# Family Law Bill [HL] [Bill 82 of 1995/96] Domestic Violence

## Research Paper 96/39

## 21 March 1996

This paper seeks to explain the main provisions of Part IV of the Family Law Bill [HL]which is due to have its second reading on 25 March 1996. This part of the Bill re-introduces with amendments the provisions of the Family Homes and Domestic Violence Bill [HL] [Bill 141 of 1994/95] which was withdrawn before its Commons Report stage last Session due to controversy over its application to cohabitants. This paper is intended to be read in conjunction with the Law Commission report *Family Law: Domestic Violence and Occupation of the Family Home* [Law Com No 207, HC1 of 1992/93], the *Notes on Clauses* on the Bill and the proceedings and evidence of the Special Public Bill Committee which considered the earlier Bill last session [HL Paper 55 of 1994/95]. The proposed reforms in this area relate only to civil remedies and so criminal law aspects of domestic violence, police responses, non-legislative government initiatives and refuge provision are not covered in this paper.

Part IV of the Bill extends only to England and Wales.

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# Summary

In England and Wales existing civil remedies available in cases of domestic violence have been the source of much complaint. Part IV of the current Bill seeks to implement most of the recommendations contained in the Law Commission report *Family Law: Domestic Violence and Occupation of the Family Home*.[1] The *Family Homes and Domestic Violence Bill* [HL Bill 141] of last session attempted also to introduce those recommendations but it was withdrawn following controversy over the application of the Bill to unmarried couples. Although some of the criticism was based on a misunderstanding of the current law, the Lord Chancellor agreed to look again at the Bill. The current Bill contains new provisions designed to "further distinguish the treatment of married and unmarried couples" and to underline "the value which we [the Government] place on marriage".[2]

Part IV of the *Family Law Bill [HL]* seeks to make provision for reform of the various discretionary remedies which exist in family law to deal with two problems: providing protection for one member of a family against molestation or violence by another, and regulating the occupation of the family home where the relationship has broken down. the Bill seeks to provide for a single consistent set of remedies - namely "non-molestation orders" and "occupation orders". Eligibility to apply for the remedies is based on the concept of persons who are "associated" with one another by way of certain family or domestic connections or who are parties to family proceedings.

The Bill's provisions extend only to England and Wales.

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1 Law Com No 207, HC 1 of 1992/93

2 Lord Chancellor, Debate on the Address (Third Day) HL Deb vol 567, 20 November 1995 c137

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# I Introduction

In England and Wales existing civil remedies available in cases of domestic violence have been the source of much complaint. On 7 May 1992 the Law Commission published its report *Family Law: Domestic Violence and Occupation of the Family Home*[3] in which it said that the remedies are "complex, confusing and lack integration". At present the orders that the courts can make fall into two categories: orders designed to protect the applicant and/or children personally and orders dealing with the occupation of the family home. Applications can be made to the magistrates' courts, the county courts and to the High Court (although this would be unusual). The orders that are available differ according to the court to which an application is made and according to the marital status of the applicant. Adult persons other than spouses and cohabitants must rely on ordinary tortious remedies (eg injunctions ancillary to proceedings for trespass to the person, nuisance and personal injury) which may be less effective in securing protection for the victim.

# II Current remedies

## A. Magistrates' Courts

Applications may be made by spouses only. No protection is offered to those who are already divorced or who are simply cohabiting. Orders are made under section 16 of the *Domestic Proceedings and Magistrates' Courts Act 1978.* The principal orders available are **personal protection orders** to prevent violence or threats of violence against the person of the applicant and/or of a child of the family and **exclusion orders** regulating the occupation of the matrimonial home. The exclusion order may require the respondent to leave the matrimonial home or to prohibit him from entering it or to require the respondent to permit the applicant to enter and remain in the home. Unlike in the county court under the *Domestic Violence and Matrimonial Proceedings Act 1976* a person cannot be excluded from a specified area around the family home.

The court can make personal protection and exclusion orders only if it is satisfied that the respondent has already used or threatened violence. Harassment such as telephone calls, shadowing or other psychological harassment is not sufficient for the obtaining of an order in the magistrates' courts. In the case of personal protection orders the magistrates' court must also be satisfied that an order is necessary for the protection of the applicant or a child of the family. In the case of exclusion orders the court must also be satisfied that the applicant (or

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[3] Law Com No 207, HC 1 of 1992-93

child) is in danger of being physically injured by the respondent if the applicant (or child) were to enter the matrimonial home. The court can attach a power of arrest to either order provided that the respondent has already used violence against the applicant (or child) and the court considers that he is likely to do so again. Personal protection orders can be expedited where immediate protection is required. There is no power to make an expedited exclusion order.

## B. County Courts

Orders can be sought in a number of ways in the county courts.

First, application may be made under section 1 of the *Domestic Violence and Matrimonial Proceedings Act 1976* by either spouses or cohabitants. The orders available are **non-molestation injunctions** to prevent violence, threats of violence and other forms of molestation and **ouster injunctions** to regulate occupation of the matrimonial home (as in the magistrates' courts) and, in some cases, to prevent a spouse or cohabitant from approaching within a specified distance of it.

Second, application may be made by a spouse to regulate the occupation of the matrimonial home or part of it under the *Matrimonial Homes Act 1983.* There is no power under this Act to exclude a respondent to domestic violence proceedings from a specified area around the family home.

Third, an application may be made ancillary to divorce proceedings for any necessary order but normally only non-molestation injunctions are granted. A spouse requiring an ouster injunction in the course of divorce proceedings would normally apply under one of the other jurisdictions.

Unlike in magistrates' courts there are no statutory conditions to be satisfied before a non-molestation injunction can be granted but the courts have shown that orders will be granted only if there is evidence that there has been molestation (not necessarily actual or threatened violence - harassment may be enough) and the court considers it necessary to grant an injunction to protect the applicant or a child living with her.

In emergency cases the court can grant non-molestation injunctions *ex parte* which means that the respondent will not be heard but the court must be satisfied that there is a real and immediate danger of serious injury. When considering applications for ouster injunctions or an order under the *Matrimonial Homes Act 1983* the court will have regard to the spouses' conduct; their needs and resources; the needs of any children; and all the circumstances of the case. Powers of arrest can also be attached to injunctions obtained in the county courts.

Although domestic violence may result in criminal proceedings, breach of an injunction is not a criminal offence. Failure to obey an injunction is a civil contempt and renders the respondent liable to committal to prison or a fine.

# III Law Commission Report

In its report on *Family Law: Domestic Violence and Occupation of the Family Home*[4] the Law Commission attributed the inconsistencies and anomalies in the present law to a piecemeal statutory development and the adoption of a remedy for a particular purpose in one context for different purposes in another:[5]

> 2.23 There are many inconsistencies and anomalies in the present law. These have arisen largely as a result of piecemeal statutory development or adaptation of a remedy developed for a particular purpose in one context for different purposes in another.
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> The existing remedies have been developed in response to a variety of needs. Those under the Matrimonial Homes Act 1983 were first introduced in 1967 in order to ensure that deserted wives were not left without a roof over their heads, by giving them rights of occupation in the matrimonial home which could be registered and enforced against third parties, and by giving the court power to regulate occupation of the matrimonial home in the long or short term. To this was later added a power to prohibit the exercise by the property-owning spouse of his right to occupy the home. The remedies provided in sections 16-18 of the Domestic Proceedings and Magistrates' Courts Act 1978 and the Domestic Violence and Matrimonial Proceedings Act 1976 have protection against violence and molestation as their primary objective and were designed to provide an urgent legal response to this, which could include an exclusion order where the circumstances justified it. The principles applicable to regulating occupation of the home in the short or long term and to providing protection from violence and molestation are not necessarily the same. But it is impossible to treat them separately because, very often, the removal of one party from the house is the only effective protection which can be provided in cases of violence.

