MATRIMONIAL CAUSES BILL 1959.

EXPLANATORY MEMORANDUM

ON

GROUNDS FOR DISSOLUTION, JUDICIAL SEPARATION AND NULLITY.

A. GROUNDS FOR DISSOLUTION.

The following is a synopsis of the grounds for dissolution of marriage in the States compared with the grounds in clause 27 of the Matrimonial Causes Bill. Where it is considered that differences in language are merely matters of drafting and not of substance, the differences have been disregarded.

(*a*) *Adultery.* (" that, since the marriage, the other party to the marriage has committed adultery ").

2. Adultery is a ground for dissolution in all States. A single act of adultery is sufficient, except in Victoria, where a wife must show that her husband has been guilty of some form of aggravated adultery. A wife domiciled in Victoria for two years may petition for dissolution on the ground that her husband has been guilty of adultery in the conjugal residence or coupled with circumstances or conduct of aggravation or of a repeated act of adultery.[1] Moreover, a wife domiciled in Victoria for any period may petition for dissolution on the ground of incestuous adultery or of bigamy with adultery or of rape or of sodomy or of bestiality or of adultery coupled with such cruelty as without adultery would have entitled her to be divorced *a mensa et thoro* under the law existing previously to 13 June, 1865 in England (that is, the ecclesiastical law) or of adultery coupled with desertion without reasonable excuse for two years or upwards.[2] This latter type of aggravated adultery is also an additional ground for dissolution in New South Wales on a wife's petition.[3]

1. Marriage Act 1958, s. 72 (*e*).
2. Marriage Act 1958, s. 74.
3. Matrimonial Causes Act, 1899, s. 14.

[1]—1000/14.5.1959.—F.6423/58.

3. Under the Commonwealth Bill, a single act of adultery will be sufficient. The Bill does not define " adultery " but relies on the vast volume of case law on the subject. The term " adultery " is not defined in any State Act, except in the Western Australian Act, where it is defined as meaning willing sexual intercourse between a married person and another person of the opposite sex who is not married to that person.[4]

(*b*) *Desertion for two years.* (" that, since the marriage, the other party to the marriage has, without just cause or excuse, wilfully deserted the petitioner for a period of not less than two years ").

4. In all States, desertion for a statutory period is a ground for dissolution. The period in all States is three years, except in Tasmania, where two years' desertion by a husband is a sufficient ground for a wife's petition. Under the Commonwealth Bill, the period is two years, for either party.

5. In New South Wales, the ground is that the respondent has without just cause or excuse wilfully deserted the petitioner and without any such cause or excuse left the petitioner continuously so deserted during three years and upwards.[5] The Victorian ground is almost identical.[6] The Queensland ground is that the petitioner has deserted the respondent " without cause continuously for three years or upwards ".[7] The South Australian ground is simply " desertion for three years ".[8] Western Australia provides for " desertion by the defendant for a continuous period of three years or more ".[9] In Tasmania, the ground is worded similarly to that of New South Wales.[10]

6. Desertion is defined in the Western Australian Act as " some act done without the consent of the other party and without just cause or excuse which manifests an intention to put an end to the matrimonial relationship and which in fact does so. The adultery of a deserted party after the desertion has commenced does not of itself put an end to the desertion. In particular and without limiting the generality of the foregoing desertion may consist of an act or a series of acts by one party reasonably calculated to cause and actually causing the other to leave the party at fault ".[11] It is also defined in the Tasmanian Act as meaning " desertion without the consent or against the will of the other party to the marriage, and without reasonable cause; and wilful or non-justifiable refusal to permit marital intercourse shall be treated as equivalent to desertion ".[12] No definition appears in the Acts of the other States. No attempt has been made in this Bill to define desertion, which is difficult to define exhaustively,[13] and reliance has again been placed on the case law. Generally speaking, however, desertion consists of three

