proof of one of the so-called matrimonial offences. It is true that damages under section 50 are supposed to be compensatory rather than punitive but the applicant is still able to assume the role of injured party. In addition the notion that damages should be available against a third party is nonsensical as it suggests that the spouse in question has no free choice in his or her own departure."²⁴⁰

Another has said:

²³⁹ See the discussion of the survey findings, *infra*, Chapter 8 and extracts from the survey report itself at Appendix C.

²⁴⁰ Phillips, *op cit* n 84, at 59-60.

"It is submitted that all actions of this nature should be abolished. The loss of the wife's consortium may be due to the voluntary act of the wife and her adultery an incident of the breakdown of the marriage. When looked at from the point of view of irretrievable marriage breakdown rather than a matter of stealing the husband's property, or the wife's protector, the action for damages against a third party becomes a curious anomaly in the law."²⁴¹

²⁴¹

Pegg, op cit n 44, p77. It has even been suggested that, in the absence of specific legislation to the contrary, the old action for criminal conversation, long since abolished in England, might still be available in Hong Kong: see supra nn 84 and 88.

Another potential area of anomaly in adultery cases concerns the citing of third parties to the proceedings. The Ordinance appears to treat differently the alleged "adulterer" (the third party involved with the wife) and the alleged "adulteress" (the third party involved with the husband). Where the husband alleges adultery, he must make the adulterer a co-respondent in the petition "unless excused by the court on special grounds from doing so": see MCO, s 14(1). This is not so where adultery is alleged by the wife. In that case "the court may, if it thinks fit, direct that the alleged adulteress be made a respondent": see MCO, s 14(2). This is further complicated by the apparent discrepancy between the Ordinance and the Matrimonial Causes Rules, as r13(1) appears to afford the third parties equal treatment.

PART II - THE TIME RESTRICTION : THE CASE FOR REFORM

Chapter 4

The law on the time restriction on petitions for divorce

The relevant legislation

4.1 Section 12 of the Matrimonial Causes Ordinance states:

"(1) Subject to subsection (2), no petition for divorce shall be presented to the court before the expiration of the period of 3 years from the date of the marriage (hereafter in this section referred to as 'the specified period').

(2) A judge of the court may, on an application made to him, allow the presentation of a petition for divorce within the specified period on the ground that the case is one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent ..."

4.2 Applications for leave to petition for divorce within three years of marriage are usually heard by a judge in chambers. These hearings are however subject to appeal, although the appeal court will generally accept the findings of the judge at first instance, unless these are shown to be clearly wrong.²⁴²

History

4.3 Our Hong Kong provision restricting petitions for divorce is based on the former equivalent English provision.²⁴³ The time restriction on seeking divorce early in marriage was not always a part of English law and indeed has a relatively short history. The restriction only came into being with the enactment of the Matrimonial Causes Act of 1937. The main thrust of that Act was to widen considerably the then grounds for divorce: to the

²⁴² Pegg, op cit n 44, at 70.

²⁴³ Contained in the Matrimonial Causes Act 1973, s 3. It should be noted however that the English restriction has been amended to an absolute time bar on petitions for divorce within the first year of marriage. This reform of the law followed the findings of the Law Commission of England and Wales in its report, "Time Restrictions on Presentation of Divorce and Nullity Petitions" (1982) Law Com No 116.

existing ground of adultery was added the further grounds of cruelty, three years' desertion and incurable insanity.²⁴⁴ However, the time restriction did not appear in the original Matrimonial Causes Bill. Its subsequent inclusion seems to have been a compromise measure to ensure the passage through the House of Commons of the more general provisions relating to the reform the grounds for divorce.²⁴⁵

4.4 At the time of the initial proposal for the time restriction it took the form of an absolute bar on divorce during the first five years of marriage. This position changed however when the Bill was put before the House of Lords. They insisted on a further compromise: that the time period be reduced from five to three years and that the bar on petitioning for divorce should not be an absolute one. Their Lordships reasoned that "the cases where divorce was sought early in the marriage were very often the worst cases coming before the court."²⁴⁶ With this, the discretion to permit divorce in cases of exceptional hardship and exceptional depravity was introduced.

Rationale

4.5 It is apparent from the discussion above that the origin of the restriction may have been a political one. Further, it is recognised that the rationale for restricting the availability of divorce where the couple have been married for only a short time is one of public policy.²⁴⁷ The reasoning seems to be that a restriction "is a useful safeguard against irresponsible or trial marriages and a valuable external buttress to the stability of marriages during the difficult early years."²⁴⁸ The restriction is intended to pose an obstacle to the hasty ending of an early marriage which, during an imposed period of reconsideration, might eventually be salvaged. It should also deter hasty remarriage. Nonetheless the issues are not simple. It can be argued that the law should not stand in the way of the dissolution of marriages which are no longer viable; and that "the law should not try to attain the aspiration of making marriages work or last; to do so is in the nature of trying to close the stable door after the horse has bolted."²⁴⁹

"Exceptional hardship"

4.6 There are two exceptions to the rule that no petition for divorce may be presented within three years of marriage: the first of these is the case of "exceptional hardship" to the applicant. The hardship suffered by the

²⁴⁴ These remained the grounds for divorce until the Divorce Reform Act of 1969 which came into force in 1971.

²⁴⁵ Law Commission of England and Wales, Working Paper no 76, "Time Restrictions on Presentation of Divorce and Nullity Petitions," para 6.

²⁴⁶ *Idem*. See also: Hansard (HL) vol 105 (1936-37) cols 730-848, esp per Lord Atkin who described the initial provision as "terrible" and "a kind of 12 1/2 per cent. Discount offered to the opponents of the Bill", *ibid*, cols 755 and 758.

²⁴⁷ See the English Law Commission's Report, op cit n 243, para 2.14.

²⁴⁸ *Idem*.

²⁴⁹ *Ibid*, para 2.12.

applicant must have been "something out of the ordinary,"²⁵⁰ which has "transcended the inevitable hardship caused by divorce."²⁵¹ Thus, the "normal standard of hardship"²⁵² suffered by the petitioning spouse, especially in the cases of adultery or behaviour, would not usually suffice.²⁵³ However, the test is a subjective one: the court is to consider the effect of the alleged conduct on the particular petitioner regardless of how the same conduct would affect the reasonable petitioner.²⁵⁴

4.7 A Hong Kong example of this principle is the case of Kwan Bui Lock v Isabelle Stamm Lock,²⁵⁵ where the applicant husband had become extremely nervous and depressed and had developed a speech problem after his wife's admitted adultery. Medical evidence was produced that the husband's condition was likely to continue to worsen until the marriage was dissolved. The court accepted that, due to the husband's condition, he would suffer exceptional hardship were he to have to wait until the marriage was three years old before being able to apply for divorce.

4.8 However, it has been held that, in deciding whether a case for exceptional hardship or depravity is made out, the court does not determine whether the allegations are true, as that would amount to the judge hearing the petition himself. His role instead is to consider whether if true, the allegations would satisfy the test of exceptional hardship or depravity.²⁵⁶

"Exceptional depravity"

4.9 This would appear to have always been difficult to establish and the courts "have found it difficult to describe any particular conduct as exceptionally depraved"²⁵⁷ particularly in the light of changing norms of behaviour in recent years. It would seem that it is not confined to sexual depravity and perversions and that even "extremely bad adulterous conduct" would not suffice.²⁵⁸ In one case,²⁵⁹ the court was unable to find the respondent's homosexual behaviour to be "exceptionally depraved". However the applicant wife succeeded in obtaining leave to petition for divorce on the ground that her knowledge of the truth about her husband would continue to cause her exceptional hardship so long as the marriage continued.

²⁵⁰ Fay v Fay [1982] AC 835 (HL).

²⁵¹ The English Law Commission's Working Paper, op cit n 245, para 17.

²⁵² Brewer v Brewer [1964] 1 WLR 403, at 413, per Pearson LJ.

²⁵³ The English Law Commission's Working Paper, op cit n 245, para 17.

²⁵⁴ Pegg, op cit n 44, at 70.

²⁵⁵ DC, MP No 106 of 1979.

²⁵⁶ G v G (1968) 112 Sol Jo 481. See also the English Law Commission's Working Paper, op cit n 245, para 14.

²⁵⁷ Pegg, op cit n 44, at 69.

²⁵⁸ The English Law Commission's Working Paper, op cit n 245, para 20.

²⁵⁹ C v C [1980] Fam 23.

Reconciliation prospects and children

4.10 Even where a case for exceptional hardship or depravity has been established, the court must take into account certain other factors before granting the leave to petition for divorce. Section 12 continues:

"... but in determining the application the judge shall have regard to the interests of any child of the family ... and to the question whether there is reasonable probability of a reconciliation between the parties during the specified period."

4.11 In relation to the question of whether attempts at reconciliation have been made, an application was refused in a Hong Kong case where a Chinese husband, who alleged that his wife had committed adultery with two European servicemen, made it clear to the court that he would not consider any attempt at reconciling with his wife, because of the loss of face involved.²⁶⁰

²⁶⁰ Chan Wing Ming v Chan Li Li [1957] HKLR 474.

Chapter 5

Criticisms of the current law

5.1 In looking into the question of whether reform of the law in this area is required, particular issues of concern have been raised elsewhere which should be taken into account.²⁶¹ These matters are discussed below in the light of responses received by the Commission during its consultation exercises.

The philosophy of modern divorce law

5.2 Under our present system, the sole ground for divorce is the irretrievable breakdown of marriage and the expressed intention of the law is to allow the empty shell of the broken marriage to be destroyed with the minimum of bitterness, distress and humiliation to the parties concerned.²⁶² At the same time, however, the law obliges couples to stay together in the early years of marriage, even where the relationship is a troubled one, in the hope that time will resolve their differences. As one of the consultees has argued, the early years of marriage involve a lot of mutual compromise for any couple, and can be very unstable and stressful. The present law provides an obstacle to hasty divorce, and, in the imposed period of reconsideration, reconciliation can occur.²⁶³ As we have already noted however, the rationale behind the restriction on divorce in early marriage is essentially one of public policy. Side by side with the purportedly neutral concept of "irretrieval breakdown," it could be argued that the law is, in this regard, inconsistent.²⁶⁴

5.3 By way of comparison, provisions restricting divorce early in marriage have either been modified, removed or were never introduced in a number of other similar legal jurisdictions.

