COMMENT

THE RECOGNITION OF OVERSEAS DIVORCES UNDER THE FAMILY LAW ACT 1975

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During the past eight years there have been a number of proposals for changes to, and legislative innovations in, the rules relating to the recognition of overseas decrees of divorce and nullity. These changes have been mooted both internationally and within Australia, and have culminated, so far as this country is concerned, in section 104 of the Family Law Act 1975 (Cth) (hereinafter referred to as the Family Law Act). It is the purpose of this comment to examine the effect of subsections (2), (3) and (8) of that section, and to suggest that they are unnecessarily complicated, may lead to bizarre and unexpected results and are therefore in urgent need of review.

The history behind section 104 can be traced back to 1968. In October of that year the Hague Conference on Private International Law adopted a Draft Convention on the Recognition of Divorces and Legal Separations. This provided, in essence, that a divorce would be entitled to recognition if the link of either habitual residence or nationality were established between one of the parties and the country in which the divorce was obtained. If that party were the respondent, no further connecting factor would be required unless the link were nationality alone, which would have to be reinforced by the petitioner's nationality in the same country; if, however, that party were the petitioner, a need was seen for a further connection, such as the habitual residence being of at least one year's duration or the habitual residence being coupled with nationality, or the last common habitual residence of the parties being in the relevant foreign country.[1]

The next step in the background to section 104 is the Report of the Law Commission and the Scottish Law Commission on the Hague Convention[2] and the enactment by the United Kingdom Parliament of the measures proposed by the Commissions. The two Law Commissions considered that the provisions of the Hague Convention were too complex, and proposed the considerable simplification of permitting the recognition of a divorce obtained in the country of domicile,

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[1] The text of the Draft Convention is set out in, *inter alia*, Appendix A of the English and Scottish Law Commissions' *Report on the Hague Convention on Recognition of Divorces and Legal Separations* Cmnd 4542 (1970).

[2] *Ibid.*

habitual residence or nationality of either party.[3] The United Kingdom Parliament accepted this suggestion, and the Recognition of Divorces and Legal Separations Act 1971 (U.K.) provides, in section 3 that

> (1) The validity of an overseas divorce or legal separation shall be recognised if, at the date of the institution of the proceedings in the country in which it was obtained—
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> (a) either spouse was habitually resident in that country; or
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> (b) either spouse was a national of that country.
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> (2) In relation to a country the law of which uses the concept of domicile as a ground of jurisdiction in matters of divorce or legal separation, subsection (1)(a) of this section shall have effect as if the reference to habitual residence included a reference to domicile within the meaning of that law.

The further developments leading to the enactment of section 104 have all occurred in this country. In December 1971 the Senate resolved to refer the following matter to the Senate Standing Committee on Constitutional and Legal Affairs—"The law and administration of divorce, custody and family matters, with particular regard to oppressive costs, delays, indignities and other injustices". During 1972 that Committee invited submissions from interested parties, one of which was a paper entitled "Recommendations by the Family Law Committee of the Sydney University Law Graduates Association". Part AA of those Recommendations contained suggested amendments in the law relating to the recognition of foreign divorce decrees, and may be summarised by saying that it advocated rules very similar to those in the Hague Draft Convention, and not as broad as those enacted by the United Kingdom Parliament.[4] Professor Nygh presented, and spoke to, this paper at a meeting of the Standing Committee on 6 July 1972. The Committee tabled a brief interim report in the Senate in October 1972; this formed one of the bases of the first Family Law Bill, which was introduced in the Senate by the then Attorney-General on 13 December 1973. That Bill lapsed when Parliament was prorogued on 14 February 1974; it was reintroduced in the Senate in April 1974 but lapsed shortly thereafter on the dissolution of both Houses of Parliament. The Bill was introduced for a third time in the Senate on 1 August 1974, and after consideration by the Standing Committee and debate in the Senate it was passed by that House on 27 November 1974; it was passed, with some minor amendments, by the House of Representatives on 21 May 1975, the Senate agreed to the House's amendments on 29 May 1975 and the Bill received the Royal Assent

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[3] *Id.* paras. 27 to 29.