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4. Matrimonial Causes and Person Status Code, 1948–1957, s. 4.
5 Matrimonial Causes Act, 1899–1958, ss. 13 (*a*) and 16 (*a*).
6. Marriage Act 1958. s. 72 (*a*).
7. The Matrimonial Causes Acts, 1864 to 1953, s. 21 (*b*).
8. Matrimonial Causes Act. 1929–1941, s. 6 (*c*).
9. Matrimonial Causes and Personal Status Code 1948–1957, s. 15 (*e*).
10 Matrimonial Causes Act. 1860, ss. 8 (2.) (i) and 9 (1.) (i).
11. Matrimonial Causes and Personal Status Code, 1948–1957, s. 4
12. Matrimonial Causes Act, 1860, s. 7.
13. *Jackson v. Jackson* ((1924) p. 19, at p. 23).

ingredients, which must exist together: the fact of separation, an intention on the part of the deserting party to abandon the other, and the absence of reasonable excuse for such conduct.[14]

7. The scope of what constitutes desertion has been extended by clauses 28, 29 and 30. Clause 28 deals with constructive desertion, that is, desertion caused by a course of conduct that obliges the other party to the marriage to leave the matrimonial home. The Bill effects a change in the law relating to constructive desertion. The present law, following the decision of the Privy Council in 1954 in *Lang v Lang*[15], is that, where one spouse leaves the matrimonial home because of the conduct of the other spouse, it is not desertion if the offending party's conduct was not intended to cause that result. Clause 28 alters this law by providing that where one party leaves the other because of that other's conduct, the person whose conduct caused the withdrawal from co-habitation is deemed to be guilty of desertion notwithstanding that that person may not *in fact* have intended the conduct to cause the other party to live separately and apart. This will mean that certain types of conduct will of necessity create an irrebuttable presumption that the part guilty of them must be held to intend to break up the marriage tie, on the principle that a man must irrebuttably be held to intend the natural consequences of his acts.[16]

8. Clause 29 also introduces a change in the law in regard to desertion. One of the essential features of desertion is that it must be against the wishes of the party who is deserted, so that if the deserted party acquiesces in the desertion there is no desertion; it is separation by consent. Consequently, when parties enter into a separation agreement, desertion cannot run, as the law now stands, notwithstanding that one of the parties may wish to bring the separation to a conclusion. Clause 29 enables desertion to commence where one of the parties to a separation agreement requests the other to resume the matrimonial relationship and the other party without reasonable justification refuses to comply with the request.

9. Because of the law that there must be a continuous intention to desert, if a deserting spouse becomes insane and therefore incapable of forming or having an intention to continue the desertion, the desertion ceases. Consequently, the deserted party is left without a remedy. Clause 30 alters the law by providing that where desertion has commenced, the desertion shall not be deemed to be terminated by reason only that the deserting party has become insane, if it appears to the court that the desertion would probably have continued if the deserting party had not become insane.

10. The Bill is not intended to be a complete code on the law of desertion, and only those provisions which are considered necessary to change the law for the better have been included in the Bill.

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14. *See* Joske's Law of Marriage and Divorce (3rd. edn.), p 181.
15. 90 C.L.R., 529.
16. *Lang v. Lang* 90 C.L.R., 529, at p. 541.

(*c*) *Wilful Refusal to Consummate.* (" that the other party to the marriage has wilfully and persistently refused to consummate the marriage ".

11. This is a ground in Western Australia only.[16]. In England, it is a ground of nullity. However, the recent United Kingdom Royal Commission on Marriage and Divorce recommended that wilful refusal should be made a ground of divorce, and not of nullity,[17] for the following reasons:—

> " 89. Refusal to consummate the marriage may be evidence of impotence in the psychological sense, as for instance, some invincible aversion or repugnance which makes consummation impracticable. Such incapacity presumed to exist at the time of the marriage is a non-statutory ground of nullity in both England and Scotland. Wilful refusal, on the other hand, connotes capacity to consummate the marriage but unwillingness to do so. To make this a statutory ground of nullity suggests some confusion of thought. Nullity should be granted for some defect or incapacity existing at the date of the marriage. Wilful refusal is something that happens after the marriage, and should therefore be a ground of divorce."

The Commission also recommended that the presentation of a petition on this ground should be made an exception to the restriction on presentation of petitions for divorce in the first three years of marriage.[17] This recommendation has also been adopted in this Bill (clause 39(2)).

12. A decree is not to be made on this ground unless the court is satisfied that, as at the commencement of the hearing of the petition, the marriage had not been consummated (clause 31).