The Commission was particularly concerned with the problems surrounding orders regulating the occupation of the matrimonial home, particularly under the *Matrimonial Homes Act 1983.* It summarised the possible criticisms as follows[6]:

> 2.26 A number of possible criticisms of the present law, and in particular the application of the Matrimonial Homes Act criteria, were put forward in the working paper and were generally approved by those who responded to it. These can be

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4 *op cit*
5 para 2.23
6 para 2.26

summarised as follows:

(i) the criteria are now out-dated, having first been enacted in 1967 for the purpose of identifying those non-owning spouses (usually wives) who were sufficiently deserving of long term accommodation in the matrimonial home to entitle them to resist dispositions to third parties; this was before most of the significant developments in this field;

(ii) by requiring the parties' conduct to be balanced against the other factors, the criteria may suggest that an ouster order is in effect punishment for bad behaviour, so that the court should be asking itself whether the respondent's conduct is serious enough to justify an order, rather than whether the effect upon the other people in the household is serious enough to do so;

(iii) these criteria with their concentration upon the conduct of the parties are applied to the whole range of very different situations: the need to provide immediate protection against violence or other forms of abuse; the need to resolve short term problems of accommodation when a relationship is or may be breaking down; and the need to resolve longer term problems where the relationship has already broken down;

(iv) where divorce proceedings have already begun, there may well be a need to resolve disputes about who should live in the matrimonial home in the short term, and if possible this should be done without either pre-judging issues which may be in dispute in the proceedings or forcing upon the parties a procedure that is based on language relying on conduct and fault whether or not they wish to pursue the disputes between them in those terms;

(v) there is a risk that the children's welfare will be given insufficient weight, contrary to the general trend towards giving increased, if not predominating, weight to their interests even in relation to matters of finance and property;

(vi) a general assumption that the effects of an exclusion order are invariably so severe as to merit the terms drastic or even Draconian, while obviously warranted in many cases, may obscure the considerable differences between the circumstances of the individual parties and in which the remedy is sought; in combination with a requirement that the respondent's conduct be bad enough to merit such a step, this may impede the sensible and practical resolution of the particular problem presented;

(vii) the Matrimonial Homes Act criteria are not easily applicable to unmarried couples, for example because they do not give any indication of the relevance, if any, or respective property rights.

The Commission also pointed out the difficulties caused by the more limited remedies available in magistrates' courts. In those courts, where it is relatively cheap and simple to obtain orders, only spouses may apply and there is no remedy for non-violent harassment. In addition, the present law provides no remedy for divorced spouses unless they happen to be again living together "as husband and wife". Rights of occupation under the 1983 Act end on divorce unless the court orders otherwise and if no order is made before the divorce none can be made after the divorce but before the financial orders following the divorce are made. A further "serious limitation of the law" was identified as the lack of any simple machinery comparable to that under the *Matrimonial Homes Act 1983* for adjusting cohabitants' rights of occupation.

The Commission considered various solutions to these problems and finally decided in favour of a new code containing a single, consistent set of remedies. The Commission had three aims in making its recommendations for reform:

- to remove the gaps, anomalies and inconsistencies in the existing remedies, with a view to synthesising them, as far as was possible, into a clear and comprehensive code
- to improve the level of protection from that available at present
- to achieve the above aims as far as possible without exacerbating the hostilities between the adults (this aim is consistent with the philosophy behind the Children Act 1989)

A substantial number of respondents to its consultation paper felt that reform should take account of the fact that domestic violence is not limited to violence between spouses, cohabiting partners and children, but is prevalent in many other forms of relationship. The Commission recommended, therefore, that non-molestation orders should be available to people who are associated with one another in any of the following ways[7]:-

(i) they are or have been married to each other;

(ii) they are cohabitants or former cohabitants;

(iii) they live or have lived in the same household, otherwise than merely by reason of one of them being the other's employee, tenant, lodger or boarder;

(iv) they are within a defined group of close relatives;

(v) they have at any time agreed to marry each other (whether or not that agreement has been terminated);

(vi) they have or have had a sexual relationship with each other (whether or not including sexual intercourse);

(vii) they are the parents of a child or, in relation to any child, are persons who have or have had parental responsibility for that child (whether or not at the same time);

(viii) they are parties to the same family proceedings.

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[7] para 3.26

Protection would therefore be offered in certain homosexual relationships and to elderly persons who were living with relatives.

Molestation goes wider than actual violence but it was recommended that it should not be subject to statutory definition in order that the courts have the flexibility to tailor orders to individual circumstances. The recommended criterion for granting non-molestation orders was "where this is reasonable having regard to all the circumstances including the need to secure the health, safety or well-being of the applicant or a relevant child"[8]. The aim of this model was to provide a complete and comprehensive code which is to be applied by all courts, including the magistrates' courts.

Another major objective of the Law Commission's proposals for reform was to remove the confusion between ouster orders, occupation orders under the 1983 Act and exclusion orders. The Commission recommended that the court should simply have power to make an occupation order, and that this should be capable of providing for a number of different matters. The order would be either declaratory or regulatory in its terms[9] .

Declaratory orders would be those:-

(i) declaring pre-existing occupation rights in the home;

(ii) extending statutory occupation rights beyond the termination of the marriage on divorce or death;

(iii) granting occupation rights in the home to non-entitled applicants ("an occupation rights order").

The regulatory orders available would be those:-

(i) requiring one party to leave the home;

(ii) suspending occupation rights and/or prohibiting one party form entering or re-entering the home, or part of the home;

(iii) requiring one party to allow the other to enter and/or remain in the home;

(iv) regulating the occupation of the home by either or both of the parties;

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[8] para 3.7
[9] para 4.1

(v) terminating occupation rights; and

(vi) excluding one party from a defined area in the vicinity of the home.

It was recommended that occupation orders should be available to those to whom non-molestation orders are available where the applicant has a legal right of occupation in the property. Where he or she has no such right then it is recommended that an occupation order should be available only to cohabitants or former spouses[10]. Spouses always have a legal right of occupation in the matrimonial home and come within the first category. Where a person with no legal entitlement to occupy the home (ie a person in the second category) applied for an occupation order the court would be required to consider the following qualifying criteria:[11]

(i) where the parties are cohabitants or former cohabitants the nature of their relationship, the length of time during which they have lived together as husband and wife and whether there are children of both parties or for whom both parties have parental responsibility;

(ii) where the parties are former cohabitants or former spouses, the length of time that has elapsed since the marriage was dissolved or annulled or since the parties ceased to live together; and

(iii) the existence of any pending proceedings between the parties for financial provision or relating to the legal or beneficial ownership of the dwelling house.

Regulatory orders would actually alter the right to occupation despite a person's legal entitlement to occupy the home and the Commission recommends that the court should have power to grant considering all the circumstances of the case and in particular the following factors:-

(i) the respective housing needs and resources of the parties and of any relevant child;

(ii) the respective financial resources of the parties; and

(iii) the likely effect of any order, or of any decision by the court not to make an order, on the health, safety and well-being of any relevant child.

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[10] para 4.9

[11] para 4.13

It was also recommended that the court be under a duty to make an order if significant harm to the applicant (or child) greater than that to the respondent would result if an order were not made[12] .

Various other recommendations were made which would allow the courts to retain a general discretion to make *ex parte* orders in cases of emergency and to attach a power of arrest to orders.

A draft Bill was attached to the Commission's report. On 15 June 1994 the Lord Chancellor announced that[13]:

> The Government have decided to implement almost all of the recommendations contained in the [Law Commission's] report and consider them to provide a firm basis upon which to reform the law relating to the civil remedies for domestic violence and occupation of the family home. Legislation to implement the recommendations will be introduced when a suitable opportunity occurs. The Government have not accepted the recommendation to give the police power to take civil action on behalf of victims of domestic violence or the recommendation for two of the proposed new categories of associated persons who would be able to apply for non-molestation and occupation orders. The categories which have not been accepted are people "who have at any time agreed to marry each other (whether or not that agreement has been terminated)", and people "who have or have had a sexual relationship with each other (whether or not including sexual intercourse)".

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[12] para 4.33

[13] HL Deb vol 555 c97WA - 15.6.94

# IV Other Reports

In July 1992 Victim Support published its Working Party report on *Domestic Violence.* The Working Party included national representatives from the police, Women's Aid Federations, Victim Support, Relate, the Probation Service, Social Services and the legal and medical professions. It was set up to look at domestic violence in a context wider than the problem of crime. It recognised the effect that violence and threats of violence might have on the health of families and noted the vulnerability of women who were socially and economically dependent on men. The report made a large number of recommendations and the Working Party was surprised at the consensus among its members, both in relation to seeing domestic violence as a major social problem and to the means necessary to reduce it and help victims. One of the major principles behind the recommendations was that civil law should be improved and simplified to provide better protection for women and children from violence occurring in their own homes[14].

