Family Law Bill [HL] [Bill 82 of 1995/96]
Divorce Law Reform

Research Paper 96/42

21 March 1996

The *Family Law Bill [HL] [Bill 82 of 1995/96]* seeks to reform the law on the ground for divorce by introducing a new legal process for divorce. It also seeks to implement (with amendments) the provisions of last session's *Family Homes and Domestic Violence Bill [HL] [Bill 141 of 1994/95*] which was withdrawn at a late stage in the Commons. This Paper seeks to explain the main effects of the divorce law reform proposals. The proposals concerning domestic violence and occupation of the family home are considered in *Research Paper 96/39*. For the most part, the Bill extends to England and Wales only.

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Summary

This paper summarises the current law and practice concerning divorce in England and Wales, Scotland and Northern Ireland and considers the proposals for reform of the law in England and Wales put forward by the Law Commission in a 1988 discussion paper *Facing the Future*[1] and a 1990 report entitled *The Ground for Divorce*[2]. The Government's own proposals were set out in a 1993 green paper *Looking to the Future - Mediation and the Ground for Divorce*[3] and a 1995 white paper of the same name.[4] They follow on from those of the Law Commission and are also intended to result in the increased use of mediation rather than litigation as a means of resolving legal issues surrounding divorce. The paper goes on to set out a brief history of divorce law reform in England and Wales, before turning to the *Family Law Bill*[5] which has just completed its passage through the House of Lords.

The divorce provisions in the Bill are described in outline and those which have been the subject of much discussion or controversy during the Bill's passage through the House of Lords are then considered in more detail. These include the statement of general principles underlying these parts of the Bill, which was added as a Government amendment following similar moves by other peers, and the 12-month period for reflection and consideration between presentation of a statement of marital breakdown and an application to the court for a divorce or separation order. The 12-month period, which is set out in Clause 7 of the Bill, is at the heart of the Bill's divorce reform scheme, as it will replace the "facts" based on fault or separation, which must currently be established in order to prove that a marriage has irretrievably broken down. There were intense debates on this subject in the Lords and this paper considers the arguments put forward there, including the views expressed by those peers who sought to extend the period on the grounds that the Government' policy was likely to encourage more divorce by making the process easier.

The paper then considers the requirement in the Bill for couples who are considering divorce to attend information meetings and the proposal for increased use of mediation, which is a central plank of the Government's strategy. The current rules governing the availability of legal aid for divorce proceedings and the imposition of the statutory charge on successful legally-aided litigants are set out, along with provisions in the Bill which are designed to enable the Legal Aid Board to enter into contracts for mediation services. The Bill will enable the Lord Chancellor to make regulations governing eligibility for these services, and prescribing the circumstances in which a contribution towards the cost may have to be made by those making use of them. The Bill will also enable regulations to be made giving the Legal Aid Board a statutory charge on property recovered or preserved as a result of mediation.

An additional controversy arose during the Bill's passage through the Lords in connection with what is now Clause 10, which is intended to enable a court to make an order preventing a marriage being dissolved if it is satisfied that this would cause substantial financial or other hardship to the applicant or a child of the family and would be wrong in all the circumstances. This paper discusses the debate on this provision and goes on to consider the amendment concerning the pension rights of divorcees, which was added to the Bill following a Government defeat in the Lords.

Statistics on the cost of marital breakdown and other matters of interest in the debate on divorce are set out in an appendix to this paper, along with an extended discussion of family mediation.

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1 Law Com No 170 HC 479
2 Law Com No. 192 HC 636
3 Cm 2424
4 Cm 2799
5 Bill 82 of 1995-96

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I Divorce

A. England and Wales

1. Current Law

At present the sole ground for divorce is that the marriage has irretrievably broken down.[1] This irretrievable breakdown can only be proved by one of five "facts":[2]

a) that the respondent[3] has committed adultery and the petitioner[4] finds it intolerable to live with the respondent (adultery);

b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent (intolerable behaviour);

c) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition (desertion);

d) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent agrees to a decree being granted (two years' separation with consent);

e) that the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition (five years' separation without consent).