5.4 The legislation in England and Wales relating to grounds for divorce is essentially the same as that applying here in Hong Kong. However the three year restriction on petitions for divorce was abolished there in 1984 and was replaced by an absolute bar on petitioning for divorce within

²⁶¹ See especially the comments of the English Law Commission in its Working Paper, op cit n 245, paras 46-55 and its Report, op cit n 243, paras 2.3-2.8.

²⁶² "The Field of Choice," op cit n 36, para 15.

²⁶³ Another consultee has commented however that, "it is impossible to legislate against emotions. People, especially young people, will rush into marriage whatever their elders or the legislation may say. To place difficulties in the way of divorce as a means of deterring hasty marriages is to grasp the wrong end of the stick. If hasty marriages are to be deterred, the legislation should make marriage, not divorce, more difficult.

²⁶⁴ As stated by one consultee, "It is a contradiction in terms to say that the only ground for divorce is that the marriage was irretrievably broken down and then to go on to say that, notwithstanding that this is what the Petitioner alleges, the parties should take time to reconcile their differences if possible."

the first year of marriage.²⁶⁵ This change to the law followed the recommendations of the English Law Commission in its Working Paper²⁶⁶ and Report²⁶⁷ which have been referred to in the preceding chapter of this report.

5.5 In Scotland there has never been a similar bar or restriction on divorce petitions within the early years of marriage. The introduction of such a provision was apparently considered at the time when the Scottish law on divorce was being brought into line with that of England and Wales, under the Divorce (Scotland) Act 1976.²⁶⁸ It was concluded however that such a provision was not necessary, as the statistics relating to its actual operation "gave little support to the view that the existence of a time restriction made any material contribution towards the objectives of a good divorce law."²⁶⁹ Accordingly, although the present grounds for divorce in Scotland are similar to our own in Hong Kong, a couple may seek a divorce in Scotland from the earliest days of their marriage.

5.6 Singapore, by contrast, also has a similar system of grounds for divorce to Hong Kong,²⁷⁰ but, like Hong Kong, also has the same three year time restriction on the presentation of divorce petitions.²⁷¹

5.7 Australia and New Zealand have both reformed their systems of grounds for divorce to "no fault," "separation only" systems.²⁷² In Australia, the couple must be separated for at least one year, while in New Zealand, the period is two years. In neither is there a bar or restriction upon seeking divorce in the early years of marriage (although in Australia conciliation counselling is compulsory if the couple have been married for less than two years).

5.8 The ground for divorce in Canada under federal legislation²⁷³ is the "breakdown of marriage"²⁷⁴ which is established either by one year's separation or by the respondent having committed adultery or "treated the other spouse with physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses."²⁷⁵ Canada is another jurisdiction where there appears to be no bar or restriction on seeking divorce early in the marriage.

²⁶⁵ See the Matrimonial and Family Proceedings Act 1984, s 1, which amended s 3 of the Matrimonial Causes Act 1973.

²⁶⁶ Op cit n 245.

²⁶⁷ Op cit n 243.

²⁶⁸ See the discussion contained in the English Law Commission's Working Paper, op cit n 245, paras 42-44.

²⁶⁹ Ibid, para 44.

²⁷⁰ Although the specified separation periods differ: in Singapore separation with consent requires 3 years separation (cf 2 years in Hong Kong), while separation without consent requires 4 years (cf 5 years in Hong Kong).

²⁷¹ Women's Charter, Cap 353.

²⁷² These reforms were effected by the 1975 Family Law Act in Australia and by the Family Proceedings Act 1980 in New Zealand.

²⁷³ Divorce Act 1985.

²⁷⁴ Ibid, s 8(1).

²⁷⁵ Ibid, s 8(2).

5.9 Under the Marriage Law of the People's Republic of China²⁷⁶, it is stated that divorce "shall be granted if husband and wife both desire it."²⁷⁷ If divorce is sought by only one of the parties, "the party may appeal directly to a people's court to start proceedings."²⁷⁸ In dealing with divorce cases, the people's court "should carry out mediation" but "divorce shall be granted if mediation fails because mutual affection no longer exists."²⁷⁹ The restrictions applicable on seeking divorce under the Chinese system include that "a husband may not apply for a divorce when his wife is pregnant or within one year after the birth of the child"²⁸⁰ but do not include any express restriction or bar on seeking divorce early in the marriage.

5.10 In terms of reconciling the restriction on early divorce with the stated philosophy underlying modern divorce law, perhaps the most difficult issue concerns the question of fault. As we have seen, the criteria applied to invoke the exceptions to the restriction, of hardship and depravity, relate mostly to the "fault" of the respondent. This clearly runs contrary to the more modern, non-fault trends in the law of divorce.²⁸¹

Mitigation of "bitterness, distress and humiliation"

5.11 As noted above, the requirements of establishing either "exceptional hardship suffered by the petitioner," or "exceptional depravity on the part of the respondent," may oblige the petitioner to make extremely damaging allegations against the other spouse in order to convince the court that the case is an exceptional one. The English Law Commission has commented:

"Although the present law of divorce is designed to minimise 'bitterness, distress and humiliation,' it seems that the making of the allegations thought to be necessary to ensure that leave is given often causes considerable bitterness, distress and humiliation even to the extent of jeopardising any reasonable settlement between the parties about financial provision and arrangements for custody of and access to children."²⁸²

5.12 It has been argued²⁸³ that the "ill-will and suffering"²⁸⁴ which may be generated by the present application procedure cannot be entirely justified when the main achievement of the restriction is to "defer rather than to deter"²⁸⁵ divorce.

²⁷⁶ Promulgated by Order No 9 of the Standing Committee of the National People's Congress on September 10, 1980. See discussion of these provisions, supra, Chapter 1, at paras 1.31 to 1.37.

²⁷⁷ Ibid, art 24.

²⁷⁸ Ibid, art 25.

²⁷⁹ Idem.

²⁸⁰ Ibid, art 27.

²⁸¹ See further the English Law Commission's Report, op cit n 243, para 2.16.

²⁸² Ibid, para 2.5. (Emphasis Added).

²⁸³ Ibid, para 2.8.

²⁸⁴ Idem.

²⁸⁵ Idem.

Maintaining judicial consistency

5.13 The English Law Commission has commented²⁸⁶ that there may be a problem in this area of divergence in judicial practice. One judge has remarked:

*"The principal difficulty lies in knowing what standards to use in assessing exceptional hardship and what is meant by the phrase exceptional depravity. Both involve value judgments of an unusually subjective character ... moreover, standards in society in these matters are not stable and are subject to considerable changes over comparatively short periods of time ... the change in the basis of divorce from the matrimonial offence to irretrievable breakdown with the expectation of relatively easy divorce may have increased the hardship involved in waiting for the specified period to elapse."*²⁸⁷

5.14 It has been suggested that the wide discretion available to the court in determining whether circumstances are "exceptional" or constitute "exceptional hardship" or "exceptional depravity" might also cause difficulty for applicants. If there is general uncertainty as to which cases fall within the exceptions, potential applicants might be discouraged at the outset from making applications, or, if they choose to persevere, may be inclined to make extreme allegations in an effort to ensure the application will succeed.²⁸⁸

5.15 Following public consultation on the topic, the English Law Commission concluded that "although some divergence in judicial approach is inevitable in any system dependent upon the exercise of a discretion, lack of certainty on the scale which comments suggested seems to us to be manifestly unsatisfactory."²⁸⁹

Effectiveness in meeting its objectives

5.16 As has been noted above, one of the main objectives of the restriction seems to be that by making divorce more difficult to obtain it will help to "buttress the institution of marriage."²⁹⁰ A counter argument has been noted above however that the restriction may merely assist to "defer" not to "deter" divorce.²⁹¹

5.17 In Scotland, where there is no time restriction or time bar, divorce statistics have been cited to bear out the argument that the restriction

²⁸⁶ Ibid, para 2.6.

²⁸⁷ *C v C* [1980] Fam 23, at 26-27, per Ormrod LJ.

²⁸⁸ English Law Commission's Report, op cit n 243, para 2.6.

²⁸⁹ Idem.

²⁹⁰ See "The Field of Choice," op cit n 36, paras 13-19.

²⁹¹ English Law Commission's Report, op cit n 243, para 2.8.

does little in practice to "save" marriage.²⁹² It has been argued that there is little evidence to suggest that the time restriction has encouraged spouses to "face and resolve their differences in the period of adjustment which necessarily follows marriage;"²⁹³ and that, "where the spouses' incompatibility is revealed in the early days of marriage, the balance of social advantage clearly lies with the speedy termination of the marriage."²⁹⁴

5.18 The essential issue appears to be whether the existence of the restriction makes any material contribution to supporting "live" marriages and burying "dead" ones.²⁹⁵ One of the Hong Kong consultees has expressed his view on this point in the following terms -

"If two married people have parted with a settled intention never to resume cohabitation, it is difficult to see how a rule restricting the right to file a divorce petition can be justified on the basis that it will keep them 'together.' All it can do is keep them married in a technical sense when the marriage is no more than an empty legal shell. A time restriction on the filing of a petition cannot preserve a marriage which has irretrievably broken down any more than the postponement of an application for a death certificate can alter the fact of death."

5.19 An interesting factor which came out of the English Law Commission's study of this area, (and which was borne out by the comments of a number of consultees in Hong Kong) was that many people, regardless of their particular educational or socio-economic background etc, were in fact quite ignorant of the restriction and expressed surprise at its existence to their solicitors when seeking advice on divorce.²⁹⁶ This immediately begs the question of how effective a deterrent to divorce the restriction provision can be, if few people actually know about it.

²⁹² Report of the Scottish Law Commission, "Divorce – The Grounds Considered" (1967) Cmnd 3256.

²⁹³ Ibid, para 30.

²⁹⁴ Idem.

²⁹⁵ See the English Law Commission's Report, op cit n 243, para 2.10.

²⁹⁶ Ibid, para 2.15.

PART III - OPTIONS FOR REFORM

Chapter 6

Grounds for divorce: the options considered

6.1 The laws of different countries reflect a variety of approaches to the issue of grounds for divorce. If there is a basic common factor between the approaches, it appears to be the extent to which the "fault" of the respondent is or is not required to be shown. Most systems fall within one of the following three categories: a "fault" regime which, as in our former system, requires the respondent to have committed some matrimonial offence before any right to a divorce arises; a combination of both fault and "no fault" criteria, as in our present system; and a "no fault" regime which grounds the divorce upon neutral criteria, such as the separation of the parties for a defined period.

