



## In Focus

### **Divorce (Financial Provision) Bill [HL] (HL Bill 21 of 2016–17)**

#### Key Provisions

The [Divorce \(Financial Provision\) Bill \[HL\]](#) is a private member's bill introduced by Baroness Deech (Crossbench). The Bill received its first reading in the House of Lords on 26 May 2016, and is scheduled to receive its second reading on 27 January 2017. The Bill proposes to replace section 25(2) of the [Matrimonial Causes Act 1973](#) with “provisions about the principles to be applied in determining applications for such orders, including provision about the effect of pre-nuptial and post-nuptial agreements”.<sup>1</sup> Setting out the purpose of the Bill, Baroness Deech explained:

The purpose of this Bill is to reform the law relating to the splitting of assets on divorce. The current law is the Matrimonial Causes Act 1973, section 25, which has not been thoroughly debated by Parliament for 40 years despite radical changes in society and families, and which has been the subject of calls for reform from the Law Commission, Resolution and the Centre for Social Justice. Reform is urgent because the law is uncertain. It is largely judge-made law, which bears little resemblance to the statute. Judicial discretion has led to unpredictability and conflicting decisions, which make it hard for parties to negotiate and lead to disproportionate costs. Legal aid has been removed and parties of modest means are left unrepresented with little guidance as to the right outcome. The Bill would implement provisions very similar to those of Scottish law, and the laws of most European and North American states. It would introduce as a fair starting point the equal division of all the property and pensions acquired by the couple after marriage; provision for short term maintenance; flexibility to allow the home to be retained for the carer and children; and binding prenuptial agreements. This is intended to facilitate mediation, reduce litigation and costs, and recognise equal partnership in marriage.<sup>2</sup>

Clause 1 would amend section 25(2) of the Matrimonial Causes Act 1973, replacing it with a series of principles that would apply in the determination of applications for financial orders in divorces. Clause 2 would restrict financial orders to matrimonial property, except in cases of pre-nuptial and post-nuptial agreements. Clause 3 would make both written pre-nuptial and post-nuptial agreements binding, subject to a number of exceptions. Clause 4 proposes that the net value of matrimonial property is to be shared fairly between the parties, apart from in specific circumstances. Clause 5 lists factors that would be taken into account when awarding periodical payments and lump sums. Clause 6 states that when determining an application to which sections 4 or 5 applies, the conduct of either party would not be taken into account, with a few exceptions. Lastly, clause 7 provides for the Bill's extent, commencement and short title.

## Background

### Divorce (Finance Provision) Bill [HL] 2014–15

Baroness Deech has introduced similar private member's bills, with the same name, in the previous three sessions. On two of these occasions, the Bill did not receive second reading. However, in the 2014–15 session, the Bill completed all its stages in the House of Lords.<sup>3</sup> During the 2014–15 Bill's second reading on 27 June 2014, Baroness Deech gave similar reasons for its introduction as have been expressed in regards to the current Bill. The central premise of the Bill has also remained the same, described by Baroness Deech as consisting of:

Three pillars: binding prenups, an equal division of post-marital assets, and some curbing of maintenance.<sup>4</sup>

During second reading, Lord Kennedy of Southwark (Labour) indicated “qualified support” for the Bill, stating:

I cannot at this stage give the Bill my wholehearted support—but [...] I give it my qualified support. However, with careful debate, identifying the issues of concern, we could be in a position to agree amendments that would enable us to give it our full support.<sup>5</sup>

Responding for the Coalition Government, Lord Faulks, the then Minister of State for Justice, stated:

The Government have a number of concerns about the Bill's provisions and whether these sufficiently safeguard the needs of children and families so as to avoid potential hardship.<sup>6</sup>

Lord Faulks also drew attention to a report by the Law Commission on the topic, arguing that “the Bill's proposals differ quite substantially from the recommendations made by the Law Commission”.<sup>7</sup> However, the then Government did not oppose the Bill receiving its second reading, despite “reservations about its approach and scope”.