No petition for divorce may be presented within one year of marriage but the specified periods for the desertion and separation facts may start to run at any time after the date of the marriage.[5]

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1 section 1(1), *Matrimonial Causes Act 1973*, as amended
2 section 1(2) of the 1973 Act
3 ie. the spouse to whom the petition is addressed
4 ie. the spouse who is presenting the petition seeking a divorce
5 sections 3(1) and (2), *Matrimonial Causes Act 1973*

The vast majority of divorces are undefended and are obtained using the "special procedure", a largely administrative, paper-based process which does not require the parties to attend court. Matters relating to the children and the family home and finances are dealt with in separate proceedings. The special procedure is a quicker and cheaper procedure than a full court hearing which is still necessary in defended cases. Details of the special procedure and its history are set out at page 24 of this paper

2. Proposals for Reform

In May 1988 the Law Commission published *Facing the Future - A Discussion Paper on the Ground for Divorce*[6]. In this paper the Commission concluded that the present law is defective and considered a number of options for reform. It favoured the option of a process over time, which would, it felt, provide a safeguard against hasty applications in which the arrangements for the parties and their children had not been properly considered, without retaining or re-introducing the notion of fault.

The Commission made the following comments about the use being made of the five facts which must be established in order to prove that a marrige has irretrievably broken down:[7]

> 2.10 Since the beginning of 1971, when the 1969 Act came into force, the number of divorces each year has more than doubled. In the early years after the reform, this was largely accounted for by reliance on the new separation provisions, which enabled marriages which had broken down many years earlier to be dissolved. However, by 1986 74 per cent of all decrees were based on adultery or behaviour. Studies by Gwynn Davis and Mervyn Murch, of the Socio-Legal Centre for Family Studies at the University of Bristol, and by John Haskey, of the Office of Population Censuses and Surveys, into the use of these facts have provided important evidence about the operation of divorce law in practice.
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> 2.11 Perhaps the most marked trend discernible from the statistics is the increased use of the behaviour fact. Although this trend is apparent among both men and women petitioners, behaviour is predominantly used by women. In 1986, 89 per cent of behaviour decrees were granted to wives, compared to 72 per cent of all decrees; almost half the divorces granted to women were based on behaviour, compared to approximately a quarter on adultery and a quarter on separation. Haskey's study has shown that the behaviour fact is more likely to be used by those in lower socio-economic classes whereas adultery and separation are more frequently used among the middle classes. A correlation has also been found between the age at divorce and fact used. Thus, those using five years' separation tend to be the oldest and those using two years' separation the youngest. However, among those with dependent children behaviour is dominant among "young" divorces. Generally, those with dependent children are more likely to use the behaviour and adultery facts.

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6 Law Com No 170, HC 479

7 *ibid* paras 2.10-2.13

2.12 Those researchers who have interviewed parties or looked at solicitors' files have concluded that these phenomena do not necessarily indicate that particular types of marital misconduct are more prevalent among particular groups. Rather, the evidence suggests that behaviour and adultery are frequently used because of the need to obtain a quick divorce. In particular, it is noteworthy that the separation grounds are least used by those petitioners who are least able to effect a separation - women, in lower social classes, and particularly those with dependent children. Davis and Murch found that 28 per cent of those petitioning on the basis of behaviour and 7 per cent of those petitioning on the basis of adultery were still living together when the petition was filed. These same groups are also most likely to need to have ancillary issues relating to custody, maintenance and housing determined quickly. This is most likely to occur once the petition has been filed.

2.13 The choice between adultery and behaviour seems to depend on social mores and on the state of the relations between the parties, as much as upon their marital history. Thus, adultery would seem to carry less stigma particularly among the middle classes and is more likely to be employed than behaviour where the parting was consensual or at least amicable. Behaviour petitions seem much less likely to have been discussed between the parties or their solicitors in advance and sometimes take respondents completely by surprise.