(*d*) *Habitual Cruelty for One Year.* (" that, since the marriage, the other party to the marriage has, during a period of not less than one year, habitually been guilty of cruelty to the petitioner ").

13. This is a ground in South Australia only in this form.[18] In New South Wales,[19] Victoria[20] and Tasmania,[21] the ground is that the respondent has during one year previously " repeatedly assaulted and cruelly beaten the petitioner ". There is no cruelty ground as such in Queensland or Western Australia.

(*e*) *Rape, Sodomy, or Bestiality.* (" that, since the marriage, the other party to the marriage has committed rape, sodomy or bestiality ").

14. These are ground in all States, but in New South Wales,[22] Victoria,[23] Queensland[24] and Tasmania[25] they are available on a wife's petition only. In England, also, these grounds are at present available on a wife's petition

16 Matrimonial Causes and Personal Status Code, 1948–1957, s. 15 (*k*).
17. Report, para. 88.
18. Matrimonial Causes Act, 1929–1941, s. 6 (*b*).
19 Matrimonial Causes Act, 1899–1958, ss. 13 (*e*), 16 (*f*).
20. Marriage Act 1958, s. 72 (*d*).
21. Matrimonial Causes Act, 1860, s. 8 (2) (iv), 9 (1) (iv).
22. Matrimonial Causes Act, 1899–1958, s. 14 (1) (*c*).
23. Marriage Act 1958, s. 74.
24. The Matrimonial Causes Acts, 1864 to 1953, s. 21.
25. Matrimonial Causes Act, 1860, s. 9 (1) (vii).

only, but the Royal Commission recommended that husband and wife should now be placed on the same footing as regards sodomy and bestiality, and that in England either spouse should be able to obtain a divorce on the ground that the other spouse has been guilty of sodomy or bestiality.[26] This Bill goes further in making rape, as well as sodomy and bestiality, grounds that are available on the petition of the husband as well as that of the wife.

15. In order to avoid the necessity for a repetition of unsavoury evidence in cases where a party to a marriage has been convicted of rape, sodomy or bestiality, or of " statutory rape ", provisions have been included in the Bill to the effect that evidence that a person has been so convicted is evidence that that person committed adultery with the person on whom the rape or other crime was committed or that the person committed sodomy or bestiality, as the case may be (clause 92(1.)). A certificate by an appropriate officer of a court in any part of the Commonwealth or its Territories or of any part of the Queen's dominions of conviction is to be conclusive evidence of the fact of conviction (clause 92(2.)).

(*f*) *Habitual Drunkenness, and/or intoxication by drugs, for two years.* (" that since the marriage, the other party to the marriage has, for a period of not less than two years—

(i) been a habitual drunkard; or

(ii) habitually been intoxicated by reason of taking or using to excess any sedative, narcotic or stimulating drug or preparation,

or has, for a part or parts of such a period, been a habitual drunkard and has, for the other part or parts of the period, habitually been so intoxicated;")

16. This is a new ground. It is, however, comparable with a number of existing grounds in which drunkenness is an element in all States, except Queensland.

17. The ground in New South Wales, on a husband's petition, is " that his wife has, during three years and upwards, been a habitual drunkard and habitually neglected her domestic duties or rendered herself unfit to discharge them "[27] and, on a wife's petition, " that her husband has, during three years and upwards, been a habitual drunkard and either habitually left the petitioner without the means of support or habitually been guilty of cruelty towards her "[28]. The ground in Western Australia[29] is the same as the New South Wales ground but the period is four years. So also is the South Australian ground,[30] except that cruelty is not included (habitual cruelty for one year being itself a ground for divorce in that State).

18. The comparable grounds in Victoria[31] and Tasmania[32] are also similar to that in New South Wales but, by definition, include intoxication by drugs.

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26. Report, para. 210.
27. Matrimonial Causes Act, 1899–1958, s. 13 (*b*).
28. Matrimonial Causes Act, 1899–1958, s. 16 (*b*).
29. Matrimonial Causes and Personal Status Code, 1948–1957, s. 15 (*g*).
30. Matrimonial Causes Act, 1929–1941, s. 6 (*d*).
31. Marriage Act 1958, s. 72 (*b*).
32. Matrimonial Causes Act, 1860, ss. 8 (2) (ii), 9 (1) (ii).