The Home Affairs Select Committee published its report on *Domestic Violence*[15] in February 1993. The Committee made a number of recommendations, many of which reinforced the recommendations already contained in the Victim Support and Law Commission Reports. The Committee largely endorsed the Law Commission's proposals and recommended that legislation based on the Commission's draft bill be introduced in the next session of Parliament[16]. No legislation was introduced in that Session.

The Committee recommended the rejection of the Law Commission's proposal that the police should have the power to pursue civil remedies on behalf of the aggrieved party in domestic violence cases on the grounds that police powers should not be extended from a criminal function to a civil function. This aspect of the Law Commission's proposals has been rejected by the Government[17].

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[14] para 9.5
[15] Third Report of 1992-93, HC 245
[16] para 119
[17] HL Deb vol 555 c97WA - 15.6.94

# V The Family Homes and Domestic Violence Bill of 1994/95

The *Family Homes and Domestic Violence Bill [HL]*[18] was introduced last session into the House of Lords. It was seen as a major reforming measure in the field of family law and it followed on from the *Children Act 1989* by bringing together a large number of piecemeal statutory provisions in a single piece of legislation. On Second Reading the Lord Chancellor endorsed the view of the Law Commission[19] that the changes provided for in the Bill would[20]:

- remove the gaps, anomalies and inconsistencies in the existing remedies, with a view to synthesising them as far as possible into a clear, simple and comprehensive code
- improve the level of protection available for victims of domestic violence
- avoid increasing hostilities between the adults involved so far as compatible with providing proper and effective protection both for adults and children

The Bill was taken under the Jellicoe procedure which provides for less contentious law reform bills to be committed to a Special Public Bill Committee in the Lords. The Committee can hear evidence and go through a bill clause by clause. Membership of such a committee does not guarantee the Government a majority; independent peers hold the balance. On Second Reading in the Lords last session the Lord Chancellor said:[21]

> I believe that the Bill will make a considerable contribution to the interests of victims of domestic violence. I also believe that it is uncontroversial in party political terms. We all appreciate the damage which can be inflicted by perpetrators on victims and on their families. I commend the Bill to the Special Public Bill Committee as a candidate for the non-controversial Bill procedure. Indeed, I have had some discussion in that respect. I believe that it is appropriate that that should be done.
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> I hope that noble Lords will feel that what I have said today illustrates my belief that the Family Homes and Domestic Violence Bill provides a firm a comprehensive foundation for the reform of the civil remedies for domestic violence. Therefore, I commend the Bill to the House for Second Reading.

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[18] Bill 141 of 1994/95

[19] see page 11

[20] HL Deb vol 561, 23 February 1995 c1255

[21] c1257

One commentator praised the effect of considering the Bill in a Special Public Bill Committee concluding that "the inevitable and constructive result of which has been to deal now with important issues of scope, jurisdiction and interpretation which all too often only arise after Bills have passed into law".[22]

In the Commons the Bill was committed to a Second Reading Committee and it passed both that stage and Committee stage with very little debate.[23] However the proposed availability of occupation orders under the Bill to cohabitants aroused controversy in the press just before the Report stage and a number of representations about the Bill were then made to the Lord Chancellor.[24] The controversy was based on a belief, largely misconceived, that cohabitants were being placed on an equal footing with married couples for the first time.[25] It was felt that certain provisions in the Bill would undermine the institution of marriage. The Government subsequently withdrew the Bill and John Taylor, then Parliamentary Secretary, Lord Chancellor's Department, explained the reasons for this in the following written answer:[26]

> The Family Homes and Domestic Violence Bill was timetabled to complete its stages in the House of Commons on the basis that it was uncontentious. This has proved not to be so. Contentious points have arisen during the last stages of this parliamentary Session. My right hon. and noble Friend, the Lord Chancellor has listened to the concerns expressed about the Bill, and he is considering them. The timetable is such that it is now impossible to make further progress this session. My right hon. and noble Friend will continue to work on the Bill with a view to bringing it back before Parliament as soon as possible.

The Bill has been bought back with amendments as Part IV of the *Family Law Bill.* These amendments seek to take account of the concerns that were expressed to the Lord Chancellor which led to the original Bill being withdrawn.

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22 Hudson, *Domestic Violence and Fiancées,* New Law Journal, 5 May 1995

23 SRC Deb 26 June 1995 cc 3-6 and SC Deb 'B' 4 July 1995 cc 3-4

24 see, for example, "Anger at Bill to 'sabotage' marriage", *Daily Mail,* 23 October 1995

25 see page 26 for further discussion of this issue

26 HC Deb vol 265 c415W - 2.11.95

# VI Part IV of the Family Law Bill [HL]

Part IV of the Bill seeks to implement most of the Law Commission's recommendations. It seeks to provide for the regulation of occupation rights to a dwelling-house; to make provision for preventing the molestation of one person by another; to enable the court to include in certain orders under the *Children Act 1989* provision excluding the abuser from the home; and to make provision for the transfer of tenancies between spouses and cohabitants. It would repeal and replace the whole of the *Domestic Violence and Matrimonial Proceedings Act 1976* and the *Matrimonial Homes Act 1983*, together with the relevant parts of the *Domestic Proceedings and Magistrates' Courts Act 1978.* Much of the existing law is, however, re-enacted in the current Bill.

On Lords Second Reading of the *Family Homes and Domestic Violence Bill* last session the Lord Chancellor explained which of the Law Commission's recommendations have been rejected by the Government and the reasons for their rejection:[27]

> I mentioned earlier that the Government are not seeking to implement every recommendation contained in the Law Commission's report. The recommendation that the police should have the power to pursue civil remedies on behalf of an aggrieved party was rejected because it would have involved a novel extension of police powers from a criminal function to a civil function. It would have required the police to decide whether to seek an order on the basis of brief contact with the parties, amounting to no more than a snapshot of a particular incident. In addition, it would have imposed significant and unaccustomed responsibilities upon the police for which the service has neither the resources nor the requisite expertise.
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> The other significant policy departure from the recommendations of the Law Commission concerns the categories of people entitled to apply for orders. The categories proposed by the Law Commission of: persons who had at any time agreed to marry each other; and persons who have or have had a sexual relationship with each other were rejected, because the persons within them may not have the same domestic link as those in the other categories. In some cases, the relationship might have been brief and the

[27] cc1256-7

parties would never have lived together. There might also be problems for the courts of definition and proof, which would not apply to the other categories. If that happened, it would undermine the principle that domestic violence remedies should be able to be obtained swiftly in emergencies. Of course, that does not mean that there would not be other remedies available to such people; but it means that the simplified form of procedure available under the Bill would not be available to them for the reasons that I have given.

The changes that have been incorporated into the current Bill in the light of the controversy last session were explained by the Lord Chancellor on the Second Reading of the current Bill:[28]

At a late stage, and just before Prorogation the Bill attracted some controversy. This was based on a belief, I think misconceived, that cohabitants were being placed on an equal footing with married couples for the first time, and that this undermined the institution of marriage.

Although I do not think that the Bill would have had the effect feared, I accept that there is genuine concern to uphold the special nature of marriage. This is a concern I share, and for that reason I have made four changes to the Bill that was before the House last Session.

First, I have introduced a general clause on marriage. This instructs the courts to have regard, when making an occupation order for a cohabitant, to the fact that they have chosen not to give each other the commitment that a married couple have chosen to give. I hope that this will emphasise the important general message that marriage is special in a way that no other relationship is.

Secondly, the previous Bill made provision for the procedure for resolving property disputes contained in the Married Women's Property Act to be available to cohabitants. I have removed that provision. Although the extension was purely of procedure it was the subject of specific concern, and I think it is right to respond to those

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[28] HL Deb vol 567 c705-6 - 30.11.95

concerns.