In its subsequent report *Family Law: The Ground for Divorce*[8] published in October 1990, the Commission reported that there was majority support for its approach to reform, which was based on a process over time. It reported that an overwhelming majority of respondents to its discussion paper agreed with the criticisms made of the current system and supported the case for reform. The Commission noted that in doing so, some respondents attached greater weight to the aim of buttressing the stability of marriage and family life, while others were more concerned that the law should minimise bitterness and distress for the parties and their children. It added that all were agreed that the law did neither satisfactorily at present.

The Commission made the following observations about current divorce law in practice:[9]

2.2 In theory, the court must inquire as best it can into the facts alleged. In practice, more than 99% of divorces are undefended. All but a tiny number of undefended cases are proved under the so-called "special procedure" where the petition and supporting affidavits are scrutinised by a Registrar and the decree is formally pronounced by the Judge in reliance on the Registrar's certificate. Our examination of court files in a wide selection of courts around the country revealed that the Registrar's scutiny may well be effective in picking up technical errors in procedure or presentation but is unlikely to reveal defects of substance, particularly in behaviour cases. There are also regional and even local variations in the extent to which corroborative evidence is required. This is not to suggest that the old system of formal oral hearings of undefended cases was any more effective: rather, that without an extensive and expensive court investigation branch it is in practice impossible adequately to test the facts if the respondent, for whatever reason, decides not to do so. The divorce itself is granted in two stages: first, a decree nisi pronounced by the Judge, and second, a decree absolute issued by the court at least six weeks later.

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8 Law Com No 192, HC 636 of 1989/90

9 *ibid* para 2.2-2.3

2.3 In practice, roughly 71.4% of divorces are granted to wives and 73.3% of divorces are based either on adultery (fact (a)), or on behaviour (fact (b)). The proportion based on behaviour has been rising steadily. The use of the five facts varies according to the petitioner's sex, age, social class and whether or not there are dependent children. Sometimes these variations reflect genuine differences in marital behaviour: it is, perhaps, unlikely to be a coincidence that 87% of behaviour decrees are granted to wives. But sometimes they reflect quite different considerations: adultery or intolerable behaviour are the only facts on which divorce proceedings may be started immediately the breakdown occurs. Either may therefore be used, not because the behaviour is any worse than in other cases, or because it is the real reason for the divorce, but because the couple have agreed to end their marriage as quickly as possible, or because one of them wishes or needs to bring proceedings quickly in order to obtain rehousing, maintenance or income support, and to settle the children's future. It appears that separation is least used by those who find it difficult to live apart because of housing or financial problems. Even if the parties can afford to live apart, the increasing use of adultery and behaviour suggests that many find two years too long to wait.

The Commission went on to summarise views about the strengths of the current system, taken from a survey of public opinion:[10]

2.4 Before turning to the criticisms of the present law, we should bear in mind that it also has strengths. Our public opinion survey revealed a large measure of public support for its principal features: thus 72% agreed that it was good that anyone who wants a divorce can get one sooner or later, although 71 % found the present five year period too long; 83% agreed that it was good that couples who did not want to put the blame on one of them did not have to do so; and 84% agreed that it was good that one could begin proceedings immediately if the other had committed adultery or behaved intolerably. Furthermore, divorce under both fault and no-fault grounds is obviously acceptable to a very high proportion of people. 67%, including 71% of divorced people, found divorce under the present law "acceptable". At the very least, we can confidently repeat the assertion in Facing the Future that "the present law is a considerable improvement on the previous position" which relied almost entirely upon proof of fault.

The following criticisms of the present law and practice were said by the Commission to "add up to a formidable case for reform":

(i) It is confusing and misleading.[11]

The Commission referred to the considerable gap between theory and practice, which it felt could only lead to confusion and disrespect for the law and might even be regarded as dishonest. It noted that the law told couples that the only ground for divorce was irretrievable breakdown of marriage, which appeared not to involve fault, but went on to say that this could only be shown by one of five "facts", three of which did involve fault. As a result of this, divorces had been refused in some cases despite clear evidence that a marriage had irretrievably broken down, because the circumstances did not fit within the required "facts".