6.2 It is clear that in recent years there has been a general shift away from strict fault-based divorce.²⁹⁷ It is apparent from the discussion below that many countries, whose divorce systems have developed similarly to Hong Kong's, are at present in the process of adopting, if they have not already done so, systems of divorce which are as neutral in approach and as non-adversarial in procedure as possible. The following paragraphs outline some of these reform models and examine how suitable each of these might be for Hong Kong.

Present system with reduced separation periods

6.3 As in our won case, the present Scottish system of grounds for divorce is based on equivalent English legislation. For the purposes of public consultation, the Scottish Law Commission published in 1988 a discussion paper entitled, "The Ground for Divorce: Should the law be changed?"²⁹⁸ The paper set out various objections to the existing law²⁹⁹ and suggested two options for reform: divorce after a period of separation only and divorce after the expiry of a period of notice.

6.4 After considering the various public responses it received, the Commission released its report, "Reform of the Ground for Divorce"³⁰⁰ in 1989. The Commission had now modified its standpoint and the reforms put forward in its report were far less "radical," to use the Commission's own term,

²⁹⁷ "Facing the Future," op cit n 1, para 4.3.

²⁹⁸ Op cit n 202.

²⁹⁹ Ibid, at 1-6.

³⁰⁰ Op cit n 2.

than those proposed in the discussion paper. Apparently the range of responses received had been very wide, from, at one extreme, calls for divorce on demand at a registrar's office, to, at the other, a return to the old pre-War regime where "the only grounds for divorce were adultery and desertion and where not even extreme cruelty was a ground for divorce."³⁰¹

6.5 The Commission's modified reforms consisted simply of retaining the existing mixed fault and no-fault system, but reducing the periods of separation from two and five years to one and two years respectively. The Commission summarised its proposals in this way:

"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 disappearance of divorce for desertion is consequential on this [(d) above]."*³⁰²

6.6 The Commission saw the following advantages in these proposals: it would not alter the basic structure of the existing divorce law; it was unlikely to "go beyond what is acceptable to a broad spectrum of responsible opinion;"³⁰³ the new separation periods would answer the criticism that the existing periods were too long; on the other hand, victims of serious matrimonial offences would not be prejudiced; and, perhaps most importantly in the light of the Scottish statistics, this new regime should divert many actions away from the divisive "behaviour" ground towards the neutral separation grounds³⁰⁴.

6.7 This moderate "half-way house" between the present system and the more radical non-fault systems outlined below, was the one most favoured by the Commission for adoption in Hong Kong in its consultation paper.³⁰⁵ It received wide support from consultees who appreciated that it would enable the present structure to be retained, while still introducing quite major reforms. Findings from the public telephone survey, which are discussed in detail in Chapter 8, would tend to indicate that substantial support exists in the community for a reduction in the present separation periods, but for the retention of certain fault elements in the law of divorce.

6.8 Consultees who were not in favour of the proposal expressed views ranging from two extremes: on the one hand, some argued that a "holistic" approach needed to be taken to reforming the law of divorce and that the basic problems with the law could not be resolved simply by "tinkering"

³⁰¹ Ibid, para 1.3.

³⁰² Ibid, paras 1.1 – 1.2.

³⁰³ Ibid, para 1.12.

³⁰⁴ Idem.

³⁰⁵ Op cit n 9.

with the separation periods; on the other hand, it was argued that the proposed separation periods were far too short and that the reforms in general would have a de-stabilizing effect on the institution of marriage.

6.9 As noted above, one of the main reasons that shortened separation periods were advanced in Scotland was in answer to the marked trend (evident in both Scotland and England) of an over-use of the fault-based facts in order to obtain speedier divorce. Interestingly, this same phenomenon is not reflected in the Hong Kong divorce statistics.³⁰⁶ Perhaps for the reason that "special procedure divorce" is not available here in behaviour cases, the rate of petitioners citing fault facts in Hong Kong is much lower than in those two jurisdictions, with the majority citing instead two years separation with consent.³⁰⁷ Nonetheless, the consultation results appear to bear out a majority view that shorter separation periods combined with some element of fault would not be an inappropriate option for Hong Kong.

"Process over time"

6.10 In its discussion paper,³⁰⁸ the English Law Commission proposed radical changes to its present system of mixed fault and no-fault criteria for divorce. The model proposed has been termed the "process over time". Briefly, the basic ground for divorce, of irretrievable breakdown, would remain, but there would be no requirement to establish any particular fact as the basis for divorce.

6.11 Proceedings would be commenced by one or both parties giving notice and filing a statement with the court that the marriage had irretrievably broken down. An initial court hearing might take place. At the end of a given transition period, the divorce decree, termed a "dissolution of marriage," would be available as of right. (The period of transition recommended by the Commission in its final report is 12 months overall.³⁰⁹)

6.12 During the course of this period the parties would be encouraged to seek conciliation in order to resolve all of the matters upon which they would have to agree, such as custody, maintenance and division of matrimonial property. If they were unable to reach agreement between themselves, these matters would be decided by the court before the grant of dissolution would be given.

6.13 The Commission justified its radical departure from the former system by the following reasoning:

"The main advantage of such a scheme is that it combines the logical position that the only true test of breakdown is that one or both parties consider the marriage at an end, with the need to

³⁰⁶ See the figures given, *infra*, at Appendix A.

³⁰⁷ *Idem*.

³⁰⁸ "Facing the Future," *op cit n 1*.

³⁰⁹ *Op cit n 2*, para 5.27.

*provide a period of reflection and transition. Once it is accepted that the present system provides neither a real test of breakdown nor any real obstacle to divorce for most people, then the proposed procedure can be seen as an improvement. Because divorce would not be available immediately, it would be not be 'too easy.' Attention throughout the process would be focussed on the continuing obligations of the parties in respect of their children and financial arrangements. The object would be to enable both parties to maintain their relationship with their children, while making the necessary arrangements for the future in as civilised a manner and timespan as can be achieved.*³¹⁰

6.14 The overall effect of these reform proposals would be to alter drastically the basis of the present divorce law in England. When the English Law Commission's final report was published in 1990³¹¹ it met with "wide support" from lawyers and the public alike.³¹² In the period since then however, doubt has been cast as to whether, because of the removal of all elements of fault and the extensive funding which will be required for the proposed national conciliation scheme, the "radical reforms" embodied in the Report will ever "see the light of day in the foreseeable future."³¹³

6.15 In Hong Kong, the same doubts concerning the likelihood of adequate funding for conciliation services were expressed by some of the several consultees who strongly advocated reforms similar to the "process over time" formula. Another difficulty with this option in the Hong Kong context is that the consultation responses, particularly those gathered during the public telephone survey, would tend to indicate that Hong Kong is not yet be ready for an entirely "no fault" system of divorce.

"Separation only"

6.16 The former divorce regimes of both Australia and New Zealand were similar to our present one. However both jurisdictions have reformed the "mixed" system (of fault and no-fault facts) to a system where the sole method of proving irretrievable breakdown is the fact of separation. The Australian change was introduced in the 1975 Family Law Act and specifies a period of one year's separation. In New Zealand, the Family Proceedings Act of 1980 defined the relevant period as two years.

6.17 The advantage of the no-fault, separation-only ground is that it focusses the proceedings on an objective, morally neutral fact, not on allegations of misconduct by one party about the other. As a consequence, the divorce process in itself is unlikely to provoke feelings of hostility between

³¹⁰ Op cit n 1, para 5.25.

³¹¹ Op cit n 2.

³¹² See for example: "Wide support for reform plan," The Law Society Gazette, Nov 7 1990; "Divorce fit for a modern marriage," The Times, Nov 2 1990.

³¹³ See "Divorced from reality," New Law Journal, Nov 9 1990 and "Mackay backs away from no-fault divorce," The Law Society Gazette, Dec 4 1991.

the parties, in contrast to fault-based actions under our own system. As we have seen in the foregoing chapters, this is a major factor in what determines a "good" divorce law. It also has the virtue of simplicity. As the English Law Commission has stated, "where separation is the sole ground, the divorce law is simple and easily understood and the divorce process can be cheap and unacrimonious."³¹⁴

6.18 This system is not without its disadvantages, however. In cases where one party has been guilty of very bad conduct towards the other, the victim is unable to use such conduct as ground to escape the marriage and must instead wait out the full term of required separation. This may not be of much concern in Australia, where the separation period is only one year, but this must surely cause difficulties on occasions in the New Zealand case.

6.19 Another concern is the fact that separation itself must be achieved before the parties are in a position to seek divorce. Economic limitations may make actual separation difficult to achieve and may affect the bargaining power between the spouses. As the English Commission has observed:

*"In times or places of housing shortage, particularly in the rented sector, this clearly operates differently as between different socio-economic groups and as between husbands and wives. Thus, spouses with dependent children without alternative accommodation are prejudiced and the ability to separate becomes a 'bargaining chip.'"*³¹⁵

6.20 The Australian and New Zealand legislation endeavours to remedy this by expressly providing for the possibility of the parties being "separated" but still living "under one roof."³¹⁶ This approach does not find favour with the English Commission however:

"Under present English case law"³¹⁷ it is theoretically difficult to establish separation under one roof. Although this could be changed by statute, it is highly likely that any new definition would soon give rise to difficulties which would have to be resolved by litigation. No doubt a body of case law would soon be built up, which would add undesirable complexity to divorce law and be of benefit only to lawyers. If it became necessary to check whether the requirements of separation under one roof were fulfilled by oral hearing in every case, then this would involve additional expense, which could not easily be justified. On the other hand, if the parties' assertion that they have been living separately under one roof is to be accepted without any form of verification, the whole requirement of [one or two years'] separation becomes something of a charade."³¹⁸

³¹⁴ "Facing the Future," op cit n 1, para 4.9.

³¹⁵ Ibid, para 4.10.

³¹⁶ For example, the Australian Family Law Act 1975, s 49(2).

³¹⁷ And also that of Hong Kong: see Pegg, op cit n 44, at 92-94.

³¹⁸ "Facing the Future," op cit n 1, para 5.11.

6.21 It is for these reasons that, despite its neutral stance, a divorce system based solely on the separation fact did not find favour with consultees. In order to divorce, couples must effect separation, as only on this fact can their divorce be based (even if one of the parties has committed adultery or is guilty of unreasonable behaviour).

6.22 Accommodation in Hong Kong is in short supply and what there is very costly. The courts here, as in other jurisdictions, may endeavour to get around this by offering a more flexible interpretation of "separation," by providing for a form of separation "under one roof." However, as the majority of families in Hong Kong are obliged to live in relatively cramped conditions in any event, physical realities may necessitate such a liberal interpretation of "separation under one roof" as to render any such limitation meaningless. Rather than use strained and artificial logic in order to hold that a separation has occurred, it might be preferable to do away with this requirement altogether and to simply opt for "giving notice" as in the systems outlined below.