Thirdly, concern was expressed about a cohabitant, who had no right to occupy a property, gaining long term possession of it. For this reason I have now provided that in such circumstances an order, which may be for a maximum of six months (that was the old provision), may be extended only once. It was possible under the former provision to extend it again and again, indefinitely. This contrasts with the position for spouses and ex-spouses. I believe that this further distinguishes between marriage and cohabitation and still retains the essential of what is required.

Fourthly, it was possible under the old Bill for the court in certain circumstances to be under a duty to make an occupation order in favour of a cohabitant with no right to occupy the home. This duty came about by the operation of the "balance of harm" test, as it was called. In these cases I have recast the test in such a way that there is no duty on the court to make such an order, but simply a discretionary power to permit it to do so. The court can have regard in considering that matter to all the circumstances of the case.

I believe that the overall effect of these amendments is to emphasise the difference between marriage and cohabitation while at the same time providing protection where it is needed.

The Lord Chancellor has not, however, made changes to meet criticisms that courts, when making orders in cases of domestic violence, can look at the mental suffering of a person as well as the physical violence they have suffered. He has also not changed the proposed power for courts to reassign a tenancy from one cohabitant to the other, whether they were joint tenants or not.

The making of such changes to the original Bill has in itself been controversial. On Second Reading of the current Bill Lord Irvine of Lairg said that the Bill was weaker as a result.[29] He said that " the whole point of an occupation order is to protect from harassment" and that "harassment is unacceptable, whether the victim is a wife or a live-in lover".[30] Baroness

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[29] HL Deb vol 567 c109-710 - 30.11.95

[30] c710

David commented that "it seems unreasonable in these days, when many couples live in a stable relationship with their children, not to recognise that this is a fact of modern life, and that in fairness to them and particularly to their children they should be treated in the same way as married couples".[31] Lord Archer of Sandwell commented that "a property-owning husband (sic) will now have an incentive not to enter into a marriage".[32]

At Committee Stage, Report Stage and on Third Reading Lord Irvine of Lairg sought to introduce a series of amendments which were designed to restore "the full force of the previous Bill".[33] In the Report Stage debate he was supported by Lord Brightman, the chairman of the Special Public Bill Committee on the previous Bill, who said that "there is no logical reason for differentiating between an unmarried couple who set up home together and a married couple who set up home together" in relation to the making of temporary occupation orders. He pointed out that whatever the status of the relationship the same problems would arise on relationship breakdown and that the children involved would need exactly the same protection".[34] In reply the Lord Chancellor said that he had been obliged to meet the concerns of Commons Members that the previous Bill had equated unmarried and married couples although the Bill did not actually do that. He said that the changes he had brought forward would not have a very significant effect in practice in diminution of protection.[35]

A further amendment was brought forward by Earl Russell which sought to remove the general clause on marriage. He said that the changes made by the Government had conciliated some people at the price of causing "extreme distaste" to a large number of other people. He said that he did not see why the test of cohabiting is relevant to the purpose of Part IV, which is physical safety.[36] In Committee Earl Russell had pointed out that cohabitation was a recognised status for many purposes including social security law.[37] The Lord Chancellor replied that he thought the general clause on marriage to be "perfectly defensible". He acknowledged that cohabitants may have given each other a commitment but that it was not the same commitment involved in marriage. He said:[38]

> They do not take vows in public which lead to legal obligations on both of them. Even following divorce, in the married situation the parties may have financial obligations to one another. By contrast, cohabitation can involve many different degrees of commitment, and so much so that I would go so far as to say that the

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31 c760
32 c785
33 HL Deb vol 568 cc1397ff - 30.1.96, HL Deb vol 570 c109ff - 4.3.96 and HL Deb vol 570 c706ff - 11.3.96
34 cc111-2
35 c114
36 c117
37 HL Deb vol 568 c1385 - 30.1.96
38 HL Deb vol 570 c118 - 4.3.95

> only thing which is certain is that it is not the same as marriage. That is why I have focused particularly on that fact.

and:[39]

> I fully accept that a cohabitant has the same right to be protected from violence as a married person. I do not accept that Clause 36 [now Clause 38] in any way prevents that. It is right that the court should take account of all the circumstances, including whether or not the parties are married, when deciding whether an occupation order is appropriate and what its terms should be.

**Clause 38** of the current Bill seeks to introduce the first change - namely, a general clause on marriage which instructs the courts to have regard to the fact that cohabitants have not given each other the commitment involved in marriage when making an occupation order on the application of a cohabitant who has no pre-existing right to occupy the family home.

The second change was the removal of the provision which would have allowed cohabitants to use the summary procedure of the *Married Women's Property Act 1882* for resolving property disputes. John Eekelaar, fellow of Pembroke College Oxford and a leading academic in the area of family law, has said that this change was regrettable. He has pointed out that the 1882 Act affected court procedure only and not the substantive law governing property disputes between cohabitants. In view of this he has said that he finds it "hard to see how maintaining procedures which benefit only lawyers ... help the institution of marriage".[40] However Lord Brightman, chairman of the Special Public Bill Committee on the previous Bill, said that he had no objection to the change as it was merely a matter of procedure.[41]

The third change relates to the twelve month limitation on the period for which occupation orders can be made in the case of non-entitled cohabitants [**Clauses 33(10) and 35(6)**]. This change has been the subject of some controversy during the Lords debates. Although it was accepted that in practice in most cases this would be adequate, concern was expressed that twelve months might not be long enough in some cases - for example, if the applicant or a child was terminally ill or perhaps disabled and in need of specially adapted accommodation. On Report Lord Irvine said that "in the circumstances of such cases in a very sensitive jurisdiction, where the facts of every case vary so infinitely, it is unhelpful to tie the court's

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[39] c118

[40] The Family Law Bill - the politics of family law - *Family Law* January 1995

[41] HL Deb vol 567 c740 - 30.11.96

hands to arbitrary time limits. The judges should be trusted."[42] He subsequently asked "how can the removal of the discretion to provide protection over an unlimited period of time conceivably strengthen the family or family life?".[43]

The fourth change relates to the recasting of the "balance of harm" test so that in the case of non-entitled cohabitants the court would have a discretionary rather than a mandatory power to make an occupation order.

At Report Stage Baroness Young sought to introduce a further change to Part IV by introducing an amendment which would have required the courts specifically to take conduct into account when considering the making of occupation orders generally.[44] The Lord Chancellor replied that as the court is instructed to have regard to all the circumstances of the case it would be able to take conduct into account whenever it considered it right to do so. He also said that he had introduced an amendment that changed the definition of "harm" so that the harm to the applicant must be attributable to the conduct of the respondent (although not necessarily deliberately).[45]

On Third Reading the Lord Chancellor introduced a series of amendments which he said were intended to emphasis the need for the court to take into account the conduct of the parties when making occupation orders under Part IV of the Bill.[46] He said that they should also ensure that the balance of harm test should apply where significant harm to an applicant or a relevant child is harm attributable to the conduct of the respondent.

# VII The Main Provisions of Part IV of the Current Bill

Part IV seeks to provide a single consistent set of remedies - "non-molestation orders" and "occupation orders" - which would be available in all courts having jurisdiction in family matters.

## A. Associated Persons

Orders would be available to associated persons. By **clause 58(3)** a person would be associated with another person if -

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[42] HL Deb vol 570 c110 - 4.3.96
[43] c111
[44] HL Deb vol 570 c103ff - 4.3.96
[45] c107
[46] HL Deb vol 570 c704 - 11.3.96

a) they are or have been married to each other,

b) they are cohabitants or former cohabitants (ie they are or have been living together as man and wife),[47]

c) they live or have lived in the same household, otherwise than merely be reason of one of them being the other's employee, tenant, lodger or boarder,

d) they are relatives,

e) they have agreed to marry one another (whether or not that agreement has been terminated),

f) in relation to any child they are both that child's parent or have or have had parental responsibility for that child or they are parties to the same family proceedings. In relation to adopted children persons would be associated to each other if one is a natural parent or grandparent of the child and the other is an adoptive parent of the child.

Orders would then be available to a much wider range of people than at present. Orders could be sought to protect against elderly abuse and abuse by aggressive adult children, for example, in certain circumstances. The exception in c) above would mean that domestic servants would not be able to seek protection under the Bill. Gay victims of domestic violence could seek protection from their partner under c) above provided that they live or have lived in the same household.