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[10] *ibid* para 2.4

[11] *ibid* para 2.8-2.11

The fact which was alleged in order to prove the breakdown might not have any connection with the real reason for the breakdown of the marriage, but might be chosen for convenience where, for example, both parties had formed new associations, but agreed to present a petition based on the behaviour of one of them, because neither wished their new partner to be named.[12] The Commission noted that:

"the sex, class and other differences in the use of the facts made it quite clear that these are chosen for a variety of reasons which have nothing to do with the reality of the case"[13]

The Commission also noted that:

"Finally, and above all, the present law pretends that the court is conducting an inquiry into the facts of the matter, when in the vast majority of cases it can do no such thing"[14]

and went on to say that the present law allows, and even encourages, the parties to lie, or at least to exaggerate, in order to get what they want in modern and no less objectionable equivalents of the bogus adultery cases which discredited the system in the past.[15]

(ii) It is discriminatory and unjust[16].

The Commission noted that the two years' separation "fact", which avoided the need to apportion blame, was in practice very difficult to achieve without substantial resources of one's own, the co-operation of the other spouse from the outset, or an ouster order from the court. The law thus provided a civilised "no-fault" ground for divorce which in practice was denied to a large section of the population. The fault-based facts could also be intrinsically unjust, as where one spouse had committed adultery or behaved unreasonably there was nothing to prevent the other obtaining a divorce based on it, even if the other spouse had committed far more adulteries or behaved far more intolerably himself or herself. This inherent potential for injustice was compounded by the practical problems of defending or bringing a cross-petition so as to resist or counter allegations of behaviour.

(iii) It distorts the parties' bargaining positions[17].

A number of groups who responded to the Law Commission's discussion paper had observed that the battles which used to be fought through the grounds for divorce were now fought over so-called ancillary matters, such as the re-distribution of income and matrimonial property and arrangements concerning any children of the marriage. The Commission noted that while negotiations over these matters could legitimately be affected by the relative merits of the parties cases and were governed by specific sets of criteria, they could also be distorted

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[12] ie. named as a co-respondent in a petition based on adultery
[13] *ibid* para 2.9
[14] *ibid* para 2.11
[15] *ibid* para 2.11
[16] *ibid* para 2.12-2.14
[17] *ibid* para 2.15

by whichever of the parties was in a stronger position in relation to the divorce itself. The strength of that position would depend on a combination of how anxious or reluctant that party was to be divorced and how easy or difficult he or she would find it to prove or disprove one of the five facts. This might not matter if the "facts" represented a coherent set of principles, reflecting the real reasons for the marital breakdown, but Commission considers that they do not and that the potentially arbitrarey results can put one party at an unfiar disadvantage.

(iv) It provokes unnecessary hostility and bitterness.[18]

A law which is arbitrary or unjust is, in the Commision's view, likely to exacerbate the feelings of bitterness, distress and humiliation which are often experienced at the time of separation and divorce. Even where a couple have agreed that their marriage cannot be saved there was the possibility that the system would make matters worse by encouraging one to make allegations against the other. The Commission noted that those people who responded to its consultation paper had confirmed the view that there was every reason to believe that the present law added needlessly to the human misery involved.

(v) It does nothing to save the marriage.[19]

The Commission considered that the present law made it difficult for a very small proportion of estranged couples to be divorced, but did so in an arbitrary way depending on which facts might be proved. It also made it very difficult for couples to become reconciled, because a spouse who wished to be divorced was obliged either to make allegations against the other or to live apart for a lengthy period. From the very beginning, attention had to be focused on how to prove the ground for divorce. The reality of living apart, financing two households and breaking up the family were not matters which were currently required to be contemplated until the decree nisi had been obtained. In the Law Commission's view there might be some petitioners who might think again if these matters had to be considered at an earlier stage.