"Unilateral demand"

6.23 Under this system, divorce is available, sometimes immediately, upon one party unilaterally declaring that the marriage has irretrievably broken down.

6.24 This system of divorce, in the case where immediate divorce is available, has two major defects: it would appear to provide the parties with very little opportunity for reflection before the matter is processed and, in giving little time for the parties to adjust to the fact of the divorce, it necessitates that the ancillary matters, such as custody, maintenance and the division of matrimonial property, be resolved separately, and usually after, the divorce itself.

6.25 There seems to be a general perception that such a system, which is essentially "divorce on demand," would make drastic inroads into the protections to the institution of marriage which are afforded under the present regime. The English Commission did however make the point that divorce under our present adultery and behaviour facts can strongly resemble immediate unilateral demand, "given the disincentives to defending and the lack of serious questioning of the petitioner's allegations."³¹⁹ The Commission went to concede however that:

"Nonetheless, it is unlikely that public opinion would accept a simple system of immediate divorce on unilateral demand ... because the present system appears to provide some moral basis for divorce and some test of breakdown."³²⁰

³¹⁹ Ibid, para 5.20.
³²⁰ Idem.

6.26 This would seem to be the view taken in Hong Kong also, as this option received little or no support from those consulted.

Consensual divorce

6.27 This describes a system where both parties concur in a mutual decision to divorce. It was recognised in the consultation paper that there must be many instances of divorce, particularly in the separation-consent cases, where, although the marriage between the couple has broken down irretrievably, they do not harbour ill-will towards each other and would prefer to petition jointly for divorce. It was noted that the present system necessitates that one be seen to be petitioning against the other. This may be totally artificial and add unnecessary distress where the couple are divorcing in truth by mutual consent

6.28 The consultation paper advocated the introduction of some form of procedure allowing parties to make a joint application for divorce if they so wish. This proposal received strong support from the consultees and has been developed in this report into a proposal for an additional, new fact of divorce by mutual consent, which is considered in detail in Chapter 8.

Chapter 7

The time restriction: the options considered

7.1 Earlier, in Chapter 5 of this report, a number of shortcomings of the law in this area were discussed. The following paragraphs outline the various options for reform which have been under consideration by the Commission.

Retention of the current law

7.2 A small number of consultees in the initial consultation exercise on this topic argued strongly in favour of retaining the present three year restriction on petitioning for divorce. Approximately 30% of those surveyed in the public telephone survey also agreed that the present law should remain as it is. These consultees appear to base their view upon the argument that to reduce or abolish the present restriction was to threaten to undermine the stability of the institution of marriage.

7.3 The majority view of consultees however, both amongst the "special interest groups" and the general public, was that the present law should be changed. The written consultation responses covered a wide spectrum of proposed alternatives, as did the comments received in response to the telephone survey. These alternatives are considered below.

Shortening the restriction period

7.4 There was a majority consensus amongst the consultees who provided written responses to the Commission, and a significant number who agreed amongst those who were consulted during the public telephone survey, that the retention of some form of restriction or bar on petitions for divorce during the early years of marriage was necessary, but that the present period of three years was too long. Within this group views ranged as to the appropriate period.

7.5 In its consideration of an appropriate period under this head, the English Law Commission identified the need to seek a balance between two extremes. In their view the appropriate time limit is one which would -

"... neither impose unnecessary hardship on people whose marriages have genuinely and irretrievably broken down and who may be in a severe state of distress as a result, nor make

divorce so rapidly available that marriage becomes a mere transient state capable of being repudiated at whim."³²¹

7.6 It is recognised however that the decision to select a particular time period for the restriction is an arbitrary one.³²² How does one quantify what the "minimum" duration of marriage should be? To express the issue in another way, how long should the law require a couple to stay together to "make a go of their marriage" before allowing them to terminate it and seek happiness elsewhere?

7.7 The arbitrariness of the choice of time period is evident in the consultation responses which ranged from between increasing the period to five years or above, to abolishing the need for it all altogether. However, the majority of those who advocated the retention of a reduced restriction period spoke in terms of a one or two year period as being appropriate.

7.8 During its deliberations the English Law Commission canvassed an argument that the period of the time restriction should correspond with the minimum period of separation required to establish a ground for divorce (ie – at present two year³²³). The rationale for this approach was that not only would this ensure consistency within divorce legislation, but it would also counter "the strongest objection to the present rule," that "it may operate to keep in existence, contrary to the parties' wishes, the legal shell of a marriage which has irretrievably broken down."³²⁴ If it is accepted that a period of separation is cogent evidence of marital breakdown and that a substantial period of time separated indicates that the breakdown is irretrievable, then arguably the law is inconsistent in requiring of spouses, as it presently does, a longer period of separation where the breakdown has occurred shortly after the marriage.

7.9 On the other hand, the English Law Commission seemed to accept that:

*"... the policy factors which should govern the selection of the period of separation sufficient to raise an inference of breakdown are not exactly the same as those which should govern the selection of a minimum period from the date of the marriage within which divorce should be regarded as exceptional, the more so since petitions may well be based on a 'fact' other than separation."*³²⁵

7.10 In the consultation paper it was suggested that, if the decision is ultimately an arbitrary one, the typing of the shortened period of the restriction to the minimum separation period would at least provide some rational justification (other than simply that the reform appears to reflect majority opinion) for the particular time limit chosen.

³²¹ See the English Law Commission's Report, op cit n 243, para 2.29.

³²² Op cit n 245, para 78.

³²³ MCO, s 11A(1)(d).

³²⁴ Op cit n 245, para 78.

³²⁵ Idem.

7.11 Another crucial aspect of the proposal to retain the restriction on early divorce concerns the retention also of the exceptions to that restriction. Much of the criticism of the present law discussed in Chapter 5 concerned the negative consequences inherent in applying the present "hardship" and "depravity" exceptions. On this basis a significant number of consultees advocated the option adopted in England and discussed below of reducing the relevant period but also imposing an absolute time bar on bringing petitions for divorce.

7.12 Other consultees argued, however, that even if the relevant period were to be substantially shortened, exception provisions should still exist in order to provide relief to applicants in extreme cases.

Imposing an absolute time bar

7.13 As noted above, adopting this option would mean that no petition for divorce could be presented under any circumstances before the expiration of a specified period, presumably one substantially shorter than the present three years. Again, as stated above, it would be necessary to reduce the present three year period if an absolute time bar were to be imposed, as it would alter the present law by removing the relief afforded in the exceptional hardship and depravity cases.

7.14 This was the option favoured most by the English Law Commission who reasoned:

"The justification for a time restriction is one of public policy; it would devalue the institution of marriage to make divorce readily obtainable within days of the marriage. The present law is on this view based on a sound principle but is objectionable because of the unsatisfactory nature of the exceptions whereby the court may allow a petition to be presented. ... Although it would be possible to construct other exceptions, none of them is entirely satisfactory. The law would on this view be simpler and more comprehensible if it asserted the general policy by means of an absolute bar on divorce in early marriage."³²⁶

7.15 The issue remains as to how the law would deal with the hardship cases which no doubt would still arise, if no relief were to be offered by way of exceptions to the general rule. This was the main factor raised in consultee responses which rejected the absolute time bar approach.

³²⁶ Ibid, para 80.

Abolishing the restriction

7.16 A significant 35% of those canvassed during the public telephone survey expressed the view that the present restriction on petitioning for divorce early in marriage should be abolished. The proportion of consultees from the special interest groups advocating this view is much lower (partly on the basis, it would seem, of a perception that the proposal would be far too radical to be acceptable to the population of Hong Kong).

7.17 As has been stated before, one of the strongest arguments in favour of retaining the time restriction is that it should "buttress the stability of marriage." It is thought that by obliging couples to stay married to each other during the "difficult early years" the restriction theoretically discourages hasty divorce and remarriage.³²⁷ On the other hand the restriction cannot prevent couples who wish to separate from doing so. It can therefore be argued that "the restriction only preserves, for an arbitrary period of time, the legal bond between some couples whose marriage has in fact broken down"³²⁸ and as a result, "the main effect of the present restriction is to delay rather than prevent divorce."³²⁹

7.18 This was borne out by a comparison of the divorce statistics in England and Wales which formerly had the same restriction provision as Hong Kong, and Scotland, which has never had such a provision. The comparison revealed that -

"... in England and Wales the number of divorces in the first three years of marriage is low compared with that for subsequent years of marriage and that ... the proportion is lower than in Scotland for the same period. In England and Wales the figures, however, increase rapidly in the fourth and subsequent years; and by the seventh year the proportion of marriages ending in divorce in [England and Wales and Scotland] ... has become almost equal."³³⁰

7.19 The Scottish experience seems to suggest, contrary to what one might expect, that large scale resort to divorce immediately after marriage is not a necessary or probable consequence of the absence of a restriction or time bar on divorce.³³¹ As the English Commission was obliged to conclude, this "may well be thought to weaken the force of the argument that the three year restriction has a positive role in buttressing the institution of marriage."³³²

7.20 Another argument in support of abolishing the restriction is its apparent inconsistency with the overall policy of present divorce legislation. If the basic principle of the law is that divorce should be available whenever a

³²⁷ See the English Law Commission's Working Paper, op cit n 245, para 56.

³²⁸ Ibid, para 50.

³²⁹ Idem.

³³⁰ Ibid, para 49.

³³¹ Ibid, para 61.

³³² Ibid, para 49.

marriage has broken down irretrievably, why should it matter whether the marriage has been in existence for three months or three years?

"Parliament has decided that two years' separation suffices to establish a prima facie case of breakdown. Why, then, should divorce be withheld in some cases because of the irrelevant fact that the parties have been married for less than three years? Again, if the petition is based on the 'fact' that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with him, a court would no doubt properly take the duration of the marriage into account in decide whether or not that fact has been established ... If the court is satisfied, taking into account the whole of the circumstances, that the petitioner cannot reasonably be expected to live with the respondent, why should divorce be postponed?"³³³

³³³

Ibid, para 47.