In the Victorian section "habitual drunkard" is defined as including "a person who is habitually intoxicated by reason of taking or using to excess any sedative, narcotic or stimulating drug or preparation." Under the Tasmanian Act, "habitual drunkard" is defined[33] as meaning "a person who habitually takes or uses any intoxicant, and while under the influence or in consequence of the effects thereof is at times dangerous or the cause of terror to himself or others, or the cause of serious harm or suffering to the members of his family or others, or incapable of managing himself or his affairs".

19. The ground in the Commonwealth Bill covers the case of a person who is a habitual drunkard for part of the statutory period and who is habitually intoxicated by drugs for the remainder of that period.

(*g*) *Frequent convictions for crime and failure to support* ("that, since the marriage, the petitioner's husband has, within a period not exceeding five years—

(i) suffered frequent convictions for crime in respect of which he has been sentenced in the aggregate to imprisonment for not less than three years; and

(ii) habitually left the petitioner without reasonable means of support;").

20. This is the only ground in the Bill that is available on a wife's petition only. A similar ground is available in all States,[34] with the exception of Queensland. In Tasmania, however, failure to support is not an ingredient of the ground. Under the provision as drawn in the Bill, it will be necessary for the petitioner to establish that the respondent has habitually left her without means of support, and it will not be necessary to prove that he left her without support for the full period of five years.[35]

(*h*) *Imprisonment for three years for offence punishable by death or imprisonment* ("that, since the marriage, the other party to the marriage has been in prison for a period of not less than three years after conviction for an offence punishable by death or imprisonment for life or for a period of five years or more, and is still in prison at the date of the petition;")

21. The comparable ground in New South Wales is "that at the time of the presentation of the petition his wife has been imprisoned for a period of not less than three years and is still in prison under a commuted sentence for a capital crime or under sentence to penal servitude or imprisonment for seven years or upwards".[36] Grounds similar to the New South Wales

33. Matrimonial Causes Act, 1860, s. 7.
34. New South Wales Matrimonial Causes Act, 1899–1958, s. 16 (*d*).
Victoria: Marriage Act 1958, s. 72 (*c*).
South Australia: Matrimonial Causes Act, 1929–1941, s. 6 (*g*).
Western Australia: Matrimonial Causes and Personal Status Code 1948–1957, s. 15 (*h*).
Tasmania: Matrimonial Causes Act 1860, ss. 8 (2) (iii), 9 (1) (iii).
35. *McCue v. McCue* (1926), 43 W.N. (N.S.W.) 148.
36. Matrimonial Causes Act, 1899–1958, ss. 13 (*c*) and 16 (*c*).

ground exist in all the other States,[37] except Queensland. The only substantial difference between these grounds and the ground in the Commonwealth Bill is that the State grounds refer to a period of sentence for an offence, whereas the Commonwealth Bill refers to the punishment prescribed for the offence.

(*i*) *Conviction for attempted murder of, or for intentionally inflicting grievous bodily harm on, the petitioner* (" that, since the marriage and within a period of one year immediately preceding the date of the petition, the other party to the marriage has been convicted, on indictment, of—

(i) having committed an offence involving the intentional infliction of grievous bodily harm on the petitioner or the intent to inflict grievous bodily harm on the petitioner; or

(ii) having attempted to murder the petitioner.")

22. There is a similar ground in all States,[38] except Queensland. The New South Wales ground is " that within one year previously (the respondent) has been convicted of having attempted to murder the petitioner or of having assaulted (the petitioner) with intent to inflict grievous bodily harm ". The wording in the Commonwealth Bill has been changed slightly to ensure that the ground covers all States and Territory offences involving the intentional (and actual) infliction of grievous bodily harm and also offences where no actual bodily harm has been occasioned but where there has been an intent to inflict grievous bodily harm.