(vi) It can make things worse for the children.[20]

On the subject of the damage done to children by divorce and the effect which the current law might have the Commission said[21]:

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[18] *ibid* para 2.16

[19] *ibid* para 2.17

[20] *ibid* para 2.19-2.20

[21] *ibid* paras 2.19-2.20 References to the literature on the adverse effects of divorce on children and whether these are attributable to parental conflict or the actual consequences of divorce itself are set out in a footnote to para.2.19

> 2.19 The present system can also make things worse for the children. The children themselves would usually prefer their parents to stay together. But the law cannot force parents to live amicably or prevent them from separating. It is not known whether children suffer more from their parents' separation or from living in a household in conflict where they may be blamed for the couple's inability to part. It is probably impossible to generalise, as there are so many variables which may affect the outcome, including the age and personality of the particular child. But it is known that the children who suffer least from their parents' break-up are usually those who are able to retain a good relationship with them both. Children who suffer most are those whose parents remain in conflict.
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> 2.20 These issues have to be faced by the parents themselves, as they agonise over what to do for the best. However regrettably, there is nothing the law can do to ensure that they stay together, even supposing that this would indeed be better for their children. On the other hand, the present law can, for all the reasons given earlier, make the conflict worse. It encourages couples to find fault with one another and disputes about children seem to be more common in divorces based on intolerable behaviour than in others. The alternative is a long period of separation during which children can suffer from the uncertainty before things can be finally sorted out or from the artificiality of their parents living in separate households under the same roof. This is scarcely an effective way of encouraging the parents to work out different ways of continuing to discharge their shared parental responsibilities. It is often said that couples undergoing marital breakdown are too wrapped up in their own problems to understand their children's needs. There are also couples who, while recognising their own relationship is at an end, are anxious to do their best for their children. The present system does little to help them to do so.

Having observed that the response to its discussion paper *Facing the Future* endorsed the criticisms of the current law and practice which it contained, the Commission stated that the present law "now fulfils neither of its original objectives. These were, first, the support of marriages which have a chance of survival, and second, the decent burial with the minimum of embarrassment, humiliation and bitterness of those that are indubitably dead".[22]

The Commission made a series of recommendations following on from the proposition that, as under present law, the sole ground for divorce should be that the marriage has broken down irretrievably. This would be proved by the passage of a twelve month period for consideration of the practical consequences which would result from a divorce and reflection on whether the breakdown in the marital relationship is irreparable.[23] Detailed recommendations were made regarding procedure and terminology but one of the major recommendations was that of encouraging the couple to seek counselling with a view to reconciliation or conciliation and mediation with a view to helping them to resolve disputed issues as amicably as possible.[24]

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[22] *ibid* para 1.5
[23] *ibid* para 3.48
[24] *ibid* paras 5.29-5.39

The Commission considered the "easier or harder" debate and reached the following conclusions:[25]

> 3.46 This debate indicates quite clearly how impossible it is to characterise any particular divorce system as "too easy" or "too difficult". "Easy" may mean short or painless, whereas "hard" may mean long or painful. For some, the model we are recommending might provide "easier" divorce, in that they would not have to separate for years before proceeding; for others, for example most of those who now rely on adultery or behaviour, it would be "harder" because they would have to wait for longer than they do at present. For some, it might be "easier", because they would no longer, justly or unjustly, be branded the wrongdoer; for others, it might be harder, because they would have to disclose their financial circumstances and confront their responsibilities towards their families before they could obtain a decree.
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> 3.47 The emotional pain which many people feel at the breakdown of their marriages is not necessarily linked in any way to the case or difficulty of the legal process. Divorce is almost always painful for their children, but if there is to be a divorce at all, the system should certainly try to make it as easy for them as it can. This was the unanimous view of all those organisations whose principal concern is the welfare of children. They supported the model we recommend as a considerable improvement from the child's point of view, not only upon the present law but on any alternative model which be proposed.