Persons who are associated by reason of their agreement to marry would need to be able to produce evidence of their agreement to marry in accordance with **clause 41**.[48]

There has been some criticism of the definition of "associated persons" under the Bill. For example, District Judge Stephen Gerlis has pointed out that the Bill would not extend protection to "those who are having a torrid affair but who have never lived together" but that it would extend protection to "the stepmother of a person with whom the applicant cohabited 30 years ago, although living until recently in New Zealand".[49]

## B. Non-molestation Orders

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[47] as defined in **clause 58(1)**

[48] see page 32

[49] *Family Law* December 1995, p701

Non-molestation orders are provided for in **clause 39**. They are defined as orders containing either or both of the following provisions: a provision prohibiting a person from molesting an associated person and a provision prohibiting the molestation of a relevant child (defined in **clause 58(2)** as any child who is living or might reasonable be expected to live with either party to the proceedings, any child in relation to whom an order under the *Adoption Act 1976* or the *Children Act 1989* is in question in the proceedings, and any other child whose interests the court considers relevant). Molestation itself is not defined in the Bill following the recommendation of the Law Commission that it should not be so. It took the view that the concept is well defined and recognised by the courts. Molestation goes wider than actual violence to encompass serious pestering and harassment. An order could be expressed so as to refer to molestation in general, to particular acts of molestation or to both [**clause 39(6)**] and could be made for a specified period or until further order [**clause 39(7)**] but will cease if the family proceedings in which it was made are withdrawn or dismissed [**clause 39(8)**].

Non-molestation orders could be made either on application to the court or the court could make such an order by its own motion in other family proceedings. Where persons are associated by reasons of their having agreed to marry no application could be made after three years from the termination of the agreement to marry [**clause 39(4)**].

The criteria for granting such orders are set out in **clause 39(5)**. The court would have to have regard to all the circumstances including the need to secure the health, safety and well-being of the applicant and of any relevant child.

## C. Occupation Orders

Occupation orders are provided for in **clauses 30-38**. They replace ouster and exclusion orders. The provisions of the Bill are complicated and the availability of each particular form of occupation order depends on the property rights entitlement of the applicant. Orders may regulate the occupation of the family home and may also exclude in respondent from a defined area in which the dwelling-house is included in appropriate cases.

### 1. Applicants with an existing right to occupy

Where an applicant has an existing right to occupy the family home the court is required by **clause 30(6)** to have regard to all the circumstances including the respective housing needs and housing resources of the parties and any relevant child, the respective financial resources of the parties and the likely effect of any order, or the decision of the court not to make an order, on the health, safety and well-being of the parties and any relevant child. By **clause 30(7)** a "balance of harm" test would apply so that the court would be required to make an order if the applicant or any relevant child is likely to suffer significant harm if the order is

not made subject to the proviso that an order would not be made if the respondent or any relevant child would suffer from significant harm if the order were made and that harm is as great or greater than that likely to be suffered by the applicant. "Harm" is defined in **clause 59** as ill-treatment or the impairment of health and, in relation to a child under 18 years, impairment of development. An order made in these circumstances could be made for a specified period, until the occurrence of a specified event or until further order.

### 2. Former spouses who have no existing right to occupy

In the case of a former spouse with no existing right to occupy the former matrimonial home (or any dwelling-house intended by the couple to be their matrimonial home) the court would by **clause 32** have a discretion whether to make an occupation order. In deciding whether to make an order the court would be required to have regard to all the factors mentioned above in relation to applicants with an existing right to occupy and also to the length of time that has elapsed since the parties ceased to live together, the length of time that has elapsed since the marriage was dissolved or annulled and the existence of any pending proceedings between the parties in relation to property and finance. The balance of harm test would apply and such orders would be for a maximum of six months at a time but with no statutory limit on extending the order.

### 3. Cohabitants with no existing right to occupy

In the case of one cohabitant or former cohabitant with no existing right to occupy the court would have a discretion whether to make an occupation order by **clause 33**. The court would be required to have regard to all the factors mentioned above in relation to entitled spouses as well as the nature of the parties' relationship, the length of time during which they have lived together as husband and wife, whether there are any children of the relationship or for whom they both have or have had parental responsibility, the length of time that has elapsed since they cased to live together and whether there are any pending proceedings relating to finance or the home between them. The balance of harm test would apply as a factor to be considered by the court and the court could only make an order for a maximum of six months and this order could only be extended once. In effect, then, protection would last for a maximum of 12 months. The court would also be required to have regard to the general clause on marriage **clause 38**.

It was the proposed availability of occupation orders to cohabitants with no existing right to occupy the family home that aroused some controversy in the press last session.[50] It was suggested that cohabitants were being placed on the same legal footing as spouses and that this was a novel development in this area. Concern was expressed that the proposals might undermine marriage and groups such as Families Need Fathers were worried that cohabitants

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[50] see, for example, "Anger at Bill to 'sabotage' marriage", *Daily Mail*, 23 October 1995

in a relationship of relatively short duration could secure occupation of a home that did not belong to him or her.[51]

[51] HL Paper 55 of 1994/95, Written Evidence, pp 20-27

However, personal protection remedies in cases of domestic violence had already been extended to cohabitants living together as husband and wife by the *Domestic Violence and Matrimonial Proceedings Act 1976*. Last session's Bill also specifically limited the availability of orders to cohabitants living together as husband and wife. Cohabitation in terms of living together as husband and wife is a question of fact for the court to decide. However, the making of occupation orders under the Bill was not limited to cases of domestic violence and orders could be sought by cohabitants where the relationship has broken down but there has been no violence. In this respect the Bill sought to provide an order to cohabitants that was previously unavailable to them. However the reports that suggested that the Bill created a legal status of "cohabitant" for all purposes were fallacious.

The Government's *Notes on Clauses* for the Commons stages of last Session's Bill made the following remarks about the criteria relevant to non-entitled applicants (i.e. those with no existing right to occupy the family home).

It implements the recommendation in paragraph 4.13 of the Law Commission's Report, and part of the second recommendation in paragraph 4.18.

There are no specified criteria in relation to non-entitled applicants under the current system. However, the Law Commission felt that statutory criteria would help clarify the circumstances in which an order should be made and offer some consistency. The Commission was of the view that criteria such as specifying a fixed time since the breakdown of the relationship of former spouses or cohabitants was likely to be too restrictive. It thus recommended a more discretionary approach which would allow the court to make orders which reflect what might be the parties' legitimate expectations according to the circumstances of each individual case. This is consistent with the approach adopted in Scotland under the Matrimonial Homes (Family Protection)(Scotland) Act 1981 where the court is directed to consider all the circumstances of the case, including the time for which the parties have been living together and whether there are any children of the relationship.

In paragraph 4.18 of their Report, the Law Commission recommended that occupation and regulatory orders should effectively be considered in two stages, although in most cases where a non-entitled applicant is applying for rights of occupation and an order regulating or extending such rights the process would in practice be telescoped. The court would first consider the non-entitled applicant's request for an occupation order and then for the regulatory order. The Law Commission thought that it was desirable to ensure that the qualifying criteria for the grant of occupation rights to non-entitled applicants did not obscure the applicant's case for a regulatory order in a situation of overwhelming need. The Commission considered that there may, for example, be cases in which the applicant's case for an occupation order is not particularly strong (perhaps because she has lived with the respondent only for a matter of weeks) but in which her need is so great that it would nevertheless be just for her application to be granted (perhaps because she is ill, has the respondent's baby to care for and nowhere else to go).

In its report the Law Commission said that "in the case of non-entitled applicants, an occupation order is essentially a short term measure of protection intended to give them time to find alternative accommodation, or, at most, to await the outcome of an application for a property law remedy".[52]

One of the criticisms that have been made of the limitations placed on the availability of occupation orders to cohabitants under the amended proposals contained in the current Bill is that the children of cohabitants would be prejudiced. It has been argued that it is inappropriate to talk of different commitments where children's interests are involved.[53]

Further discussion on this issue can be found in Part VI of this Paper.

### 4. Neither spouse or former spouse entitled to occupy

In the case of neither spouse having an entitlement to occupy the court would by **clause 34** be able to make an order in the same way as it could in relation to orders where the applicant spouse is entitled to occupy. However such orders would be subject to a six month time limit and only one extension for a maximum period of a further six months would be possible.