[4] The text of Part AA is set out in the Official Hansard Report of the meeting of the Senate Standing Committee of 6 July 1972, 54-59.

on 12 June 1975.[5] Despite these Parliamentary vicissitudes, the provisions of what is now section 104(3) have remained virtually unchanged since the Bill was first introduced in the Senate in December 1973, and the relevant sub-clause in that Bill in turn followed very closely the wording of a draft sub-clause included in the Recommendations by the Family Law Committee of the Sydney University Law Graduates Association.

Although it is subsection (3) of section 104 which lays down the principal grounds on which overseas decrees will be recognised, that subsection must be read with the definitions provided by subsections (1) and (2). The three subsections provide:

> 104. (1) In this section—
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> "applicant", in relation to the dissolution or annulment of a marriage, means the party at whose instance the dissolution or annulment was effected;
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> "marriage", includes a purported marriage that is void;
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> "overseas country", means a country, or part of a country, outside Australia;
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> "relevant date", in relation to a dissolution or annulment of a marriage, means the date of the institution of the proceedings that resulted in the dissolution or annulment;
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> "respondent", in relation to the dissolution or annulment of a marriage, means a party to the marriage not being the party at whose instance the dissolution or annulment was effected.
>
> (2) For the purposes of this section, a person who is a national of a country of which an overseas country forms part shall be deemed to be a national of that overseas country.
>
> (3) A dissolution or annulment of a marriage effected in accordance with the law of an overseas country shall be recognised as valid in Australia where—
>
> (a) the respondent was ordinarily resident in the overseas country at the relevant date;
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> (b) the applicant was ordinarily resident in the overseas country at the relevant date and either—
>
> (i) the ordinary residence of the applicant had continued for not less than 1 year immediately before the relevant date; or
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> (ii) the last place of cohabitation of the parties to the marriage was in that country;
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> (c) the applicant or the respondent was domiciled in the overseas country at the relevant date;

[5] For a fuller account of the various stages leading up to the passage of this statute see Enderby, "The Family Law Act 1975" (1975) 49 A.L.J. 477, 477-478.

(d) the respondent was a national of the overseas country at the relevant date;

(e) the applicant was a national of the overseas country at the relevant date and either—

(i) the applicant was ordinarily resident in that country at that date; or

(ii) the applicant had been ordinarily resident in that country for a continuous period of 1 year falling, at least in part, within the 2 years immediately before the relevant date; or

(f) the applicant was a national of, and present in, the overseas country at the relevant date and the last place of cohabitation of the parties to the marriage was in an overseas country the law of which, at the relevant date, did not provide for dissolution of marriage or annulment of marriage, as the case may be.

Paragraphs (a) and (b) of subsection (3) call for little comment in themselves, apart from the point that they follow very closely the provisions of article 2(1) and (2) of the Hague Draft Convention, and are thus to some extent subject to the criticism made by the Law Commission and the Scottish Law Commission of being unnecessarily complex.[6]

Paragraph (c), however, merits more detailed comment. This provision first appeared in the forerunners of section 104 during 1974, and was not one of the proposals put forward by the Family Law Committee of the Sydney University Law Graduates Association. It was included in the Bill at the same time that domicile was added as a basis for the jurisdiction of Australian courts in what is now section 39(3) of the Act. The principal observation to be made of paragraph (c) is that the concept of domicile, although subject to some modifications by the operation of section 4(3) of the Family Law Act, has become a term of art that is so hedged about with judicial niceties as to render its meaning in any particular case a matter of some doubt. One example may be given to show the difficulties to which its use in paragraph (c) may give rise. In *Buswell* v. *Inland Revenue Commissioners*[7] the English Court of Appeal held that the plaintiff's domicile of origin in South Africa continued to be his operative domicile, even though he had left there in 1928, at the age of seven, and had not revisited the country until 1968. If the plaintiff were to return to South Africa and obtain a divorce there (and the South African courts could take jurisdiction to hear his petition on the basis of his domicile)[8] it would have to be recognised here under

[6] *Supra*, n. 3.

[7] [1974] 1 W.L.R. 1631.