PART IV - CONCLUSIONS AND RECOMMENDATIONS

Chapter 8

Conclusions

8.1 A divorce must surely be one of the most stressful and damaging experiences that a couple or a family can ever go through. As the English Law Commission has emphasised, it is not simply "a day in court" but a whole "process" of painful change and adjustment which will affect the parties and their children for years to come, if not for the rest of their lives.³³⁴

8.2 Undoubtedly there has been a dramatic rise in the rate of divorce in Hong Kong as elsewhere in recent years, in both the numbers and proportions of marriages being terminated.³³⁵ This being the case, it is appreciated that any proposals to further "liberalise" the law of divorce may be greeted with some hesitation, if not downright objection.

8.3 The sociological factors underlying the development of increasing divorce were considered earlier in this report.³³⁶ The view was advanced that, rather than indicating a decline in the status of marriage as an institution, the divorce figures reflect our modern society's increased expectations of the personal happiness and fulfillment to be derived from being married.

8.4 A basic issue for those involved in the law in this area is: what is the proper role of the law in regulating personal social relationships? In former times, the law of divorce was seen as a means of strictly enforcing the notion of the sanctity of marriage. With its emphasis on matrimonial offences, divorce law was essentially punitive in nature. Parties who wilfully flouted its rulings were considered to be a deviant minority and were accordingly stigmatised. With divorce becoming more and more commonplace, this view seems now to be largely out-moded. The law, responding to social development, has made a steady shift towards non-fault grounds for divorce.

8.5 Studies undertaken by other law reform agencies have unmasked the fact that whatever legal regime for divorce is put in place,

³³⁴ See especially the comments of the English Law Commission as to how the post-divorce adjustment of the children of divorcing parties might be enhanced: "although divorce law itself can do little actively to this end, it can and should ensure that the divorce process is not positively adverse to this adjustment." "Facing the Future," op cit n 1, para 3.50.

³³⁵ In 1970, the number of divorce petitions filed in Hong Kong represented just over 1% of the number of marriages registered in that year. Since 1970 however, while the number of marriages registered each year has more than doubled, the number of divorce petitions filed has increased more than 15 times: see the figures given, infra, at Appendix A.

³³⁶ See supra, Chapter 1, at paras 1.5 – 1.21.

parties will endeavour to use the system to one end: to obtain the quickest and fairest divorce for themselves that they can. This has meant in other jurisdictions that petitioners frequently resort to "over use" of fault-based facts simply to speed up the divorce process.

8.6 By contrast, in Hong Kong the majority of divorce petitions are based on the non-fault separation facts³³⁷ (apparently because of the differences in divorce procedure here).³³⁸ Nonetheless, it appeared from the responses in the consultation exercises that there exists in Hong Kong a strong consensus which would advocate moves to change the present law.³³⁹

8.7 The law in the area of divorce is needed to dissolve the legal tie of marriage between the parties and to ensure that matters regarding the welfare of the children and fair distribution of the matrimonial assets are attended to. Another role of the law in this area, which is not always recognised, is that it provides a "rite of passage" so that the parties involved have a definite point from which to let go of their old lives and to start afresh. Issues for consideration includes: how effectively does the law which is the subject of this report facilitate what has become a fact of modern life – the ever-increasing incidence of divorce? To what further extent than at present can this area of the law be made to fulfil its functions and assist the parties to resolve their divorce with as little harm as possible?

8.8 In the earlier chapters of this report various arguments were canvassed which appeared to call for reforms of the law relating to the grounds for divorce³⁴⁰ and the restriction on divorce early in marriage.³⁴¹ We have also examined a number of possible options for reform.³⁴² In reaching the conclusions and recommendations set out below, the Law Reform Commission has taken careful account of these different arguments and proposals, together with the wide variety of views expressed by those who responded in the consultation exercises.

8.9 In addition to the matters specifically within its terms of reference, the Commission has also commented later below on certain collateral matters which it feels should be reviewed.

Retention of "irretrievable breakdown" as the sole ground for divorce

8.10 The concept of irretrievable breakdown of marriage as the sole ground for divorce has become one of the cornerstones of modern divorce law. It is a principle which in itself is seen as truly reflecting the underlying basis on which divorce situations are founded.³⁴³ Therefore, in the interests

³³⁷ See the figures given, *infra*, at Appendix A.

³³⁸ See *supra*, Chapter 2, paras 2.41 – 2.42.

³³⁹ See especially the findings of the public telephone survey, *infra*, at Appendix C.

³⁴⁰ See *supra*, Chapter 3.

³⁴¹ See *supra*, Chapter 5.

³⁴² See *supra*, Part III.

³⁴³ See *supra*, Chapter 1, especially para 1.20.

of maintaining certainty within the law, the Commission is of the view that this established principle should be retained as the sole ground for divorce.

Retention of the fault/non-fault structure

8.11 Although it may appear to be out of step with the modern shift towards totally non-fault systems of divorce, the Commission also supports the retention of the existing structure of mixed fault and non-fault criteria for establishing irretrievable breakdown.³⁴⁴

8.12 In the earlier consultation exercise on grounds for divorce, there appeared to be far more support for the present mixed system than calls for a complete non-fault system.³⁴⁵ Arguments ranged from permitting couples to "have their day in court" to endeavouring to ensure the safety of victims of abusive spouses.

8.13 The results of the public telephone survey were unequivocal. Support amongst the respondents for the retention of the existing fault facts ranged between 74% (adultery) and 87% (behaviour) compared with 8% and 3% (respectively) of respondents who called for their abolition.³⁴⁶

Retention of adultery and behaviour as separate facts

8.14 On the basis of the above findings, the Commission advocates the retention of the existing fault-based facts of adultery³⁴⁷ and behaviour.³⁴⁸

8.15 An issue was raised by a number of consultees in the early exercise was whether it is justifiable to retain the distinction between the two heads of adultery and behaviour and their separate legal tests.³⁴⁹ Each of the consultees concerned recommended that adultery should be subsumed within a general head of "Behaviour," where the test would be similar to the present requirement that "the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent." Their main contention was that adultery cases should naturally fall within those cases of behaviour where it would be unreasonable to expect the petitioner to continue to live with the respondent.

8.16 The Commission carefully considered these arguments but concluded that, on balance, it was preferable to retain the existing established distinction between the two facts of adultery and behaviour, and their differing legal test; and accordingly, that they should continue to be provided for separately in section 11A(1)(a) and (b) of the Ordinance.

³⁴⁴ See supra, Chapter 2.

³⁴⁵ See the discussion, supra, Chapter 6, esp paras 6.7 – 6.9.

³⁴⁶ See, infra, at Appendix C.

³⁴⁷ See supra, Chapter 2, paras 2.4 –2.9.

³⁴⁸ See supra, Chapter 2, paras 2.10 – 2.14.

³⁴⁹ I.e, a subjective test in the case of adultery and an objective one in the case of behaviour: see supra, Chapter 2, paras 2.4 –2.14.

Separation with consent

8.17 Where both parties consent to the divorce, under the existing provisions they must have been separated for a continuous period of at least two years prior to the presentation of the petition.³⁵⁰ The Commission has come to the view that this two year period should be reduced to one year.³⁵¹ This approach is in line with the Scottish recommendations to reform the separation facts, and received considerable support when it was advocated in the early consultation exercise.³⁵²

8.18 In the findings of the public telephone survey,³⁵³ the majority view (ie, 57% of the respondents) was that the separation period where the parties both consented to divorce should be one year or less (indeed a significant 40% of respondents felt that there need be no minimum separation period in this case, compared with 31% who wished to retain the existing two year period). The underlying view of the majority is perhaps reflected in the words of one of the earlier consultees:

"Where a marriage has continued for some time, and both parties have decided it must end, why should it be necessary for them to undergo a period of limbo before they can get on with their lives? If they genuinely desire to end their marriage, why should society punish them by requiring such a delay, which is not required of petitioners alleging adultery or behaviour?"

8.19 In relation to the procedure involved under this head, the present legislation requires the parties to assume the adversarial roles of petitioner and respondent, even though the fact relied on is the non-fault fact of separation and both parties consent to the divorce. The Commission therefore proposes the introduction of a new procedure permitting the parties to make a joint application for divorce if they so wish.³⁵⁴

³⁵⁰ See supra, Chapter 2, paras 2.22 – 2.27, and Chapter 6, paras 6.3 – 6.9.

³⁵¹ Though at an earlier stage in its deliberations, the Commission had considered retaining the present minimum separation period of two years with consent, on the basis (a) that Hong Kong divorce petitioners do not appear to manifest the same tendency as their English and Scottish counterparts of citing fault rather than non-fault facts in order to obtain a quicker divorce (ie – two years separation with consent is the most frequently cited fact in Hong Kong: see the figures at Appendix A, infra), and (b) some consultees had expressed the view that, for conciliation purposes at least, two years was considered a preferable period in order to assist the parties either to reconcile, or to make their post-divorce arrangements as amicably as possible. (However, another consultee has commented, "it is extremely rare for couples to be reconciled after they have both made the decision to divorce, conciliation only tending to be successful before the parties have reached that decision.")

³⁵² See supra, Chapter 6, para 6.7.

³⁵³ See the figures given, infra, at Appendix C.

³⁵⁴ As one of the consultees has commented, "The adversarial character of our legal system ... has always seemed to me to be unsuitable for dealing with the human misery generated by marital breakdown. I therefore strongly support the tentative initial move away from the adversarial approach which is manifested by the proposal to introduce joint applications for divorce where both spouses consent."

Separation without consent

8.20 As noted above, the Commission is of the view that the present five year minimum period of separation³⁵⁵ should be reduced to two years. The majority of the consultees in the early exercise expressed the opinion that the five year period should be drastically reduced. A number of the consultees suggested a three year period while a similar number accepted the recommendation contained in the consultation paper, that it be reduced to two years. In the public telephone survey, the response was more definitive, with 81% in total considering five years too long, and a majority of 54% advocating two years or less.³⁵⁶

8.21 In cases where the respondent does not consent to the petition, the existing statutory protections would continue.³⁵⁷ Accordingly, the respondent may, as now, oppose the granting of the decree nisi under the present "grave financial or other hardship" provision.³⁵⁸ The respondent may also apply to the court, under section 17A of the Ordinance,³⁵⁹ for the withholding of the decree absolute pending the court's consideration of the financial provision made for the respondent, and the arrangements made for the children of the marriage.