### 5. Neither cohabitant or former cohabitant entitled to occupy

By **clause 35** the court would have a discretion to make an occupation order in these circumstances. The factors it would be required to consider would be the housing needs and housing resources of each of the parties and any relevant child and the financial resources of each of the parties. The balance of harm test would apply as a factor to be considered by the court and such orders would be subject to an initial maximum period of six months with a twelve month overall maximum. **Clause 38** would also require the court to take into account the fact that the parties have not given each other the same commitment as a married couple.

### 6. Additional Provisions

Additional provisions could be included by the court in occupation orders made under **clauses 30 and 32-35** either on making the order or at any time thereafter by virtue of **clause 37**. These include repair and maintenance obligations, discharge of rent or mortgage payments etc,

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[52] para 4.7

[53] Good news for children - *Childright* December 1995

payments by one party to the other, directions as to possession and use of furniture, obligations to take reasonable care of that furniture and obligations to take reasonable steps to secure the dwelling-house and its contents. In deciding whether and how to exercise its powers under this clause the court would be required to have regard to all the circumstances of the case including the financial needs and financial resources of the parties and the financial obligations which they have or are likely to have in the foreseeable future including financial obligations to each other and any relevant child. In relation to cohabitants the court would also be required to take into account **clause 38 -** ie that the parties have not given each other the commitment of marriage.

#### 7. Effect of an occupation order : non-entitled applicants

An occupation order would not confer a property right to a non-entitled applicant - the order merely confers a personal right to live in the property and this right could not prevent a sale of the property.

## D. Ex Parte Orders

Non-molestation orders and occupation orders could be made *ex parte* (ie without notice to the respondent) in cases where the court considers it just and convenient to do so [**clause 42**]. In determining whether to exercise its powers the court would be required to have regard to all the circumstances including any risk of significant harm to the applicant or a relevant child if the order is not made immediately, whether it is likely that the applicant will be deterred or prevented from pursuing the application if an order is not made immediately and whether there is reason to believe that the respondent is deliberately evading service of the proceedings. The respondent would be afforded an opportunity to make representations relating to the *ex parte* order at a hearing as soon as just and convenient. At present *ex parte* orders regulating the occupation of a dwelling-house are extremely rare.

## E. Undertakings

**Clause 43** seeks to provide for the acceptance by the court of undertakings from any party to the proceedings. This would be likely to be done where the parties wanted to avoid the antagonism of a full hearing. Undertakings would be enforceable in the same way as a court order, except that no power of arrest may be attached to an undertaking and the court could not accept an undertaking in circumstances where a power of arrest is appropriate.

In effect this clause extends the list of persons who may give or accept undertakings in cases of domestic violence. The advantage of undertakings is that they are a means of encouraging the settling of disputes and of defusing difficult and potentially explosive situations. They also avoid the need for full and often lengthy hearings. As there are no "winners" or "losers" they are breached less often than formal court orders. Undertakings cannot, however, have a power of arrest attached to them.

It has been suggested that the benefits of extending the list of persons who may give or accept undertakings might be undermined by the combined effect of **clauses 43(3) and 44(2)** which could be interpreted as prohibiting the court from accepting an undertaking in cases where there has been violence or threatened violence. This point does not seem to have been raised in debate so far.

## F. Powers of Arrest

**Clause 44** and **Schedule 5** seek to provide for the court's powers to arrest for breach of, and to attach a power of arrest to, an occupation or non-molestation order.

## G. Emergency Protection of Children

Under present legislation there is no public law provision in England and Wales empowering a court to order an alleged abuser out of the family home. This means that a local authority cannot apply to the court for such an order. However, in certain circumstances private law remedies can be used to achieve the same effect. For example, a non-abusing parent could apply to the county court for a short-term ouster injunction[54] or for an exclusion order[55] and government guidance to local authorities suggests that it may in certain circumstances be appropriate to encourage the non-abusing parent to do so. It also suggests that they could encourage the alleged abuser to leave the home voluntarily using their powers under the Children Act[56] to provide assistance with finding alternative housing or cash to the person who leaves the family home.[57]

The Law Commission's 1992 report on domestic violence, which put the case for a change in the law, argued that some local authorities already appeared to be inducing suspected abusers to leave. Legislation would provide a way of regularising and controlling the practice.

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54 Section 1 of the Domestic Violence and Matrimonial Proceedings Act 1976

55 Section 16 of the Domestic Proceedings and Magistrates' Court Act 1978

56 Children Act schedule 2 paragraph 5

57 Children Act 1989: Guidance and Regulations, volume 1: the courts para 4.31

The Law Commission's main argument, however, was that sudden removal from home always carried some risk to the child's welfare even though there were undoubtedly cases where a child needed immediate and guaranteed protection from risk of serious harm which could only be given by removal from home.[58]

The Law Commission report also described earlier pressure for legislation. In particular, it referred to the "considerable support" given during the passage of the Children Act 1989 to the possibility of ousting an abuser or suspected abuser.[59] It also described responses to its earlier Working Paper which had discussed a range of options for dealing with the issue[60] and set out its recommendations. These general recommendations are now specified in detail in schedule 6 of the Bill.

The schedule amends the Children Act 1989 in order to give the courts power to require that a suspected abuser leave the family home. This power would be short-term and could only be made as part of an interim care order or an emergency protection order. These are both short-term powers which the courts already have under the Children Act to remove the child from the home. By linking the new power to these orders, the Bill would still enable local authorities to remove the child quickly without going back to court if it became necessary. The exclusion requirement would then lapse after 24 hours so that the suspected abuser and child were not both removed from the home at the same time.

The maximum time limits which apply to the existing orders would apply to the new exclusion requirement but there is a provision for the court to set the exclusion requirement for a shorter period than the order and another provision for the period to be extended on an application to vary or discharge the order. The maximum duration of an emergency protection order is 8 days extendable to a maximum of 15 days and the maximum in the case of an interim care order is basically 8 weeks extendable for 4 weeks at a time. Other aspects of the orders also carry over to the exclusion requirement - for example an emergency protection order can be made ex parte which means that the alleged abuser does not have to be represented although he(she) does the right challenge the order after 72 hours if he(she) was not there when it was made.

The schedule provides that certain conditions have to be satisfied before a court can include an exclusion order. In brief, these relate to the likelihood of preventing significant harm to the child; to the existence of another person living in the home who is judged by the court to be able and willing to give the child the care necessary; and to that person consenting to the exclusion requirement. The Bill also provides that once the court has decided to include

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58 Family Law, Domestic Violence and Occupation of the Family Home, Law Com 207, HC 1 of 1991/92, May 1992, paras 6.15 - 6.22

59 SC Deb B 25 May 1989 cc 325-329

60 Domestic violence and Occupation of the Family Home, Law Commission Working Paper No 113, August 1989, Appendix A

an exclusion requirement, it may attach a power of arrest to that requirement.

The schedule covers England and Wales. Similar provision for Scotland exists already in the Children (Scotland) Act 1995 sections 76-80 although the approach adopted there is slightly different. The courts are given power to make an exclusion order on its own and the emphasis is on the longer-term in that the maximum length of an order is six months. The suspected abuser must have an opportunity of being heard or represented although there is provision for an interim order to be made where this condition cannot be satisfied.