[8] Hahlo and Kahn, *The South African Law of Husband and Wife* (3rd ed. 1969) 525.

paragraph (c), even though Mr Buswell's links with South Africa might only have been that his father was domiciled there in 1921, when Mr Buswell was born, and that during the intervening 55 years Mr Buswell had not formed a fixed intention permanently and indefinitely to reside in any particular country. In the vast majority of cases coming within section 104(3), on the other hand, paragraph (c) will be otiose. It is suggested that it is very much easier to prove "ordinary residence" in a country, or nationality, than to prove domicile, which requires proof of an intention to remain there permanently or indefinitely.

Paragraph (d) of section 104(3) is a provision which also calls for some detailed comment. It is virtually identical to one of the proposals put forward by the Family Law Committee of the Sydney University Law Graduates Association. It appears to go beyond the terms of the Hague Convention, in that article 2(3) of the latter would permit the recognition of a divorce only when both spouses are nationals of the overseas country, not merely the respondent alone. The reason for this change from the terms of the Convention, as stated in the Family Law Committee's written submissions to the Senate Standing Committee,[9] was that

> The nationality of the respondent by itself should be sufficient for he or she can hardly complain if the petitioner comes over and divorces her or him according to the respondent's own law.

It is suggested that this reason is insufficient, as it confuses nationality with residence. It is further suggested that both article 2(3) of the Hague Convention and paragraph (d) of section 104(3) may give rise to a number of problems stemming from a combination of two factors; the first is that a number of European countries, particularly Greece, Italy and those behind the "Iron Curtain", do not recognise that any of their citizens can ever lose that nationality, and impose citizenship on at least the first generation descendants of a citizen; the second is the large-scale migration from all of those countries into Australia since the Second World War. The sort of difficulty which may arise in the application of paragraph (d) is epitomised by the fact situation which came before the English High Court in *Torok* v. *Torok*.[10] The parties had been born and brought up in Hungary, but both left in 1956, after the Hungarian uprising, and went to the United Kingdom. They were married in Scotland in 1957, they became naturalised British subjects and the wife had continued at all times to live in England. The husband went to Canada in 1967, and had apparently continued living there. Late in 1972 the husband instituted divorce proceedings in Hungary, of which the wife was given notice, and a

[9] Official Hansard Report of the meeting of the Senate Standing Committee of 6 July 1972, 56.

[10] [1973] 1 W.L.R. 1066.

court in Budapest pronounced a partial decree of divorce in January 1973. Ormrod J. found that by Hungarian law the husband would still be regarded as a national of Hungary; although nothing is said in the report as to the wife's nationality, there is no reason to suppose that she would not also be regarded, in Hungary, as having Hungarian nationality. It would thus appear that the divorce would be required to be recognised under section 104(3)(d), although there was no more than the most slender connection between the parties and Hungary.

There are other hypothetical fact situations which would come within the terms of paragraph (d) in which the result might be regarded as more acceptable, although still far from approaching the rationale for the paragraph given by the Family Law Committee. One such situation relates to a respondent who is a citizen of the United States of America. Since, in that country, divorce is a matter of State and not federal law, paragraph (d) can only be applied to divorces obtained there when it is read in conjunction with section 104(2), under which a citizen of the United States is deemed for these purposes to be a citizen of each of the States of the Union. Thus a husband, who is an Australian resident and citizen, and who has married a United States citizen, is entitled to take a six-week holiday in Nevada, obtain a divorce there and have that divorce recognised in Australia, even though the wife was born, brought up and retains close connections only with, say, one of the eastern seaboard States. However, the anomalies inherent in this situation are very largely reduced by the combined effect of section 104(4) and the full faith and credit clause in the United States Constitution. If, on the above hypothetical facts, the divorce is "unilateral" *i.e.*, the wife received no notice of the Nevada proceedings, and took no part in them—she would be very likely to succeed in preventing the Nevada decree being recognised here, as section 104(4) prohibits recognition if, *inter alia*, one party has been denied natural justice. In this context, "natural justice" clearly demands that each party has notice of the proceedings.[11] If, on the other hand, the hypothetical Nevada proceedings were "bilateral" —*i.e.* the wife received notice of the proceedings, entered a general appearance thereto, but took no steps to contest the matter—then it would appear that the full faith and credit clause of the United States Constitution would ensure that the resultant decree was recognised for all purposes in all the other States of the Union.[12] If, in that case, the

[11] For a full discussion of the meaning of "natural justice" in this context, see the discussion by Fox J. of the predecessor of s. 104(4) in *Norman* v. *Norman (No. 3)* (1969) 16 F.L.R. 231, 244-245.