(*j*) *Habitual and wilful failure for two years to pay maintenance* (" that the other party to the marriage has habitually and wilfully failed, throughout the period of two years immediately preceding the date of the petition, to pay maintenance for the petitioner—

(i) ordered to be paid under an order of, or an order registered in, a court in the Commonwealth or a Territory of the Commonwealth; or

(ii) agreed to be paid under an agreement between the parties to the marriage providing for their separation;")

23. There are similar grounds in South Australia[39] and Western Australia[40] only. In both States, the statutory period is three years. The period under the Bill is two years, to correspond with the period of desertion under the Bill, failure to pay maintenance being a matrimonial offence similar to desertion. The Western Australia ground, which includes failure to pay maintenance for children, is as follows:—

" Entire or habitual failure by a defendant husband during a period of three years at least immediately prior to the commencement

37. Victoria: Marriage Act, 1958, s. 72 (*e*).
South Australia: Matrimonial Causes Act, 1929–1941, s. 6 (*e*).
Western Australia: Matrimonial Causes and Personal Status Code, 1948–1957, s. 15 (*h*).
Tasmania: Matrimonial Causes Act, 1860, s. 81 (2) (iii), 9 (1) (iii).

38. New South Wales: Matrimonial Causes, 1899–1958, ss. 13 (*d*), 16 (*e*).
Victoria: Marriage Act 1958, s. 72 (*d*).
South Australia: Matrimonial Causes Act, 1929–1941, s. 6 (*f*).
Western Australia; Matrimonial Causes and Personal Status Code, 1945–1947. s. 15 (*d*).
Tasmania: Matrimonial Causes Act, 1860, ss. 8 (2) (iv), 9 (1.) (iv).

39. Matrimonial Causes Act, 1929–1941, s. 6 (*j*).

40. Matrimonial Causes and Personal Status Code, 1948–1957, s. 15 (*f*).

of the action to make periodical payments of maintenance which he is obliged to make by the terms of an order of some competent court or by any agreement between the parties under which the parties have been separated during such period. In this paragraph ' maintenance ' means maintenance which the defendant is obliged to pay for the benefit of the plaintiff alone or for the benefit of the plaintiff and any child or children or for the benefit of any children.".

(*k*) *Failure for one year to comply with a decree for restitution of conjugal rights* (" that the other party to the marriage has, for a period of not less than one year, failed to comply with a decree of restitution of conjugal rights made under this Act.")

24. In New South Wales, Queensland, South Australia and Tasmania, the court has jurisdiction to grant decrees for restitution of conjugal rights. In New South Wales[41] and South Australia[42] only, failure to comply with a decree is equivalent to desertion. In the case of South Australia, the failure to comply constitutes desertion as from the date of the order, and the full period for desertion (three years) must elapse before proceedings for desertion can be taken. The New South Wales provision, however, is as follows:—

> " 11.—(1.) If the respondent fails to comply with a decree of the Court for restitution of conjugal rights such respondent shall thereupon be deemed to have been guilty of desertion without reasonable cause and a suit for dissolution of marriage or for judicial separation may be forthwith instituted and a decree nisi for the dissolution of the marriage or a decree of judicial separation may be pronounced on the ground of desertion although the period of three years may not have elapsed since the failure to comply with the decree for restitution of conjugal rights ".

The period for compliance with a decree normally ordered by a court in New South Wales is twenty-one days.

(*l*) *Insane and unlikely to recover, and confinement for five out of six years in an institution for the insane* (" that the other party to the marriage—

(i) is, at the date of the petition, of unsound mind and unlikely to recover; and

(ii) since the marriage and within the period of six years immediately preceding the date of the petition, has been confined for a period of, or for periods aggregating, not less than five years in an institution where persons may be confined for unsoundness of mind in accordance with law, or in more than one such institution.")

By virtue of clause 32, the court must be satisfied before making a decree on this ground, that the respondent was still so confined and unlikely to recover at the commencement of the hearing of the petition.

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41. Matrimonial Causes Act, 1899–1958, s. 11.
42. Matrimonial Causes Act, 1929–1941, s. 19.

25. There is a similar ground in all States,[43] except in New South Wales. In Western Australia, however, the statutory period is five years immediately preceding the commencement of the action, or periods of not less than five years in the aggregate during the seven years immediately preceding such commencement. In Tasmania, the confinement must be for a period or period aggregating not less than seven years out of the ten years prior to the filing of the petition.