The provisions in schedule 6 have received strong support from certain children's organisations, in particular the NSPCC and ChildLine. They were first included in the Family Homes and Domestic Violence Bill which collapsed in the Autumn of 1995 as a result of opposition to other elements of its contents. NSPCC then issued a press notice regretting the failure of the Bill which said that the NSPCC had particularly welcomed the measures which would have protected children by removing suspected child abusers from the family home instead of the child.[61] Valerie Howarth Executive Direcctor of ChildLine wrote to the Guardian to say that she hoped that "this sensible and humane Bill will be resurrected as soon as possible," particularly commending the fact that the Bill would have made it easier to remove an alleged abuser from the family home by means of an ouster order.[62]

The clause and schedule were approved without debate in the Lords on the Government's second attempt, that is during the passage of the Family Law Bill which is now due for its Second Reading in the Commons. There was little debate the first time round either although there was an attempt to tighten up the provisions when, in line with a recommendation from the NSPCC, an amendment was put forward but withdrawn on report in the Lords which would have required (rather than enabled) the courts to attach a power of arrest to an exclusion requirement.[63]

Attitudes to the proposals can be gleaned from the report of Oral and Written Evidence given to the House of Lords Special Public Committee on the Family Homes and Domestic Violence Bill [H.L.] (the Bill which failed). To the extent that the provisions were mentioned they were welcomed although there was some concern with the detail, such as the NSPCC's desire for the power of arrest to mandatory. The East London Families Need Fathers were in the minority among those giving evidence to the Committee in describing the proposed new powers as "horrendous."[64]

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61 Statement on the Family Homes and Domestic Violence Bill, NSPCC Press Notice 2 November 1995

62 Let them be seen to be heard, Letter to the Editor from Valerie Howarth, The Guardian 10 November 1996

63 HL Deb 25 May 1995 c1071-1086

64 Family Homes and Domestic Violence Bill, Proceedings of the Special Public Committee with evidence and the Bill (as amended) HL Paper 55 of 1994/95

### H. Transfer of a Council Tenancy

By **clause 50** and **Schedule 7** the courts would be given a new power to transfer a tenancy to a cohabitant on the breakdown of the relationship. The Law Commission recommended this change so that the law in England and Wales was brought into line with that of Scotland, where the courts were given this power by the *Matrimonial Homes (Family Protection)(Scotland) Act 1981*.[65]

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[65] paras. 6.1-6.6, *Family Law : Domestic Violence and Occupation of the Family Home* Law Com No 207, HC 1 of 1992/93

# VIII Main issues arising during debate

This part of the current Bill has not been subject to great debate during its Lords stages except in respect of the amendments made as a result of the controversy of October 1995. However, the following issues arose during the debates on last session's bill.

## A. Family Court

The proposed reforms are intended to provide a unified set of remedies in all the courts dealing with domestic violence case. On Second Reading, last session, Baroness David said:[66]

> First, I must say that it is altogether satisfactory that the jurisdiction of the courts will operate in the same way as under the Children Act 1989. One of the great advantages of that Act and the rules made under it is that they introduce a basically unified system for dealing with family matters relating to children which applied throughout all the courts. The different levels of court will have the same powers save that the magistrates' court will have some more limited powers than county courts and the High Court in relation to occupation orders.
>
> And it will be possible to transfer cases to a different level of court where this is necessary because of the complexity of the case and/or the need to hear the application with others affecting the parties in different courts. This is seen as being consistent with the eventual introduction of a family court for which many of us have been asking for a very long time. I am sure that the noble Baroness, Lady Faithfull, will support me in this. These arrangements should make it very much easier for those needing to go to law; and, I hope, also cheaper.

In reply the Lord Chancellor said that he believes that there is, in effect, a family court at present:[67]

> Perhaps I may say a word about the family court. I believe that we have one. There are, of course, questions relating to what the family court should do in all circumstances. I hope to address matters such as mediation which arise out of the Green Paper that I produced some time ago in relation to the grounds for divorce. Work on that is proceeding as fast as the nature of the problem permits.
>
> I am also very conscious of the point that was made by the noble Baroness, Lady Fisher of Rednal, the noble Lord, Lord Mishcon, and others, that there is a need for inter-agency co-operation. That is perhaps true right across the field with which we are concerned. There are state agencies in these fields, and there are also many voluntary agencies.

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66 HL Deb vol 561 c1264 - 23.2.95

67 c1269

I believe that it is extremely important to build on the tremendous amount of expertise and effort that comes from the voluntary organisations in this field. Many serve with a sense of real commitment as their primary reason for being in those organisations. It is very necessary to do what one can to co-ordinate these matters. I am busily engaged on trying to see what arrangements can be made in respect of mediation. As noble Lords will know, there is more than one organisation in that field. If there is any question of trying to extend my operations in that area, a degree of co-operation is a necessary basis for further progress.

The Children Act-particularly with its jurisdictional provisions-in effect set up a family court, because it allowed these proceedings to be taken either in the family proceedings court at the magistrates' level or in the county court, presided over by judges who have made special studies, and, finally, the Family Division. The result is that at every level one gets the necessary family jurisdiction.

As I said earlier, it does not necessarily mean that everything that everybody wants should be available in a family court. An example would be mediation. My noble and learned friend Lord Hailsham of Saint Marylebone, when he held office, commissioned some research on mediation. One of the conclusions drawn by that Newcastle study was that, on the whole, court annexed mediation probably gave not quite such good results as non-court annexed mediation.

## B. Definition of Associated Persons

There was concern about the exclusion of two of the categories recommended by the Law Commission from the definition of "associated persons". In addition there was discussion as to whether the Law Commission's recommendation itself was sufficiently embracing as it did not include the new partner of someone who has broken off a relationship with a former partner and who may be threatened by a former partner.

On Second Reading last session, Lord Archer of Sandwell made the following comments

about the exclusion of persons who have or had agreed to marry[68]:

> First, it is said that it may be difficult for a court to establish whether persons fall into the categories. I must say I find that surprising. Courts have been deciding whether people have agreed to marry since long before the case of *Bardell v. Pickwick*, and they have been deciding whether parties have had a sexual relationship since before the establishment of the divorce court in 1857.
>
> The second reason is that the categories may not be in such a vulnerable position as other categories. I have discussed the matter with experienced practitioners in the field. They say that often it is precisely those in these situations, where the hopes of one party are frustrated at the outset, where passions are least restrained. They also say that intervention at this early stage may head off more serious problems later. We await with interest the discussion of that issue in Committee.

[68] HL Deb vol 561, 23 February 1995 c.1259

In Committee last session, Baroness David moved an amendment which sought to include fiancés and former fiancés within the definition of "associated persons". She said:[69]

What I am aiming to do in this amendment is to put back into the Bill one of the conditions in Clause 2 of the Law Commission Bill. The first four conditions in the Bill before us are the same as for the Law Commission Bill, but I wish to add the fifth paragraph in the Law Commission Bill, which states that associated persons will be those that have at any time agreed to marry each other, whether or not the agreement has been terminated.

Why I am convinced that this paragraph should be put back in the Bill is really because of what Mrs. Justice Hale said to us when she gave evidence, and I do not think I can do better than to cite what she said because that puts my case completely:

"The next point is including the two categories that we proposed but the Government has decided not to adopt, and I certainly hope that you would give very careful consideration [that is, the Committee] to reinserting at least one of those and preferably both. I was glad to see that so many of your respondents have also taken the same view. The point about which I am particularly concerned and it is the point to which the President of the Family Division refers to in his evidence, when he says he understands I am going to make a point and he agrees with it, it is this point-that is the question of couples who have been engaged to marry one another. It seems to me that the fact that this can sometimes be disputed and/or difficult to prove, is not a sufficient reason to deny relief in the very many cases when it is not in dispute or is easy to prove. Usually an agreement to marry is quite easy to prove and is frequently not at all in dispute. The relationship may have been at least as long and the emotions just as intense as many cohabitations or even marriages, and the need for protection or a remedy just as great. I also find it something of an affront to those quaintly old-fashioned couples who do not live together before they marry, that they should be denied a remedy given to those who do live together, either before or with no thought of marriage. They may also have acquired a property, which is intended to be their matrimonial home when they marry, and there is a strong case for allowing occupation orders between them at least if they are jointly entitled, or in favour of the one who is entitled-so as to sort out what is to happen to that house in the short term before it can be disposed of, or whatever. I could even see a case for extending all of the occupational remedies to them, on the basis that if they have obtained a house that was intended to be their matrimonial home, it ought to be possible to deal with it, whatever the position is as to its legal ownership or tenancy."

I was also supported in my wish to put this back into the Bill by the evidence that we had from Victim Support. It said:

"We welcome the fact that the Bill widens the list of categories of those who may apply for Orders. However, we very much regret the fact that two categories recommended by the Law Commission-those who at any time had agreed to marry each other and those who have or have had a sexual relationship with each other-were rejected. The reasons for our concerns are as follows"

and this applies to my amendment-

"Those who had agreed to marry:

We are concerned that this omission may disproportionately affect members of some ethnic minority groups where formal agreements to marry are customary and where cohabitation may not be involved."