Abolition of desertion

8.22 The responses received in the early consultation exercise indicated that views were mixed as to whether the fact of desertion³⁶⁰ should be retained. Some felt that it was out-moded, with its concentration on fault, however a small number of consultees felt that it was still of use and should be retained. In stark contrast, the public telephone survey revealed that, as with the other fault criteria of adultery and behaviour, there is strong public support in Hong Kong for some retention of the fault element in the law of divorce.³⁶¹

8.23 However, as a consequence of reducing to two years the separation period for divorce where the respondent does not consent, the fact of desertion for a period of two years, as it is presently framed, would be rendered obsolete. Accordingly, the Commission advocates that the fact of desertion should be abolished.³⁶²

³⁵⁵ See supra, Chapter 2, paras 2.22 – 2.27.

³⁵⁶ See the figures given, infra, at Appendix C.

³⁵⁷ These powers are of course in addition to the courts general powers under the Matrimonial Proceedings and Property Ordinance, Cap 192, to make orders in respect of financial provision and property adjustment between the parties.

³⁵⁸ MCO, s 15B. See supra, Chapter 2, paras 2.28 – 2.32.

³⁵⁹ See supra, Chapter 2, paras 2.33 – 2.42.

³⁶⁰ See supra, Chapter 2, paras 2.15 – 2.21.

³⁶¹ See the figures given, infra, at Appendix C.

³⁶² See also the approach taken by the Scottish Law Commission discussed, supra, Chapter 6, para 6.3 – 6.9.

New fact: One year's notice of divorce by mutual consent

8.24 In addition to retaining the existing fault-based facts of adultery and behaviour, and reducing the separation periods to one year with consent and two years without consent, the Commission advocates the introduction of a new "fact" into the divorce legislation, namely divorce by mutual consent after one year's notice.

8.25 Where parties both wish to divorce, this new fact would be available as an alternative to the present fact of separation with consent. Under the new provision, parties who mutually consent to divorce would simply file with the court a joint notice of their intention to divorce, wait a minimum period of one year, and then apply jointly to the court to have their divorce made final. During the one year period of notice, parties would be free to separate, or to stay together in the same household whilst they sort out their divorce arrangements or endeavour to reconcile.

8.26 This is similar to the "process over time" recommendation of the English Law Commission,³⁶³ and the proposal for "divorce after the lapse of a period of time from the giving of notice of intention to divorce,"³⁶⁴ which was the second model suggested by the Scottish Law Commission in its discussion paper on the topic. The merits of this type of proposal were stated thus by the Scottish Law Commission:

"It would not require proof of separation, 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 of what is meant by separation."

The difference between this proposal and those put forward by the English and Scottish Law Commissions is that this would be an additional, not the only, fact on which to base a divorce petition.

8.27 A proposal similar to this one was also advocated by several of the consultees in the early consultation exercise. When the proposal for this new fact was put to respondents in the public telephone survey, 70% expressed support for it. The preferred length of time for the period of notice was one year or less (51% of total respondents).³⁶⁵ In the Commission's view, one of the main advantages of this new provision would be that it would not oblige parties concerned to separate, which can be a difficult undertaking in Hong Kong. As one of the consultees has observed:

"In an overpopulated environment such as Hong Kong very few couples, unless they are among the super rich, can afford to live apart, that is in separate buildings, until all financial

³⁶³ See supra, Chapter 6, paras 6.10 – 6.15.

³⁶⁴ See the Scottish Law Commission's Discussion Paper, op cit n 202, pp 11 – 13.

³⁶⁵ See the figures given, infra, at Appenedix C.

arrangements following divorce are decided. This leads to couples who have decided to divorce sharing the same premises, and having to satisfy a judge that they have separate households, which is totally impractical especially if there are children of the family."

8.28 A second advantage of this fact is that it is non-adversarial. It recognises that the decision to divorce is a mutual one between the particular parties concerned. They give notice jointly to the court at the initial stage and apply jointly after the period of notice to have the divorce made final.

A one year restriction on petitioning for divorce early in marriage

8.29 It was apparent from the responses in the early consultation exercise that the range of views on reforming the law in this area was wide and varied.³⁶⁶ There was, however, a clear call for the present three year period of restriction to be reduced. In the public telephone survey, 54% of the respondents thought that a restriction period of some sort should be maintained. However, a substantial 35% of the remaining minority thought that the restriction should be abolished altogether.³⁶⁷

8.30 The Commission has concluded that a time restriction on petitioning for divorce early in marriage should be retained, but that the present three year period should be reduced so that a party may petition for divorce after only one year of marriage.

8.31 The Commission gave consideration to adopting the other aspect of the approach taken in England, of imposing an absolute bar on petitions for divorce within the first year of marriage,³⁶⁸ so that even exceptional cases would not be permitted to be brought within this period.³⁶⁹ Although the Commission recognised that there may be problems inherent in the present exception provisions relating to "hardship" and "depravity," which were discussed earlier in this report,³⁷⁰ the Commission concluded nonetheless that these exceptions to the general principle of restriction should be retained. In the Commission's view it was essential to have some provision to permit immediate divorce in such extreme case, even if they were only ever few in number.

Collateral matters

8.32 During the course of its consideration of the matters within the terms of reference of this report, certain collateral matters came to the

³⁶⁶ See supra, Chapter 7.

³⁶⁷ See the figures given, infra, at Appendix C.

³⁶⁸ See supra, Chapter 7, paras 7.13 – 7.15.

³⁶⁹ See supra, Chapter 4, paras 4.6 – 4.9.

³⁷⁰ See supra, Chapter 5.

attention of the Commission on which it makes the following recommendations.

Conciliation

8.33 A recurring theme throughout the responses to the early consultation exercise was the call for improved access to conciliation services for parties undergoing the divorce process. The comments seemed to focus on the following issues.

8.34 Respondents were firmly of the view that conciliation was preferable to litigation, and that marriage guidance, mediation and conciliation services could provide great assistance to parties considering or undergoing divorce, particularly in relation to helping them to reconcile or else to sort out their divorce arrangements as amicably as possible. It was felt therefore that more resources than at present should be made available to encourage expansion of the existing services and the development of new services.

8.35 Concern was expressed that general awareness of such services was not very high in Hong Kong and that priority should be given to promoting their usefulness and availability to the general public. There were also calls for more emphasis to be placed on the development of pre-marriage counselling schemes and family-life programmes generally. Doubt was cast by several consultees on the effectiveness of the present legislative provisions designed to promote conciliation.³⁷¹

8.36 The findings of the public telephone survey have borne out the view that the conciliation services available to assist parties going through divorce are not widely known about in Hong Kong. Nearly 70% of the respondents to the survey indicated they were unaware of them. Of those who were aware, only one-fifth said that they knew of someone who had made use of such a service.³⁷²

8.37 The Commission has concluded that there is a need to raise community consciousness about different conciliation services available in Hong Kong in order to promote their use by couples undergoing marital difficulties or divorce.

8.38 A simple first step would be for a promotional booklet to be prepared, giving details of the different types of family counselling, mediation and conciliation services available in Hong Kong (whether government-sponsored, private or voluntary), and listing relevant contact addresses and telephone numbers. This could be actively distributed through such agencies as the Legal Aid Department, the Law Society, the Legal Advice and Duty Lawyers Scheme and law firms generally, as well as

³⁷¹ le, the power of the court under s 15A(1) to adjourn proceedings enable reconciliation attempts to be made, the six month period of allowance given to the parties to attempt to reconcile under s 15(A)(3)-(5), and the solicitor's certificate requirement under s 18B(b), r 12(3) and form 2A (MCR). See *supra*, Chapter 2, paras 2.43 – 2.46.

³⁷² See the figures given, *infra*, at Appendix C.

through the Social Welfare Department and various conciliation agencies themselves. Another means of promotion would be regular screening on television of a government-sponsored community message featuring conciliation services.³⁷³

8.39 The Commission has also concluded that, as the number of divorces increases, the need for such services will continue to increase, and the Government should therefore consider how the development of further services in this area can be accomplished.

8.40 Recent developments have included the Marriage Mediation Counselling Project, a referral scheme operated by the Hong Kong Catholic Marriage Advisory Council in conjunction with the Legal Aid Department,³⁷⁴ and a proposal for the establishment of a family mediation service under the auspices of the Hong Kong International Arbitration Centre.³⁷⁵

8.41 Another type of service was suggested by several consultees in the early consultation exercise and echoes similar proposals of the Hong Kong Council for Social Service Task Force on Family Court.³⁷⁶ This proposal was for a court conciliation co-ordinator to be appointed to act as a liaison between petitioning parties, the court and conciliation agencies. Part of the role of the co-ordinator would be to refer parties to conciliation services where it was thought necessary.

Damages for adultery

8.42 Another matter considered by the Commission, but collateral to its principal recommendations, is the action for damages for adultery presently contained in section 50 of the Matrimonial Causes Ordinance.³⁷⁷ The Commission has concluded that this action, which was originally based upon notions of a husband's proprietary interest in his wife and her services, is now totally out-moded and should be abolished. The Commission is also of the view that, for the removal of doubt, any common law action for criminal conversation which might still be available in Hong Kong, should be expressly abolished by statute.

³⁷³ Similar to, for example, those used to promote the youth counselling services and the Family Planning Association.

³⁷⁴ See "Evaluative Research Report on the Marriage Mediation Counselling Project," (The Hong Kong Marriage Advisory Council, October 1991), which states, at 31, that "Most of the clients (92.3%) were either satisfied or very satisfied with the service received from the Project."

³⁷⁵ See "Matrimonial mediation mooted," *The New Gazette*, July 1991, at 5.

³⁷⁶ See "Proposal on the Establishment of a Family Court in Hong Kong" (1989) Hong Kong Council of Social Service, at 15 – 17.

³⁷⁷ See *supra*, Chapter 2, paras 2.7 – 2.9.

Chapter 9

Summary of recommendations

Recommended reforms of the Matrimonial Causes Ordinance, Cap 179

Grounds for divorce

Irretrievable breakdown

9.1 The concept of irretrievable breakdown of marriage provided in section 11 of the Matrimonial Causes Ordinance should be retained as the sole ground for divorce.

Adultery

9.2 The fact of adultery contained in section 11A(1)(a) should be retained.

Behaviour

9.3 The fact of behaviour contained in section 11A(1)(b) should be retained.

Desertion

9.4 The fact of desertion contained in section 11A(1)(c) should be abolished (as a consequence of the recommendation at para 9.6 below).

Separation with consent

9.5 The fact of separation with the respondent's consent contained in section 11A(1)(d) should be retained, but the present two year minimum period of separation required under this fact should be reduced to one year.

9.6 Furthermore, it is recommended that in any case where both parties consent to the petition for divorce, they be permitted to make a joint application for divorce if they so wish.

Separation without consent

9.7 The fact of separation contained in section 11A(1)(e) should be retained, but the present five year minimum period of separation required under this fact should be reduced to two years.