(*m*) *Separation for five years* (" that, since the marriage, the parties to the marriage have been separated (whether by agreement, decree or otherwise) for a continuous period of not less than five years immediately preceding the date of the petition and there is no reasonable likelihood of cohabitation being resumed; ")

26. This ground, as drafted, is based upon the ground in section 15 (*j*) of the Western Australian Matrimonial Causes and Personal Status Code, 1948.

27. There is a somewhat similar ground in South Australia,[44] as follows:—

" (*k*) That during the five years preceding the commencement of the action the husband and wife have been living separately under and pursuant to a decree or order, granting a judicial separation or relief from cohabitation, and made whether before or after the enactment of this paragraph by any Court, whether superior or inferior, in any part of His Majesty's dominions."

28. There are also two somewhat similar grounds in New Zealand,[45] as follows:—

" (*i*) that the petitioner and respondent are parties to an agreement for separation, whether made by deed or other writing or verbally, and that such agreement is in full force and has been in full force for not less than three years ".

" (*jj*) that the petitioner and respondent are living apart and are unlikely to be reconciled, and have been living apart for not less than seven years: ".

These provisions must be read subject to section 18 of the New Zealand Act, which is as follows:—

" 18. In every case where the ground on which relief is sought is one of those specified in paragraphs (*h*), (*i*), (*j*) and (*jj*) of section ten of this Act, and the petitioner has proved his or her case, the Court shall have a discretion as to whether or not a decree shall be made; but if upon the hearing of a petition praying for relief on the ground specified in paragraph (*i*) or paragraph (*j*) or paragraph (*jj*) aforesaid the respondent opposes the making of a decree, and it is proved to the satisfaction of the Court that the separation was due to the wrongful act or conduct of the petitioner, the Court shall dismiss the petition.".

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43. Victoria: Marriage Act 1958, s. 72 (*f*).
Queensland: The Matrimonial Causes Acts, 1864 to 1953, s. 21 (*a*).
South Australia: Matrimonial Causes Act, 1929–1941, s. 6 (i).
Western Australia: Matrimonial Causes and Personal Status Code, 1948–1957, s. 15 (i).
Tasmania: Matrimonial Causes Act, 1860, ss. 8 (2.) (v), 9 (1.). (vi).

44. Matrimonial Causes Act, 1929–1941, s. 6 (*k*).

45. Divorce and Matrimonial Causes Act, 1928, ss. 10 (i), 10 (*jj*).

29. Under the Western Australian Act, the commission of certain matrimonial offences by a petitioner who relies on the ground of five years' separation is an absolute bar to the granting of the petition (section 26). Subject to these absolute bars, the court has an absolute discretion to grant or refuse relief (section 25). Section 26 is as follows:—

> " 26. The court shall not make an order for dissolution of marriage or judicial separation if the evidence discloses—
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> . . . . . .
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> (*d*) in the case of an action for dissolution of marriage on the ground that the husband and wife have lived apart for a period of not less than five years immediately preceding the commencement of the action and are not likely to resume cohabitation that the plaintiff—
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> (i) has in the five years preceding the commencement of the action—
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> been guilty of adultery;
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> been guilty of sodomy or bestiality;
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> been convicted of attempted murder of the defendant or of assault on the defendant with intent to inflict grievous bodily harm;
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> been imprisoned for an offence or offences against the criminal law for a period exceeding three years or for periods amounting in the aggregate to at least three years;
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> (ii) is in default when the action is commenced in respect of maintenance payments under any antecedent court order or under any agreement for the payment of maintenance for the defendant or any child of the marriage."

30. So far as the Commonwealth Bill is concerned, the absolute bars to relief contained in clause 35, condonation and connivance, are not applicable to this ground, and do not apply to it. Nor do the ordinary discretionary bars in clause 37. Instead, clause 33 provides special limitations on the general duty of the court to grant a decree (as to which, *see* clause 64). These special provisions are as follows:—

> (1.) Where the court is satisfied that, by reason of the conduct of the petitioner, whether before or after the separation commenced, or for any other reason, it would, in the particular circumstances of the case, be harsh and oppressive to the respondent, or contrary to the public interest, to grant a decree on that ground on the petition of the petitioner, the court *shall* refuse to make the decree sought.
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> (2.) The court *may*, in its discretion, refuse to make a decree if the petitioner has, whether before or after the separation commenced, committed adultery that has not been condoned by the respondent or, having been so condoned, has been revived.

