UNIFORM DIVORCE LAWS

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In each of the Australian States there is a separate system of divorce laws. In each State the grounds of divorce vary and even the procedure for obtaining a divorce varies. Under the Commonwealth Constitution authority is given to the Commonwealth Parliament to make laws in respect of divorce and matrimonial causes and it can hardly be open to doubt that the framers of the Constitution expected the enactment of a uniform law operating throughout Australia upon this subject. The need for such a law has been stated on many occasions, for example, in *Waghorn v. Waghorn*,[1] Rich J. suggested that the Parliament of the Commonwealth might exercise its constitutional powers and enact uniform divorce laws. He said, 'It appears to be a matter of some importance that the residents of the six States of the Commonwealth should live under corresponding conditions so far as divorce is concerned.'[2] The legislature would not be originating a system of divorce but merely passing a uniform act in substitution for the divorce acts of the States, and thus 'To heavenliest harmony reduce the seeming chaos'. It does not seem right that an Australian citizen should be able to secure a divorce in one part of Australia on certain grounds, and yet not be able to obtain a divorce in other parts of Australia on the same grounds.

The question is upon what basis one should seek to provide uniform grounds of divorce. A great deal depends upon the point of view. Despite the fact that there have been divorce laws in Australia for well nigh a century, there are still some who are entirely opposed to divorce, and the only uniformity they would approve of would be no divorce at all. There are others who would say that divorce is undesirable and therefore make the grounds of divorce as narrow as possible. Again there are those who would like divorce laws which would suit their individual cases but who otherwise would not be concerned to amend the divorce laws. Then again, there are the people who would wish the right to divorce to be made easier and who would say, if you are going to pass divorce legislation, make your reforms drastic.

To those who approach the matter from the point of view of seeking to obtain uniform divorce, no one of the above views is

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[1] (1942) 65 C.L.R. 289.

[2] *Ibid.* 294.

acceptable. The viewpoint is that there is a set of laws in each State of the Commonwealth and that the attempt should be to produce a uniform law from the existing State laws. In other words one would work on what have already been accepted as grounds for divorce in some part or parts of the Commonwealth. There is a number of grounds of divorce accepted in most if not all the States of the Commonwealth. It is true that to some extent these grounds may differ in detail in some of the States. Where there is a particular ground accepted in the majority of the States, it would seem that that ground should be accepted throughout the Commonwealth, even though there be some variations in detail at present existing between the different States. Variations of this nature should become the subject of a reasonable compromise.

When considering the grounds of divorce, one should not forget that statistics will show the extent to which each ground of divorce has been used. An examination of divorce statistics indicates that most divorces have been obtained on the ground of either adultery or desertion. The other grounds have not been availed of to any great extent and certainly have not been abused. This does not mean that these grounds are not necessary. They exist to meet the case of marriages which have broken down for these particular reasons. The fact that fortunately so many marriages have not broken down for these reasons as for adultery and desertion, is no reason for depriving persons of relief when their marriages have broken down through wrongful conduct of a substantial nature, which has been accepted by the majority of the States as a ground for divorce.

It is, of course, essential that in a uniform act, the grounds should be uniform as between themselves and this consideration is not without importance when one comes to consider the statutory period of time which should elapse before an offence is completed. This view if accepted would involve some modifications of existing State laws.

The grounds for divorce in the Australian States are as follows:

Adultery is a ground for divorce in all States, save in Victoria a wife must prove a repeated act of adultery, or adultery in the conjugal residence, or adultery coupled with circumstances or conduct of aggravation, or incestuous adultery, or adultery coupled with cruelty or bigamy, or adultery coupled with two years' desertion.

Desertion. Three years' desertion is a ground for divorce in all States, save that in Tasmania a wife need only prove two years' desertion. In New South Wales disobedience of an order for

restitution of conjugal rights constitutes statutory desertion and is a ground for divorce.

Drunkenness and Cruelty. In Victoria, New South Wales and Tasmania, habitual drunkenness for three years, coupled with habitual cruelty or habitual leaving without means of support for the same three years, is a wife's ground for divorce and habitual drunkenness coupled with habitual neglect by a wife of her domestic duties or habitually rendering herself unfit to discharge them for the same three years is a husband's ground for divorce. Western Australia has the same grounds but the period is four years. In South Australia, habitual cruelty for one year is a ground for divorce, and a wife may petition for divorce on the ground of habitual drunkenness for three years, together with habitual leaving her without sufficient means of support and a husband may petition on the ground of the wife's habitual drunkenness for three years together with habitual neglect of domestic duties. In Victoria, New South Wales and Tasmania, repeated assaults and cruel beatings for the twelve months immediately prior to petitioning is a ground for divorce.