Divorce by mutual consent – joint notice

9.8 A new fact should be introduced into the provisions of section 11A(1) permitting parties to divorce by mutual consent after a period of one year's notice to the court. The parties in this case would be able to do so by giving joint notice to the court of their intention to divorce, and then, after a minimum period of one year, by filing a joint application to have their divorce made final.

Time restriction on divorce early in marriage

Time restriction period

9.9 The present three year time restriction on petitions for divorce, contained in section 12(1), should be reduced to one year.

Exceptions

9.10 The existing provision for the exceptions of "exceptional hardship suffered by the petitioner" and "exceptional depravity on the part of the respondent," contained in section 12(2), should be retained.

Collateral matters

Conciliation

9.11 With regard to conciliation, it is recommended that priority be given to the public promotion of services available for marriage counselling, mediation and conciliation. Furthermore, it is recommended the Government give consideration to future expansion and development of these services in Hong Kong.

Damages for adultery

9.12 It is recommended that the action for damages for adultery contained in section 50 should be abolished.

APPENDICES

HONG KONG MARRIAGE AND DIVORCE STATISTICS

Year	Marriages # Registered	Divorce* Petitioner Filed	Divorce* Decrees Absolute
1972	27,358	532	354
1973	30,436	793	493
1974	37,634	789	714
1975	36,192	893	668
1976	39,617	1,054	809
1977	40,390	1,372	955
1978	40,400	1,728	1,420
1979	45,222	2,018	1,520
1980	50,845	2,421	2,087
1981	50,756	2,811	2,060
1982	51,467	3,120	2,673
1983	47,784	3,734	2,750
1984	53,410	4,764	4,086
1985	45,056	5,047	4,313
1986	43,280	5,339	4,257
1987	48,561	5,747	5,055
1988	45,238	5,893	5,098
1989	43,952	6,275	5,507
1990	47,168	6,767	5,551
1991	42,568	7,287	6,295

Figures supplied by Census and Statistics Dept

* Figures supplied by Judiciary

DIVORCE
FACTS CITED IN PETITION*

Year	Adultery	Behaviour	Desertion	Separation 2 years	Separation 5 years	Other Misc.
1980	142 (6%)	496 (20%)	148 (6%)	1,247 (51%)	384 (16%)	48 (2%)
1982	138 (5%)	474 (17%)	174 (6%)	1,544 (54%)	463 (16%)	68 (2%)
1988	218 (4%)	1,267 (24%)	164 (3%)	2,551 (49%)	851 (16%)	143 (3%)
1990	202 (3%)	1,633 (24%)	206 (3%)	3,485 (51%)	1,151 (17%)	99 (2%)

* Figures collated from Divorce Registry

GROUNDS FOR DIVORCE
AND
THE TIME RESTRICTION ON PETITIONS FOR DIVORCE

List of Consultees
(written respondents)

Association for the Advancement of Feminism

Ms Pam Baker, Legal Aid Department

Ms Vivian Chih, Barrister

Mr Charles Ching QC, Barrister

Mr Neal Clough, Legal Aid Department

Caritas

Catholic Women's League

Chinese University of Hong Kong

City & New Territories Administration

Mr Nigel de Boinville, Barrister

H H Judge Leonard, District Court

Federation of Women Lawyers

Harmony House

Hong Kong Bar Association

Hong Kong Catholic Marriage Advisory Council

Hong Kong Christian Council

Hong Kong Council of Social Service

Hong Kong Council of Women

Hong Kong Family Law Association

Hong Kong Family Welfare Society
Hong Kong Polytechnic
Hong Kong Red Cross
Ms Susan Johnson, Solicitor
Law Society of Hong Kong
Legal Aid Department
Methodist Church Hong Kong
Roman Catholic Diocese of Hong Kong
Salvation Army
Social Welfare Advisory Committee
Social Welfare Department
University of Hong Kong (Faculty of Law)
Ms Colette van de Eb, Barrister
Mr Ian Wingfield, Legal Department
World Vision of Hong Kong

MBL

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OPINION SURVEY ON DIVORCE LAW

- A Report -

Conducted For : CITY AND NEW TERRITORIES ADMINISTRATION
Client Contact : Mr. Dominic Cheung
Research Contact : Ms. Jenny So
Date Submitted : January 24, 1992
Job No. : 970

BACKGROUND

This report contains the findings of a study conducted on behalf of City and New Territories Administration regarding opinion survey on Divorce Law.

Market Behaviour (Hong Kong) Limited was chosen to conduct the survey and the following document contains the research objectives, methodology, summary and conclusion as well as the main findings.

SUMMARY AND CONCLUSIONS

1. In general, it seems there is less variance between men and women in their views to issues related to Divorce Law. Rather, there is a sharp differences between the younger, better educated, white collar and higher income groups and their counterparts in most of the issues.
2. About half of the respondents want to retain the restriction on divorce in the early stage of the marriage but about one third want to abolish that. The latter group tend to be made up by the younger, the better educated and the higher income group. Women also appear to be more willing to abolish the restriction. Therefore it is expected that, in a few years' time, the balance will be redressed and the trend of wanting abolition will continue as the general population become better educated with the current compulsory education system.
3. Of those who favour the restriction, only half say the restriction should be 3 years (or 28% of the 1,000 respondents as base). In another word, 50% of the respondents favour either abolition or restriction but with a shorter period. Again, this group tend to be made up by the younger, the better educated and the higher income group. This means that in a few years' time, the demand for change of the current Divorce Law on this aspect will be even greater.
4. Likewise, about half of the respondents agree that there should be a separation period before a petition for divorce by consent is permitted but 40% disagree. Those who disagree are more likely to be the younger, the better educated or the higher income group. Again, this group tend to represent the trend of the future.
5. There is an overwhelming support for the proposed new divorce procedure (the proposed new divorce procedure is: for parties who both consent to a divorce, they would be able simply to give notice to the court of their intention to divorce, wait a certain period and then apply jointly to have the divorce made final. In the mean time they would not be under any obligation to separate). Again, the younger or the better educated are more inclined to support the proposal. In a few years' time, it is therefore expected that the support for the new proposal will be even higher when the majority of population have at least secondary education.

Those who are against the new procedure speak in terms of broad principles rather than in the practicability of the compulsory separation.
6. The most popular waiting time for the new procedure is 1 year or less.

7. On the other hand, the 5 years separation period for non-consent divorce is found to be highly unpopular. Six in ten of the respondents favour 2 to 3 years separation period.
8. The Hong Kong public obviously still believe in marital faults and an absolute majority want to retain adultery, unreasonable behaviour and desertion as reasons for a petition.
9. Only about one-third of the population are aware of conciliation service in Hong Kong; very few have personal knowledge of people who have used it, but those who do are very positive about the service. It seems a lot of publicity and civic education are needed to inform the public of the availability of the conciliation service in Hong Kong.

APPROPRIATE LENGTH FOR THE RESTRICTION PERIOD (Q. 2)

Base: All respondents (n=1000)

	<u>Less than 1 year</u>	<u>1 year</u>	<u>2 years</u>	<u>3 years</u>	<u>4 years</u>	<u>5 years or above</u>	<u>Abolished</u>	<u>No Opinion</u>
	%	%	%	%	%	%	%	%
TOTAL	1	3	11	28	2	9	35	11
<u>Sex</u>								
Male	1	2	12	29	3	10	30	13
Female	*	3	10	27	2	8	40	10
<u>Age</u>								
18 - 29	-	3	11	26	2	6	44	9
30 - 44	2	3	11	27	2	10	34	12
45 - 65	*	2	10	32	3	14	25	14
<u>Marital Status</u>								
Single	-	3	13	23	3	6	43	10
Married	1	2	10	30	2	11	31	12
Other	*	7	6	35	5	17	26	5
<u>No. of Children</u>								
Not applicable	-	3	13	23	3	6	43	10
None	2	4	12	32	1	6	33	10
1 - 2	1	3	10	30	2	10	33	12
3 plus	1	2	10	30	3	15	26	12
<u>Education</u>								
Primary or below	1	2	7	31	3	13	28	13
Secondary	1	2	12	27	2	8	36	11
Matriculated & above	1	4	13	25	1	7	40	9
<u>Occupation</u>								
White collar	1	3	12	25	2	6	42	11
Blue collar	1	2	8	31	3	12	30	12
Housewife	*	3	11	29	1	11	34	11
Other	-	4	17	25	3	13	28	10
<u>Monthly Household Income</u>								
Below HK\$7,500	1	4	8	33	3	16	27	10
HK\$7,500 to \$9,999	1	2	12	29	3	10	30	13
HK\$10,000 to 19,999	1	2	12	27	2	8	36	11
HK\$20,00 and above	2	3	11	28	2	6	42	6
Refused	1	2	10	21	-	8	36	21

MINIMUM TIME PERIOD FOR SEPARATION WHERE BOTH PARTIES
CONSENT (Q.4)

Base: All respondents (n=1000)

	<u>Less than 1 year</u>	<u>1 year</u>	<u>2 years</u>	<u>3 years</u>	<u>4 years</u>	<u>5 years or above</u>	<u>Disagree/ no opinion</u>
	%	%	%	%	%	%	%
TOTAL	3	14	31	4	*	1	46
<u>Sex</u>							
Male	4	14	29	4	1	1	47
Female	3	14	33	4	-	1	45
<u>Age</u>							
18 - 29	6	16	23	3	1	*	52
30 - 44	3	14	31	3	-	1	47
45 - 65	1	11	40	6	*	2	37
<u>Marital Status</u>							
Single	4	16	21	4	1	*	54
Married	3	13	36	3	*	1	42
Other	3	14	23	8	-	2	49
<u>No. of Children</u>							
Not applicable	4	16	21	4	1	*	54
None	8	15	17	4	1	-	53
1 - 2	3	13	34	2	-	2	46
3 plus	1	14	45	7	1	2	30
<u>Education</u>							
Primary or below	2	10	37	4	1	2	42
Secondary	4	13	31	4	*	1	47
Matriculated & above	4	21	20	3	1	1	50
<u>Occupation</u>							
White collar	4	20	25	3	*	1	48
Blue collar	4	11	30	4	1	1	49
Housewife	2	12	38	4	-	2	42
Other	3	11	38	5	1	1	39
<u>Monthly Household Income</u>							
Below HK\$7,500	1	9	40	5	-	2	44
HK\$7,500 to \$9,999	4	11	34	3	-	1	47
HK\$10,000 to 19,999	3	17	29	2	1	1	47
HK\$20,000 & above	4	17	26	3	1	1	48
Refused	6	13	26	7	1	2	43