[12] The literature on full faith and credit as applied to inter-State divorce decrees in America is considerable. Two comparatively recent discussions of the topic are Morris, "The Recognition of American Divorces in England" (1975) 24 International and Comparative Law Quarterly 635, 639-640 and Rheinstein, *Marriage Stability, Divorce, and the Law* (1972) 63-81, especially 78-79.

wife would be regarded as divorced in the particular part of the United States from which she came, there is every good reason for equally regarding her as divorced in Australia. But it must be emphasised that this not unreasonable solution arises very largely from the happy accident of the way in which United States courts have interpreted a particular clause in their own Constitution, and it may well be that the application of subsections (2) and (3)(d) to other federations creates considerable anomalies.

Paragraph (e) of section 104(3) requires little comment. It follows very closely the wording of article 2(4) of the Hague Draft Convention of 1968. As has been said above in relation to paragraphs (a) and (b), the criticism of unnecessary complexity levelled by the Law Commission and the Scottish Law Commission at the whole of article 2 of the Convention may be made about this paragraph.

Paragraph(f), the final paragraph of section 104(3), is also closely based upon the provisions of the Hague Convention, article 2(5). Apart from the already-voiced observation of unnecessary complexity, the further point can be made in relation to this paragraph that it is difficult to see when it may ever be applied in this country. Its application requires a combination of two factors: (i) the parties having had their last place of cohabitation in a country which does not provide for dissolution of marriage, and (ii) one of the parties obtaining a "migratory" divorce in the country of his or her nationality. But on the first point, the number of countries which do not provide for dissolution of marriage is very small indeed. They are Andorra, the Argentine, Brazil, Chile, Colombia, Ireland, Leichtenstein, Malta, Paraguay, the Philippines and Spain.[13] And as to the second point, there is only a limited number of countries which will take jurisdiction in divorce solely on the basis of nationality without any residential requirement—in general, it is confined to the countries of continental Europe and those other states whose law is derived from one of those countries.[14] It is suggested that the combination of these two limiting factors leaves paragraph (f) with but a miniscule area of possible operation, especially when one considers that a "migratory" divorce obtained in the country which happens to be that of the respondent's nationality will be recognised under paragraph (d), without the limitations imposed by paragraph (f).

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[13] See Rabel, *The Conflict of Laws: A Comparative Study* (2nd ed., 1959) Vol. I, 462; Rheinstein, *op. cit.* 8; *International Encyclopedia of Comparative Law* (1974) Vol. IV, 1-101. Dissolution of marriage has been permitted in Italy since 1970: von Mehren and Nadelmann, "The Hague Conference Convention of June 1, 1970 on Recognition of Foreign Divorce Decrees" (1971) 5 Family Law Quarterly 303, 308, n. 26. The First Secretary of the Portuguese Embassy in Canberra recently informed the author that that country has, by a law of 27 May 1975, permitted any of its citizens to petition for dissolution of marriage.

[14] Rabel, *op. cit.*, 427 *et seq.*

One final observation on the terms of section 104 relates to subsection (8). This provision was not one that was included in the Recommendations by the Family Law Committee of the Sydney University Law Graduates Association. That Committee proposed the continued application of the rule in *Armitage* v. *Attorney-General*,[15] under which a divorce will be recognised in Australia even though it is not granted by the courts of the husband's domicile, so long as it is recognised by that law. The Committee saw no need to make specific legislative provision along those lines, as it recommended a general subsection under which all the common law rules on the recognition of foreign divorces would continue to have effect. When the Family Law Bill was first introduced into the Senate in December 1973 this latter recommendation had been adopted, in terms identical to those now appearing in section 104(5) of the Act. The 1973 Bill also contained a sub-clause in the same terms as subsection (8) and thereby greatly expanded the rule in *Armitage* v. *Attorney-General* so that it was to relate not only to the law of the husband's domicile but also to the laws of all the countries referred to in what is now subsection (3).