That makes the case that I want to put. I beg to move.

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[69] Special Public Bill Committee Deb 24 April 1995 c4

In reply the Lord Chancellor suggested that a compromise solution might be possible on Report and the amendment was withdrawn. He said:[70]

As your Lordships know, I have taken the view that this amendment is not appropriate. I believe that it would introduce into the Bill a category of persons who could have considerable difficulties in relation to definition and proof as part of the domestic violence jurisdiction. I believe that the important point as regards that jurisdiction is that it may often be needed in emergency situations. If it is difficult for the court to establish a jurisdiction, it is likely to affect the speed with which a remedy may be granted. That would defeat an important object of the domestic violence legislation-a fast remedy for the protection of an applicant.

I believe that it is not necessary for those who have agreed to marry to be included as a separate category within the Bill. Many people who could fall under this category will already be included within the wide range of other applicants able to apply for remedies, particularly the categories of cohabitants or the parents of a child. Those who do not fall within the categories in the Bill are, of course, able to apply for remedies under the law of tort. In my view, the law of tort is more suitable in this context than the domestic violence jurisdiction. In particular, the parties would never have lived together and thus a potential applicant will have a separate residence so that the regulation of property rights is likely to be less relevant. There is also the consideration that parties may not be in such a vulnerable position as others who are resident in the same household as their attacker, and may have nowhere else to go. However, if they are in such a position, the law of tort will be available to them.

As the noble Baroness has mentioned, some of the witnesses spoke in favour of extending this, including Mrs. Justice Hale, who suggested that this would require careful consideration. Mrs. Justice Hale I think accepted that there would be circumstances in which this category would be quite difficult to prove, and that is the problem that I have in accepting the amendment. The amendment, in its present form anyway, cannot distinguish between cases where the proof is difficult and cases where it is not. I think it is particularly important that the Family Law Bar Association and Judge Fricker, who are extremely familiar with the day-to-day operation of this jurisdiction, were-as I understood their evidence-against this.

During the evidence, one witness-and I have Judge Fricker in mind here-argued very cogently that if family law remedies were stretched to cover wider issues, it was likely to have an adverse effect on family law, and I think that that is true.

I noticed that in moving her amendment the noble Baroness referred to a situation in which there was a formal agreement to marry. It seems to me that there may be seeds of a possible compromise in this if the amendment could make it clear that it applied only to cases in which the proof of the agreement was very easy. Formal agreement to many would be one way of doing it, but I am not sure whether that would necessarily by the only way.

It would certainly help to solve my problem if the noble Baroness were able to propose an amendment which excluded the category of case which Mrs. Justice Hale freely accepted was involved-the category where it would be quite difficult to prove whether or not there has been an agreement to marry, and your Lordships will not require me to outline the sort of cases in which that might be very difficult to prove. In the case of quite a long relationship, the real question is: did it amount to an agreement to marry? If you have to try to analyse that over a lengthy relationship, I think that your Lordships will see what the problem is. If that is a preliminary to the jurisdiction, it could be very awkward for the nature of this jurisdiction.

My short answer to this amendment is that it involves introducing into the qualifications categories which may be very difficult to establish in fact in particular cases, and thus would destroy the summary nature of the remedy which is involved here.

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[70] c4-6

On Report last session, the Lord Chancellor successfully introduced an amendment to extend the categories of "associated persons" to persons who have agreed to marry one another (whether or not that agreement has been terminated).[71] Orders will be available only if there is evidence of an agreement to marry which by **clause 41** should be written evidence of the agreement to marry; or the agreement to marry is evidenced by the gift of an engagement ring or a ceremony before witnesses. In the latter case this would not necessarily be a betrothal ceremony but a marriage ceremony that was not valid for the purposes of English law and is hoped to ensure the protection of certain members of ethnic minority groups.

## C. Stalking and the Tort of Harassment

The protection of Part III of the Bill extends only to "associated persons" as defined in **clause 58(3)**. It will not, therefore, offer protection in cases of "stalking" if there is no association between the stalker and his victim.

At Committee stage last session, the Lord Chancellor said that he considered the development of a new branch of tort in this area to be important. He said:[72]

> I have certain proposals in mind relating to privacy which could have an effect on some of this area if by any chance it were to progress by legislation. Even if it did not progress by that method, it might progress by other methods which would have some effect.
>
> I think that the general area of tort that is in issue here may well be a matter for the Law Commission to look at more systematically, and I would certainly wish to consider that as a possibility because I think the judiciary may well develop this area. It is always difficult because it depends on the cases that they get and how suitable they are for making developments. But I certainly have in mind that this is an area of tort law which should not be neglected either by the judiciary, if that happens, or alternatively by promoting legislation after study by the Law Commission,

The courts have been developing the law in this area and some commentators believe that the decision of the Court of Appeal in *Burris v Azadani*[73] has established a tort of harassment in its own right.

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[71] HL Deb vol 564 cc1061-2 -25.5.95

[72] Special Public Bill Committee Deb 24 April 1995 c5

[73] *Times* 9 August 1995

### D. Children

A new clause (now **clause 40***)* was introduced at Committee stage last session, as a provision similar to that in section 10(8) of the *Children Act 1989* to require that children should only be able to apply for a non-molestation or occupation order with leave of the court, and that leave should only be granted if the child has sufficient understanding to make the application. This requirement will not extend to young people aged 16 or 17 who are believed to be likely to have sufficient understanding to make application under the Bill and who may, in any event, be married.[74]

### E. Undertakings

In Committee last session, the Lord Chancellor introduced a new clause (now **Clause 43**) which sought to allow courts to accept undertakings from a respondent (ie an alleged perpetrator of violence) without making a non-molestation or an exclusion order. This is already common practice in the county courts but magistrates' courts do not have this power at present. Undertakings are promises make to a court which technically have the status of a court order. They avoid the need for a contested hearing which may further deepen bad feeling between the parties. The clause seeks to ensure that all relevant courts will now have the same powers in line with the idea that Part IV of the Bill provides a unified set of remedies in cases of domestic violence.

## IX Implementation of Part IV of the Family Law Bill

Detailed rules of court will be necessary for the implementation of Part IV of the Bill when enacted [see **clause 54**]. It is envisaged that it may take one or two years for these rules to be in place.

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[74] c10

# Appendix

# Proceedings on the Bills

## The Family Homes and Domestic Violence Bill [HL] [Bill 141 of 1994/95]

### Lords Debates

| | | |
|---|---|---|
| Second Reading - | | HL Deb vol 563, 23 February 1995 c1254ff |
| Special Public Bill Committee - | | PBC Deb 24 April 1995 and HL Paper 55 of 1994-95 |
| Report Stage - | | HL Deb vol 564, 25 May 1995 c1061ff |
| Third Reading - | | HL Deb vol 565, 20 June 1995 c220ff |

### Commons Debates

| | | |
|---|---|---|
| Second Reading Committee - | | 26 June 1995 cc3-6 |
| Committee Stage - | | SC Deb 'B', 4 July 1995 cc3-4 |

## The Family Law Bill [HL] [Bill 82 of 1995/96]

### Lords Debates

| | | |
|---|---|---|
| Second Reading - | | HL Deb vol 567, 30 November 1995 cc700ff |
| Committee Stage - | First day: | HL Deb vol 568, 11 January 1996 cc277ff |
| | Second day: | HL Deb vol 568, 22 January 1996 cc802ff |
| | Third day: | HL Deb vol 568, 23 January 1996 cc908ff |
| | Fourth day: | HL Deb vol 568, 25 January 1996, cc1129ff |
| | Fifth day: | HL Deb vol 568, 30 January 1996, cc1382ff |
| Report Stage - | First day: | HL Deb vol 569, 22 February 1996, cc1145ff |
| | Second day: | HL Deb vol 569, 29 February 1996, cc1610ff |
| | Third day: | HL Deb vol 570, 4 March 1996, cc10ff |
| Third Reading - | | HL Deb vol 570, 11 March 1996, cc618ff |

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**Research Paper 96/39** **Section Code: HAS**

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**Family Homes and Domestic Violence**

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