* : Less than 0.5%

WHETHER OR NOT THE PROPOSAL FOR AN ADDITIONAL
ALTERNATIVE MEANS OF OBTAINING A DIVORCE IS ACCEPTABLE (Q.5)

Base: All respondents (n=1000)

	<u>Acceptable</u>	<u>Not Acceptable</u>	<u>No opinion</u>
	%	%	%
TOTAL	69	24	7
<u>Sex</u>			
Male	72	22	6
Female	66	27	7
<u>Age</u>			
18 – 29	74	22	5
30 – 44	67	25	8
45 – 65	66	26	7
<u>Marital Status</u>			
Single	73	20	6
Married	67	26	7
Other	62	33	5
<u>No. of Children</u>			
Not applicable	73	20	6
None	69	25	6
1 – 2	67	26	7
3 plus	65	26	8
<u>Education</u>			
Primary or below	65	26	9
Secondary	70	24	6
Matriculation & above	72	23	5
<u>Occupation</u>			
White collar	68	25	7
Blue collar	69	25	6
Housewife	68	26	6
Other	73	17	10
<u>Monthly Household Income</u>			
Below HK\$7,500	70	24	6
HK\$7,500 to 9,999	75	21	4
HK\$10,000 to 19,999	71	25	4
HK\$20,000 & above	71	24	5
Refused	51	28	20

APPROPRIATE LENGTH OF THE WAITING PERIOD IN THE CASE
STATED IN THE PROPOSAL (Q. 6)

Base: All respondents (n=1000)

	<u>Less than 1 year</u>	<u>1 year</u>	<u>2 years</u>	<u>3 years</u>	<u>4 years</u>	<u>5 years or above</u>	<u>No Answer</u>
	%	%	%	%	%	%	%
TOTAL	29	22	13	3	*	1	31
<u>Sex</u>							
Male	32	20	14	3	-	1	28
Female	26	23	13	3	*	1	34
<u>Age</u>							
18 – 29	37	23	12	2	-	-	26
30 – 44	31	21	11	3	*	*	33
45 – 65	17	21	19	5	*	3	34
<u>Marital Status</u>							
Single	37	22	10	3	-	-	27
Married	26	21	15	3	*	1	33
Other	20	30	8	3	-	3	38
<u>No. of Children</u>							
Not applicable	37	22	10	3	-	-	27
None	32	25	8	2	-	-	31
1 – 2	27	22	15	2	*	1	33
3 plus	20	19	17	7	1	1	35
<u>Education</u>							
Primary or below	23	17	17	5	1	2	35
Secondary	31	23	12	3	*	*	30
Matriculated & above	33	25	13	1	-	-	28
<u>Occupation</u>							
White collar	29	25	11	2	-	-	32
Blue collar	28	19	16	4	-	1	31
Housewife	26	22	13	4	1	1	32
Other	40	15	14	*	-	3	27
<u>Monthly Household Income</u>							
Below HK\$7,500	30	13	21	4	-	2	30
HK\$7,500 to \$9,999	32	22	15	3	1	1	25
HK\$10,000 to 19,999	31	25	12	3	-	1	29
HK\$20,000 & above	30	28	10	3	-	-	29
Refused	18	15	12	3	1	1	49

* : Less than 0.5%

OPINION TOWARDS THE MINIMUM SEPARATION OF FIVE YEARS IN
CASE OF ONLY ONE PARTY PETITION FOR A DIVORCE (Q.7)

Base: All respondents (n=1000)

	<u>Too Long</u>	<u>Appropriate</u>	<u>Too Short</u>	<u>No Opinion</u>
	%	%	%	%
TOTAL	81	14	1	3
<u>Sex</u>				
Male	80	15	1	4
Female	83	13	1	3
<u>Age</u>				
18 – 29	84	13	*	3
30 – 44	77	16	2	5
45 – 65	80	15	1	4
<u>Marital Status</u>				
Single	82	16	*	2
Married	82	13	1	4
Other	73	22	3	2
<u>No. of Children</u>				
Not applicable	82	16	*	2
None	78	16	-	6
1 – 2	82	12	1	5
3 plus	81	15	1	3
<u>Education</u>				
Primary or below	81	14	1	4
Secondary	82	14	1	3
Matriculated & above	82	15	*	3
<u>Occupation</u>				
White collar	82	13	*	5
Blue collar	81	16	1	3
Housewife	83	12	1	4
Other	80	17	1	1
<u>Monthly Household Income</u>				
Below HK\$7,500	78	17	1	3
HK\$7,500 to \$9,999	77	20	-	3
HK\$10,000 to 19,999	86	10	1	3
HK\$20,000 & above	85	12	-	2
Refused	73	16	2	9

* : Less than 0.5%

MINIMUM SEPARATION PERIOD IN CASE OF CONSENT BY ONLY ONE PARTY (Q.8)

Base: All respondents (n=1000)

	<u>Less than 1 year</u>	<u>1 year</u>	<u>2 years</u>	<u>3 years</u>	<u>4 years</u>	<u>5 years or above</u>	<u>No answer</u>
	%	%	%	%	%	%	%
TOTAL	7	15	32	27	1	1	18
<u>Sex</u>							
Male	8	15	28	28	1	1	19
Female	6	14	36	27	*	1	16
<u>Age</u>							
18 – 29	6	16	31	28	1	*	17
30 – 44	9	15	33	26	*	*	16
45 – 65	6	12	30	28	1	2	21
<u>Marital Status</u>							
Single	6	16	30	28	1	*	18
Married	8	14	32	28	1	1	17
Other	4	19	41	6	-	3	24
<u>No. of Children</u>							
Not applicable	7	16	30	28	1	*	18
None	6	20	29	20	-	-	22
1 – 2	9	15	30	29	*	1	17
3 plus	6	11	39	25	1	1	17
<u>Education</u>							
Primary or below	7	13	35	25	1	1	18
Secondary	7	15	30	29	1	1	18
Matriculated & above	7	16	32	26	1	*	18
<u>Occupation</u>							
White collar	5	15	32	28	*	*	18
Blue collar	11	14	26	29	1	1	19
Housewife	6	16	37	22	1	1	16
Other	5	9	35	28	3	1	19
<u>Monthly Household Income</u>							
Below HK\$7,500	7	14	34	23	-	1	20
HK\$7,500 to \$9,999	7	13	32	25	*	-	23
HK\$10,000 to 19,999	8	13	33	31	1	1	13
HK\$20,000 & above	6	16	30	31	2	-	15
Refused	8	18	28	28	*	2	25

* : Less than 0.5%

OPINION TOWARDS DIVORCE PETITION BASE ON EVIDENCE OF ADULTERY (Q.9)

Base: All respondents (n=1000)

	<u>Retained</u>	<u>Modified</u>	<u>Abolished</u>	<u>No Opinion</u>
	%	%	%	%
TOTAL	74	12	8	6
<u>Sex</u>				
Male	73	13	9	5
Female	76	12	6	6
<u>Age</u>				
18 – 29	74	15	10	2
30 – 44	76	9	7	8
45 – 65	72	14	7	7
<u>Marital Status</u>				
Single	74	14	7	4
Married	75	11	8	6
Other	58	19	14	9
<u>No. of Children</u>				
Not applicable	74	14	7	4
None	71	7	15	7
1 – 2	76	13	6	6
3 plus	72	11	9	8
<u>Education</u>				
Primary or below	76	8	7	9
Secondary	75	12	8	5
Matriculated & above	71	18	9	3
<u>Occupation</u>				
White collar	74	13	9	4
Blue collar	74	11	7	8
Housewife	76	12	6	5
Other	70	15	11	3
<u>Monthly Household Income</u>				
Below HK\$7,500	77	9	8	5
HK\$7,500 to \$9,999	75	11	9	6
HK\$10,000 to 19,999	79	11	7	3
HK\$20,000 & above	72	17	7	4
Refused	61	15	9	15

OPINION TOWARDS DIVORCE PETITION BASE ON FACTS OF UNREASONABLE BEHAVIOUR OF THE OTHER PARTY (Q.10)

Base: All respondents (n=1000)

	<u>Retained</u>	<u>Modified</u>	<u>Abolished</u>	<u>No Opinion</u>
	%	%	%	%
TOTAL	87	7	3	3
<u>Sex</u>				
Male	84	9	3	4
Female	89	6	3	2
<u>Age</u>				
18 – 29	89	6	3	1
30 – 44	87	8	2	3
45 – 65	84	8	4	5
<u>Marital Status</u>				
Single	89	6	3	2
Married	85	8	3	4
Other	89	9	-	2
<u>No. of Children</u>				
Not applicable	89	6	3	2
None	87	6	2	4
1 – 2	88	7	2	3
3 plus	81	11	3	5
<u>Education</u>				
Primary or below	85	8	4	3
Secondary	87	7	3	3
Matriculated & above	87	6	2	4
<u>Occupation</u>				
White collar	89	7	1	3
Blue collar	84	9	4	3
Housewife	85	8	4	3
Other	90	2	3	4
<u>Monthly Household Income</u>				
Below HK\$7,500	85	9	3	2
HK\$7,500 to \$9,999	90	6	2	2
HK\$10,000 to 19,999	90	6	3	1
HK\$20,000 & above	91	6	1	2
Refused	72	11	6	11

AWARENESS OF THE CONCILIATION SERVICE IN HONG KONG TO ASSIST
PEOPLE WHO ARE GOING THROUGH A DIVORCE (Q.12)

Base: All respondents (n=1000)

	<u>Aware</u>	<u>Not Aware</u>
	%	%
TOTAL	32	68
<u>Sex</u>		
Male	30	70
Female	33	67
<u>Age</u>		
18 – 29	28	72
30 – 44	37	63
45 – 65	28	72
<u>Marital Status</u>		
Single	28	72
Married	34	66
Other	24	76
<u>No. of Children</u>		
Not applicable	28	72
None	23	77
1 – 2	35	65
3 plus	33	77
<u>Education</u>		
Primary or below	28	72
Secondary	33	67
Matriculated & above	34	66
<u>Occupation</u>		
White collar	39	61
Blue collar	27	73
Housewife	32	68
Other	23	77
<u>Monthly Household Income</u>		
Below HK\$7,500	29	71
HK\$7,500 to \$9,999	30	70
HK\$10,000 to 19,999	33	67
HK\$20,000 & above	38	62
Refused	24	76