Committee stage took place on 21 November 2014 and saw several key changes made to the Bill.<sup>8</sup> Prior to the committee stage, Baroness Deech gave notice of her intention to oppose the question that the then clause 6 stand part of the Bill.<sup>9</sup> During committee, other amendments agreed saw the retention of section 25(1) of the Matrimonial Causes Act, preserving the provision that “in dealing with finance after divorce the interests of children under 18 are the first consideration for the court”.<sup>10</sup> Clause 2 was replaced with a proposed new clause defining matrimonial property, and other changes included clarification of the definition of a “relevant financial order”, an increase in the amount of time that maintenance should last and several changes to proposals concerning pre and post-nuptial agreements.<sup>11</sup>

Lord Faulks stated during the committee stage that “the Government position [regarding the Bill] was made clear at second reading and it would not be helpful to repeat that position at this stage”.<sup>12</sup> However, later he added that “the Government are not convinced that the certainty that the Bill and these amendments intend to provide would not come at too great a cost in rigidity”.<sup>13</sup>

The Bill received its third reading on 18 March 2015, where no amendments were made. However, the Bill did not receive a first reading in the House of Commons. The current Bill, introduced in the House of Lords on 26 May 2016, contains the same clauses as the Divorce (Financial Provision) Bill [HL] 2014–15, as amended in committee.<sup>14</sup>

### External Commentary

In February 2015, Resolution (an organisation of family lawyers and other professionals) launched its *Manifesto for Family Law*, which called for changes to the law surrounding divorce and separation.<sup>15</sup>

Focusing on six key areas, the 'Manifesto' urged the next Government to take action to improve the "unmodern law" on divorce. This included a recommendation to help people understand how divorce will affect their future finances. Outlining the issue, Resolution argued:

Divorce law relating to finances is complex and difficult to understand. Outcomes can be difficult to predict, even for legal professionals. Section 25 of the Matrimonial Causes Act 1973, which determines how money is divided up on divorce, has fundamentally remained unchanged for the last 40 years.<sup>16</sup>

The Manifesto also argued that people separate with little or no understanding of the financial consequences of their break up, thereby making it more difficult for them to reach agreement and, as a result, placing burden upon the court system. It also contended that the courts have seen an increase in unrepresented litigants due to the removal of legal aid for divorce, with 50,000 people representing themselves in 2013. Offering a solution to the issues raised, the Manifesto recommended the reform of section 25 of the Matrimonial Property Act 1973, with changes including the addition of enforceable agreements ('pre-nups'), clear guidelines on the division of capital resources and pensions, and a distinction between matrimonial property and non-matrimonial property in cases where resources exceed the needs of the separating couple.

As discussed in the debates on the Bill introduced in the 2014–15 session, the Law Commission's report, *Matrimonial Property, Needs and Agreements*, released in February 2014, made a number of recommendations in regards to financial needs and marital property agreements. These included the suggestion that the meaning of 'financial needs' be clarified in guidance published by the Family Justice Council, to ensure consistent application by the courts and assist those without legal representation who need a clear statement of their responsibilities and the objective their financial settlements should be achieving.<sup>17</sup> This guidance, entitled, *Sorting out Finances on Divorce*, was published in April 2016.<sup>18</sup> The Law Commission report also recommended that work be completed to assess whether a formula to produce a financial range, within which a court order might fall, would assist in indicating minimum and maximum levels of support within which parties can negotiate.<sup>19</sup> The then Government submitted its preliminary views on the report in a letter in April 2014, which was deposited in the Library.<sup>20</sup> However, in a written question on 20 October 2014, Simon Hughes, the then Minister of State for Justice and Civil Liberties, stated:

In September 2014 the Government proposed to the Law Commission that a final response should be given in the next Parliament. This will allow the next Government to give the proposals full consideration without the current pressures on Parliamentary time.<sup>21</sup>

In a more recent written question answered on 29 July 2015, Lord Faulks stated that the Government was "carefully considering the Law Commission's recommendations and will respond in due course".<sup>22</sup>

## Statistics

Figures published by the Office for National Statistics (ONS) in December 2016, showed that there were 111,169 divorces in England and Wales in 2014.<sup>23</sup> This number represented a decrease of 3.1 percent from the previous year and a decline of 27 percent from a peak in 2003. The bulletin also provides information on trends in divorce since the 1970s, finding that the percentage of marriages which end in divorce generally increased between the early 1970s and the early 1990s; 22 percent of marriages in 1970 ended by the 15th wedding anniversary, compared to 33 percent ending after the same time period in 1995. For marriages since 2000, there is some evidence of decreases in the proportion ending in divorce. Nicola Haines, from the Vital Statistics Outputs Branch of the ONS, provides some context to these figures:

Compared with 2004, divorce rates in 2014 were lower for all age groups except women aged 55 and over. Likely factors include increased cohabiting and increasing age at first marriage.