(3.) Where petitions by both parties to a marriage for the dissolution of the marriage are before a court, the court shall not, upon either of the petitions, make a decree on the ground of separation if it is able properly to make a decree upon the other petition on any other ground.

(*n*) *Presumption of death* (" that the other party to the marriage has been absent from the petitioner for such time and in such circumstances as to provide reasonable grounds for presuming that he or she is dead.")

31. There is a similar ground in Queensland,[46] South Australia[47] and Western Australia.[48]

32. Clause 34 of the Bill provides that where proceedings are brought upon this ground proof that the other party to the marriage was actually absent from the petitioner for a period of seven years immediately preceding the date of the petition, and that the petitioner has no reason to believe that the other party was alive at any time within that period, is sufficient to establish the ground, unless it is shown that the other party to the marriage was alive at any time within that period. There is a similar provision in the Queensland and South Australian sections.

B. GROUNDS FOR JUDICIAL SEPARATION.

1. In all States[1], the grounds for judicial separation available to either spouse are—

(1) Adultery.

(2) Cruelty.

and also, except in Western Australia—

(3) Desertion without cause for two years.

(4) Any ground on which a divorce *a mensa et thoro* might have been pronounced in the ecclesiastical courts in England prior to the Matrimonial Causes Act, 1857.

2. In addition, the following are grounds in the States indicated—

(*a*) In New South Wales, the several grounds for dissolution of marriage.

(*b*) In Victoria, insanity (as for dissolution).

(*c*) In South Australia, failure to comply with an order for restitution of conjugal rights.

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46. Queensland: The Matrimonial Causes Acts, 1864 to 1953, s. 39A.
47. South Australia: Matrimonial Causes Act, 1929–1941, s. 6*a*.
48. Western Australia: Matrimonial Causes and Personal Status Code, 1948–1957, s. 16.

1. New South Wales: Matrimonial Causes Act 1899–1958, ss. 31–33.
Victoria: Marriage Act 1958, ss. 60–61.
Queensland: The Matrimonial Causes Acts, 1864 to 1953, ss. 2 9.
South Australia: Matrimonial Causes Act, 1929–1941, s. 7.
Western Australia: Matrimonial Causes and Personal Status Code, 1948–1957, s. 17.
Tasmania: Matrimonial Causes Act 1860, ss. 1, 3.

(*d*) In Western Australia, desertion (no period of time fixed), sodomy or bestiality, cruelty to children, and wilful refusal to provide reasonable maintenance for plaintiff or children.

3. Under the Commonwealth Bill (clause 48) all the grounds for dissolution of marriage are to be grounds for judicial separation, with the exception of ground (*m*) (separation for five years) and (*n*) (presumption of death). The very nature of ground (*m*) is such that it should not constitute a ground for judicial separation—indeed parties separated by a decree of judicial separation may apply for dissolution of their marriage under this ground. Ground (*n*) is not applicable to judicial separation.

C. GROUNDS FOR NULLITY.

1 The only grounds for nullity in the States at the present time are the common law grounds, which are as follows:—

(i) Incapacity to consummate the marriage arising from impotence.

(ii) Marriage within the prohibited degrees.

(iii) Prior marriage.

(iv) Breach of a provision of the marriage law essential to validity.

(v) Want of consent through mental incapacity, mistake, fraud or duress.

(vi) Nonage, or lack of marriageable age.

2. In England, additional grounds of nullity were added in 1937, and these are now to be found in section 8 of the United Kingdom Matrimonial Causes Act, 1950, which is as follows :—

"8.—(1.) In addition to any other grounds on which a marriage is by law void or voidable, a marriage shall be voidable on the ground—

(*a*) that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate the marriage; or

(*b*) that either party to the marriage was at the time of the marriage of unsound mind or a mental defective within the meaning of the Mental Deficiency Acts, 1913–1938, or subject to recurrent fits of insanity or epilepsy; or

(*c*) that the respondent was at the time of the marriage suffering from venereal disease in a communicable form; or

(*d*) that the respondent was at the time of the marriage pregnant by some person other than the petitioner."