Crime. In all states rape and the commission of an unnatural offence is ground for divorce being obtained by a wife. In all states save Queensland imprisonment for not less than three years and continued imprisonment under a commuted sentence for a capital crime or under sentence of imprisonment for seven years and upwards is ground for divorce. In Victoria, New South Wales, South Australia and Western Australia, it is a wife's ground for divorce that her husband has within five years undergone frequent convictions for crime and been sentenced in the aggregate to imprisonment for three years or upwards and has left her habitually without sufficient means of support. In Tasmania either husband or wife may petition for divorce on the ground that the other has within five years undergone frequent terms of imprisonment and been sentenced in the aggregate to imprisonment for three years. In Victoria, New South Wales, South Australia and Western Australia, conviction during the year prior to petition of attempt to murder the other spouse or of assaulting such spouse with intent to inflict grievous bodily harm is ground for divorce. Tasmania limits the ground to conviction for attempt to murder.

Insanity. In Victoria, Queensland, South Australia and Western Australia, divorce is obtainable when a spouse is a lunatic or person of unsound mind and has been an inmate of one or more mental hospitals for periods not less in the aggregate than five years, within

six years (seven years in Western Australia) immediately preceding the filing of the petition and is unlikely to recover from the lunacy or unsoundness of mind. In Tasmania the ground is similar but the insanity must have persisted for seven out of the preceding ten years, and confinement in a mental institution need not be proved.

Failure to Support. In South Australia it is a ground for a wife's divorce that husband has habitually failed for three years to pay maintenance to wife under a court order or written separation agreement. In Western Australia, it is a wife's ground for divorce that the husband has habitually failed to pay maintenance for herself or their children due under a court order or a separation agreement.

Presumption of Death. In Queensland, South Australia and Western Australia, it is a ground for divorce that reasonable grounds exist for supposing the other spouse is dead.

Pre-nuptial Incontinence. In Western Australia it is a ground for divorce that either party was incontinent prior to marriage with result respectively that at the time of the marriage the wife was pregnant to a man other than the husband, or a woman other than the wife was pregnant to the husband.

Separation. In Western Australia it is a ground for divorce where separation is of five years' duration and there is no reasonable likelihood of resumption of cohabitation. In South Australia it is a ground for divorce where parties are living separately for five years pursuant to a separation order.

Wilful Refusal to Consummate the Marriage. This is a ground for divorce in Western Australia. In Western Australia, impotence, insanity at the time of marriage, nonage, duress or fraud bringing about the marriage have been made grounds for dissolution of marriage, whereas in the other states decrees of nullity of marriage would be granted.

It will be seen from the above account that in a majority of the states, adultery, desertion, drunkenness and cruelty, crime, and insanity are recognized as grounds of divorce. So far as adultery is concerned, there can, in these days, be hardly any question that a single act of adultery should be a ground for divorce whether at the suit of husband or of wife. In the case of desertion the problem is to decide the period of desertion which at present, at its maximum, is three years and, at a minimum, is twenty-one days, being the period during which a restitution order should be obeyed. One view is that a desertion period of three years punishes not the wrongdoer but the wronged party and that in the third year of desertion it is extremely rare that any effort to come together again is made. Those supporting

this view accept the period of two years, which exists in Tasmania in the case of a wife, as the period which should constitute the offence of desertion. If this period is accepted it would follow that the restitution provision applied in New South Wales could be brought in line by lengthening the period of breach of the restitution order necessary to constitute a ground of divorce. Having regard to the fact that two sets of proceedings have to be brought to obtain a divorce on the ground of statutory desertion, and the time which elapses while the first set is proceeding must be taken into account, the suggestion has been made that the length of the period of breach of a restitution order should be one year, which would make the period which would elapse before the divorce could be obtained as approximately as might be a period of two years' desertion.

Habitual cruelty for one year is a ground for divorce in one state and the same ground exists in three other states though cast in slightly different language. The effect of accepting such a ground would be that the combined ground of habitual drunkenness and cruelty would be superfluous. Habitual drunkenness as a combined ground exists in five states. The question is whether habitual drunkenness should be a ground for divorce in itself or whether it should be combined with leaving without support or neglect of domestic duties. In actual practice courts pay great attention to proof of drunkenness and, if satisfied of habitual drunkenness, require little extra proof of the other element in the ground. Indeed in the case of a woman drunkard, neglect of domestic duties almost necessarily follows and practically the same may be said with regard to absence of support from the male drunkard. On the question of drunkenness as a ground for divorce the Royal Commission on Divorce reported:

> It seems probable from the evidence given before us that habitual drunkenness produces as much, if not more misery for the sober partner and the children of a marriage, as any other cause in the list of grave causes. Such inebriety carries with it loss of interest in surroundings, loss of self-respect, neglect of duty, personal uncleanliness, neglect of children, violence, delusions of suspicion, a tendency to indecent behaviour, and a general state which makes companionship impossible. This applies to both sexes, but in the case of a drunken husband the physical pain of brute force is often added to the mental and moral injury he inflicts upon his wife; moreover, by neglect of business and wanton expenditure, he has power to reduce himself and those dependent upon him to penury. In the case of a drunken wife neglect of home duties and the care

of the children, waste of means, pawning and selling possessions, and many attendant evils, produce a most deplorable state of things. In both cases the ruin of the children can be traced to the evil parental example.