Previous research indicates a higher risk of divorce among those marrying at younger ages, whilst cohabitation may be reducing the number of weaker relationships progressing to marriage.

In regards to the children of divorced couples, ONS data from 2013 shows that 48 percent of couples divorcing had at least one child under the age of 16 living in the family home, equalling 94,864 children, a decrease of 38 percent from 2003.<sup>24</sup> Of these children, 21 percent were aged under 5 years and 64 percent were aged under 11 years.

Several polls carried out by YouGov have explored the public's opinion on the topic of pre-nuptial agreements. In 2010, YouGov reported that 72 percent of those asked thought that the courts should recognise pre-nuptial agreements.<sup>25</sup> Further research in 2014 found that 58 percent thought that knowledge of what would happen financially if a marriage ended made no difference to the chance of divorce.<sup>26</sup>

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## Further Information

- Jane Mair et al, [Built to Last: The Family Law \(Scotland\) Act 1985: 30 Years of Financial Provision on Divorce](#), University of Glasgow, 2016
- House of Commons Library, [Financial Provision When a Relationship Ends](#), 12 April 2016

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<sup>1</sup> Clause 1(2) of the Bill.

<sup>2</sup> This text was provided by Baroness Deech on request from the Library.

<sup>3</sup> [Divorce \(Financial Provision\) Bill \[HL\]](#), HL Bill 60 of 2014–15, clause 1(2).

<sup>4</sup> [HL Hansard, 27 June 2014, col 1494](#).

<sup>5</sup> *ibid*, col 1510.

<sup>6</sup> *ibid*, col 1516.

<sup>7</sup> *ibid*, col 1514.

<sup>8</sup> [HL Hansard, 21 November 2014, cols 618–44](#).

<sup>9</sup> Divorce (Financial Provision) Bill [HL], [Marshaled List of Amendments to be Moved in Committee](#), 19 November 2014, p 5.

<sup>10</sup> [HL Hansard, 21 November 2014, cols 618–9](#).

<sup>11</sup> *ibid*, col 629.

<sup>12</sup> *ibid*, col 619.

<sup>13</sup> *ibid*, col 630.

<sup>14</sup> [Divorce \(Financial Provision\) Bill \[HL\]](#), HL Bill 60 of 2014–15 (as amended in committee).

<sup>15</sup> Resolution, [Manifesto for Family Law](#), February 2015.

<sup>16</sup> *ibid*, p 24.

<sup>17</sup> Law Commission, [Matrimonial Property, Needs and Agreements](#), 27 February 2014, p 6.

<sup>18</sup> Family Justice Council, [Sorting Out Finances on Divorce](#), April 2016.

<sup>19</sup> *ibid*, p 7.

<sup>20</sup> Ministry of Justice, '[Letter to Professor Elizabeth Cooke: Law Commission Report on Matrimonial Property, Needs and Agreements](#)', 8 April 2014, DEP2014-1304.

<sup>21</sup> House of Commons, '[Written Question: Matrimonial Property](#)', 20 October 2014, 210514.

<sup>22</sup> House of Lords, '[Written Question: Matrimonial Property](#)', 29 July 2015, HL1496.

<sup>23</sup> Office for National Statistics, [Statistical Bulletin: Divorces in England and Wales: 2014](#), 5 December 2016.

<sup>24</sup> Office for National Statistics, [Statistical Bulletin: Divorces in England and Wales: 2013](#), 23 November 2013.

<sup>25</sup> YouGov, '[Survey Results: Prenups](#)', 2010.

<sup>26</sup> YouGov, '[Prenups Don't Increase Chance of Divorce Says Public](#)', 9 March 2014.

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