3. Queensland adopted the English ground (*c*) in the Health Act of 1937. Western Australia adopted the English grounds (*a*) and (*d*), as well as common law grounds (i), (v) and (vi), as grounds for *dissolution* of marriage[1]: the only grounds of nullity in that State now are common law grounds (ii), (iii) and (iv).[2]

1. Matrimonial Causes and Personal Status Code, 1948–1957, s. 15 (*k*), (*n*), (*m*).
2. Matrimonial Causes and Personal Status Code, 1948–1957, s. 20.

4. The recent United Kingdom Royal Commission on Marriage and Divorce considered the grounds for nullity at some length (Part II. of the Report) and came to the conclusion, in effect, that the grounds mentioned in paragraph 2 above were justified and should be retained, but not extended. The Commission recommended that wilful refusal to consummate a marriage should be made a ground of divorce, and not of nullity as it is at present in England. Wilful refusal has been made a ground for dissolution under this Bill[3] and the remainder of the English grounds have been adopted as circumstances rendering a marriage voidable (clause 20) and so consituting grounds for annulment (clause 43).

5. The Western Australian precedent of making marriages that are voidable capable of being dissolved instead of being annulled has not been followed in this Bill. However, in view of the provision in this Bill that a decree of nullity of a voidable marriage does not render illegitimate a child of the parties born since, or legitimated during, the marriage (clause 47, which alters the existing law)[4] the only difference between dissolution and annulment of a voidable marriage under this Bill is the basis of jurisdiction (clause 22 (4.) and (5.)), the bars to relief (clauses 35, 36 and 37, which are not applicable to nullity proceedings) and the actual form of the relief.

6. The Bill makes provision (clause 43) for a decree of nullity where a marriage is void or voidable. The Bill does not, however, require that a decree must be obtained for the purpose of annulling a void marriage. The distinction between a void and a voidable marriage has been stated[5] as follows:—

> " A void marriage is one that will be regarded by every court in any case in which the existence of the marriage is an issue as never having taken place and can be so treated by both parties to it without the necessity of any decree annulling it: a voidable marriage is one that will be regarded by every court as a valid subsisting marriage until a decree annulling it has been pronounced by a court of competent jurisdiction."

7. At present, the children of a void marriage are illegitimate, but those of a voidable marriage are deemed legitimate unless the marriage is set aside in the lifetime of the parties. A petition for annulment of a voidable marriage may only be presented by one of the spouses in the lifetime of the other, so that if one of them dies before the decree is granted, the marriage must be treated as valid for all purposes and for all time. Clause 47 of the Bill provides that a decree of nullity of a voidable marriage annuls the marriage from the the date on which the decree becomes absolute and does not render illegitimate a child of the parties born since, or legitimated during, the marriage.

8. The common law grounds of nullity have been classified as rendering a marriage void or voidable as follows:[6]—

Canonical disabilities—Voidable—

(i) Incapacity to consummate the marriage arising from impotence.
(ii) Marriage within the prohibited degrees.

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3. *See* page 4 above.
4. *See* paragraph 7 below.
5. Per Lord Green in *De Reneville and De Reneville* (1948) 1 All E.R. 56, at p. 60.
6. MacKenzie's Divorce Paractice, 6th Edn., p. 152.

Civil disabilities—Void—

(iii) Prior marriage.

(iv) Breach of a provision of the marriage law essential to validity.

(v) Want of consent through mental incapacity, mistake, fraud or duress.

(vi) Nonage or lack of marriageable age.

9. It would seem, however, that in at least some of the cases falling under classes (v) and (vi) the courts would find that the marriages were voidable only, and capable of approbation or ratification where the disability was removed.[7] Under this Bill, the position has been made certain by making marriages *void* if any of the common law disabilities are present, except for incapacity to consummate, which will render a marriage voidable (clause 20 (1.) (*a*)). As already stated, the adopted English grounds will make those marriages voidable.

7. In a recent case on duress the court expressed the view that the marriage was probably not void, but voidable. (*Parojcic* v. *Parojcic* (1958), 1 W.L.R., 1280).

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