It would appear that there is a strong case for habitual drunkenness being accepted as a ground for divorce, and if that is so, it can hardly be said that the statutory period can be longer than the period fixed in the case of desertion. A spouse who endeavours for as long as possible to keep the home together under most difficult circumstances can surely not be penalized for doing so, as against the spouse who leaves the home and and then secures divorce on the ground of constructive desertion.

The grounds of divorce relating to criminal conduct and to insanity are to be found in the majority of the states. The ground of habitual failure to pay maintenance for three years is a wife's ground and is of comparatively recent origin. It covers the case where there has been an abandonment of the wife, though for technical reasons of law a charge of desertion would fail. It can be argued that it fills a gap and gives relief in a case which rightly demands it, though it only exists in two states.

The ground of presumption of death has of recent years been accepted in three states, following its adoption in England. Difficulty has often arisen in desertion cases, of satisfying the court that the deserter is still alive, in order to justify a decree. This ground gets over the difficulty.

So far as the remaining grounds of divorce are concerned they are exclusively Western Australian, save the ground of separation which exists to a limited extent in South Australia. As they are not accepted by a majority of the states and are not supplementary to grounds which are so accepted, it must be regarded as doubtful whether they would find place in a uniform divorce law.

The suggestions so far made have led to criticism both because it is said that they go too far and that they do not go far enough. They are an attempt to find a middle course between the various conflicting grounds of divorce existing in the Australian states and to deal with the matter on a logical basis.

It may well be, however, that the approach should be on the basis of taking only those grounds which are accepted by the majority of states, and this view may very well be acceptable to many who consider that the previous suggestions go too far. If there is to be divorce it should be for legitimate reasons, and grounds acceptable for many years in the majority of the states can hardly be rejected

unless, of course, there is to be no divorce. On this basis the following grounds of divorce would be provided: adultery; desertion for three years; three years' habitual drunkenness coupled with a like period of cruelty or leaving without support by a husband, or of habitual neglect of domestic duties or rendering herself unfit to discharge them on the part of a wife; rape, sodomy or bestiality on the part of a husband; imprisonment for three years immediately preceding the proceedings under a commuted sentence for a capital crime or under a sentence of imprisonment for life or for at least seven years; conviction during the year immediately preceding the petition of having attempted to murder, or having assaulted with intent to inflict grievous bodily harm, or having caused grievous bodily harm to the petitioner; being a husband, having within five years undergone frequent convictions for crime and been sentenced in the aggregate to imprisonment for not less than three years and left his wife habitually without the means of support; repeated assaults and cruel beatings over a period of one year; confinement for an aggregate of not less than five years out of the six years immediately preceding the petition in an institution or institutions where persons may be confined for unsoundness of mind pursuant to law and being of unsound mind and unlikely to recover; absence from the petitioner for such time and in such circumstances as provide reasonable grounds for presuming that the other party to the marriage is dead.

Of these grounds, repeated assaults and beatings for one year in terms is law in only three states but it was formerly law in a fourth, where it has now become the somewhat wider ground of habitual cruelty for one year. It is, therefore, proper to say that it is accepted in a majority of the states. The presumption of death ground is accepted in only three states, but it is also accepted in England and this may be regarded as weighing down the balance, particularly as it is a sensible ground which obviates the seeking of a decree on the ground of desertion.

It will be seen that separation has not been accepted as a ground for divorce and this will cause antagonism, just as the suggestion of separation as a ground for divorce occasions antagonism. Separation of spouses by consent is just as undesirable as divorce since it keeps them apart, and at one time separation agreements were regarded as contrary to public policy, and this view has not been wholly abandoned by the law. In the case of verbal separations by consent, the law now is that a party to such a separation may request the

other party to resume the matrimonial relationship and failure without reasonable justification to comply with the request constitutes desertion as from the date of the refusal. A similar provision should be enacted with regard to deeds of separation so as to enable divorce for desertion to be claimed three years after the date of the refusal to come together (unless the desertion is terminated in the meantime). Failure to obey an order for restitution of conjugal rights should likewise constitute desertion as from the date of the order, enabling a divorce to be obtained for desertion after the expiration of three years.

The effect of these reforms is that while they do not involve easy divorce or divorce with undue speed, they should enable any person who has a real and substantial ground of divorce to obtain relief.