The terms of subsection (8) are as follows:

> For the purposes of the preceding provisions of this section but without limiting the operation of those provisions, a dissolution or annulment of a marriage shall be deemed to have been effected in accordance with the law of an overseas country if it was effected in another overseas country in circumstances in which, at the relevant date, it would have been recognized as valid by the law of the first-mentioned overseas country.

A general comment that may be made about this provision is that it extends very considerably the range of foreign decrees which may be recognised here. This may be illustrated by two specific examples. First, if subsection (8) is read in combination with subsection (3)(d), a divorce obtained by the spouse of a United Kingdom citizen will be recognised in this country if it would also be recognised by the law of the United Kingdom. As mentioned above, the latter country has enacted the Recognition of Divorces and Legal Separations Act 1971 (U.K.), the terms of section 3 of which have already been set out.[16] Jurisdiction in divorce in Nevada, it appears,[17] is based on domicile as there understood, *i.e.* six weeks' residence within the geographical jurisdiction of the court coupled with an intention of making a home and permanently residing there for an indefinite time. Thus if such a test is satisfied, a Nevada divorce must be recognised in the United Kingdom. And if the Nevada court is more than willing to accept any

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[15] [1906] P. 135.

[16] *Supra* 233-234.

[17] The statement in the text is taken from the judgment of Ormrod J. in *Messina* v. *Smith* [1971] P. 322, 339.

evidence of the petitioner's intention to continue residing in Nevada, the question of his or her domicile in that State cannot be raised again in the United Kingdom, if the divorce was "bilateral", because of section 5 of the United Kingdom Act. This provides:

> (1) For the purpose of deciding whether an overseas divorce or legal separation is entitled to recognition by virtue of the foregoing provisions of this Act, any finding of fact made (whether expressly or by implication) in the proceedings by means of which the divorce or legal separation was obtained and on the basis of which jurisdiction was assumed in those proceedings shall—
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> (a) if both spouses took part in the proceedings, be conclusive evidence of the fact found; and
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> (b) in any other case, be sufficient proof of that fact unless the contrary is shown.
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> (2) In this section "finding of fact" includes a finding that either spouse was habitually resident or domiciled in, or a national of, the country in which the divorce or legal separation was obtained; and for the purposes of subsection (1)(a) of this section, a spouse who has appeared in judicial proceedings shall be treated as having taken part in them.

It is thus submitted that the many Australian residents who are married to United Kingdom citizens (that is, anyone born in the United Kingdom or Colonies, anyone whose father was born there, and the wife of anybody in these two categories, so long as she has gone through the formality of registration)[18] have the enviable advantage of being able to obtain, with the consent of their spouse, a Nevada divorce which will be recognised here. It is suggested that the spouse's consent is advisable, first so as to bring into play section 5 of the Recognition of Divorces and Legal Separations Act 1971 (U.K.),[19] and secondly so as to ensure that the "respondent" spouse cannot later challenge the recognition of the decree under section 104(4)(a) of the Family Law Act on the grounds that he or she has been denied natural justice.[20] The only ground of attack left open to the "respondent" would then be that the "applicant" had fraudulently deceived the Nevada court as to his or her domiciliary intentions.[21]

The other specific case to which one can apply section 104(8) of the Family Law Act is a divorce obtained by the spouse of a United

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[18] British Nationality Act 1948, ss. 4, 5(1), 6(2), 12(1) and (2) (U.K.).

[19] See also Morris, *op. cit.*, who puts forward further views why only "bilateral" divorces obtained in the United States will be recognised under the Act of 1971.

[20] See the text accompanying n. 11 on the meaning of the term "natural justice" in this context.

[21] See Family Law Act 1975, s. 104(4)(a) (Cth) and the discussion by Fox J. in *Norman* v. *Norman (No. 3)* (1969) 16 F.L.R. 231, 244-245 of the equivalent provisions in s. 95(7) of the Matrimonial Causes Act 1959 (Cth).

States citizen in a country such as Haiti, which permits "migratory" divorces. Under subsection (8), read in conjunction with subsection (3)(d), such a divorce will be recognised here so long as it would be recognised by "United States" law. Since recognition of foreign divorces in the United States is a matter of State and not federal law, subsection (2) must be called in aid; reading all three provisions together, it will be seen that the spouse of a United States citizen (wherever that citizen happened to live or be domiciled within the United States) will be able to obtain a divorce that is required to be recognised here, so long as it is also recognised by the State of New York. That State has been chosen because its recognition rules are the most generous within the United States; its Court of Appeals has affirmed that it will recognise "bilateral" Mexican divorces, even though the petitioner has spent little more than an hour in Mexico and the respondent has appeared in the Mexican court only by an attorney.[22] In 1971 the Mexican Congress amended its Nationality and Naturalization Act in such a way as to rule out the possibility of such "one-day" divorces,[23] but Mexico was quickly replaced by Haiti as a "divorce mill"; the Haitian Divorce Law of 28 June 1971 provides that its divorce court acquires jurisdiction when the petitioner personally appears before it, and both parties specifically submit to its jurisdiction.[24] And there is to date at least one New York decision recognising a Haitian divorce decree.[25] It would thus appear that if a United States citizen and his or her spouse, both of whom are resident in Australia, wish to get a speedy divorce, the spouse may take a brief holiday in Haiti and petition for divorce there; so long as the other party specifically submits to the jurisdiction of the Haitian court, the resulting divorce is required to be recognised in this country even though it is unlikely to be recognised anywhere in the United States except in the State of New York.[26] And this result follows from the plain words of a statute which Senator Missen said was "far from . . . being a 'quickie' divorce Bill which will give quick divorces . . .".[27]

This last example is admittedly extreme, but it serves to highlight the criticism which, throughout this comment, has been levelled at section 104 of the Family Law Act—that is, that some parts of the section are

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[22] *Rosenstiel* v. *Rosenstiel* (1965) 209 N.E. 2d 709.

[23] For further details of the Mexican Legislation see Juenger, "Recognition of Foreign Divorces—British and American Perspectives" (1972) 20 American Journal of Comparative Law 1, 22, n. 111.

[24] The details of Haitian Law are taken from the judgment of McCaffrey J. in *Kraham* v. *Kraham* (1973) 342 N.Y.S. 2d 943, 948.

[25] *Kraham* v. *Kraham* (1973) 342 N.Y.S. 2d 943. The decree was recognised for the purpose of sanctioning a mutually agreed increase in the alimony provisions contained therein, but there does not appear from the judgment any reason why such decrees would not be recognised for all purposes.

[26] *Kugler* v. *Haitian Tours, Inc.* (1972) 293 A. 2d 706.

[27] S. Deb. 1974, Vol. 62, 2031.

unnecessarily complicated and may lead to bizarre and possibly unexpected results. It is suggested that the section would be considerably improved by the repeal of subsections (2), (3) and (8) and the enactment of a new subsection (3) along the following lines:

> (3) A dissolution or annulment of a marriage effected in accordance with the law of an overseas country shall be recognised as valid in Australia where either the applicant or the respondent had been ordinarily resident in the overseas country for a continuous period of not less than 1 year before the relevant date.

In my submission, this change would have the merit of clarity and simplicity, factors which were given very great weight by the Law Commission and the Scottish Law Commission in their Report on the Hague Convention.[28] It would have the demerit of being arbitrary but, it is submitted, no more arbitrary than the present provisions. To those who would argue that this suggestion would not permit Australia to ratify the Hague Draft Convention on the Recognition of Divorces and Legal Separations, two answers may be given; first, section 104 in its present form does not cover legal separations, and so does not permit ratification, and second, it may seriously be questioned how far Australia should go in order to ratify a Convention which has apparently been ratified so far by three countries only[29] and to which Australia made no contribution, as it was not a member of the Hague Conference in 1968.

[28] English and Scottish Law Commissions' Report, *op. cit.*, especially paras 25 and 30.

[29] "Current Legal Developments" (1976) 25 International and Comparative Law Quarterly 449.