The practical result of the recommendations would be that the actual divorce process would take longer than it does at present for many people. The financial and emotional consequences would, however, have to be addressed before a decree were granted, which is not the case at present. This change has the aim of attempting to reduce the negative feelings of anger and injustice that often surround divorce. The recommendations are also intended to help preserve marriages that can be saved.

On 6 December 1993 the Lord Chancellor published a green paper on divorce, *Looking to the Future: Mediation and the Ground for Divorce.*[26] It set out options for reform of divorce law and sought views on a no-fault divorce law aimed at reducing the cost of the proceedings and acrimony over children, finance and property. The Law Commission's proposal for divorce as a process over time was the favoured option but views were sought on the question of whether parties should have to wait longer than the one year proposed by the Commission, perhaps for two years, before they might obtain a divorce. It also asked whether the waiting period should be different in cases where there are children of the marriage. The Green Paper placed much emphasis on integrating family mediation into the divorce process and asked whether mediation should be a compulsory element of the procedure. The main new proposal was for a personal divorce information interview for those contemplating a divorce. It envisaged that legal information about divorce (but not legal advice) would be given along with information about marriage guidance, conciliation services, costs and legal aid.

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[25] *ibid* paras 3.46-3.47

[26] Cm 2424, December 1993

In his foreword to the green paper the Lord Chancellor made the following comments on the issue of legislating on divorce:

> "The breakdown of marriage is a serious problem. Seeking to prevent the breakdown of marriage is an objective which goes far beyond the scope of the law. The divorce law is intended to deal with the situation in which a breakdown has taken place.
> "Sometimes questions of divorce reform are approached by asking whether they make the obtaining of a divorce easier or more difficult. Almost inevitably the breakdown of marriage is hard for one or both of the parties and especially for the children. I believe that a good divorce law will support the institution of marriage by seeking to lay out for parties a process by which they receive help to prevent a marriage being dissolved. If that is not possible it should seek to eliminate unnecessary distress for the parties and particularly for their children in those cases where a marriage has broken down irretrievably."

and

> "I recognise that marriage and divorce are matters upon which very strong views are held. I recognise, for example, that there are many who would wish to see marriage indissoluble except upon very limited grounds. But the civil legislator has to take account of the reality of the human condition in the society for which the legislation is devised. However desirable it might be for marriages generally not to be dissolved, some do break down. It would be unrealistic for the law not to recognise this fact and make provision for an orderly process of dealing with it..."

The Government also expressed the view that any new system should ensure that couples receive a better service, generally at less cost to them and to the taxpayer than at present.[27]

On 27 April 1995 the Lord Chancellor published a white paper on divorce, *Looking to the future: Mediation and the ground for divorce*.[28] The proposals generally mirrored those favoured in the green paper. At this stage some controversy emerged about the compulsory information interview which was now proposed to take the form of a group session; it was felt by some to be humiliating. It was also felt that it could possibly put victims of domestic violence at additional risk. Lawyers also expressed concern about the role of mediation in the proposals and emphasised the need for legal advice in relation to financial matters in particular.

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[27] para 9.1
[28] Cm 2799

On 16 November the *Family Law Bill*[29] was introduced into the House of Lords by the Lord Chancellor. Under the Bill's provisions the sole ground for divorce will remain the irretrievable breakdown of the marriage. It is intended that this should be proved by the passage of a period of twelve months during which the parties will make arrangements for the children and the finances. The twelve-month period will begin to run when a statement of marital breakdown is received by the court. The Government has agreed to conduct pilot studies to establish the best format for the dissemination of divorce information - videos are one option that is being considered. The Bill also seeks to allow the Legal Aid Board to fund mediation services in specified circumstances.

The removal of the concept of fault in divorce cases remains controversial and the Government intends to allow Conservative Members a free vote on matters of conscience in the Bill.[30]

B. Scotland

1. Current Law

At present section 1(1) of the *Divorce (Scotland) Act 1976* provides that the sole ground for divorce is that the marriage has broken down irretrievably. Irretrievable breakdown may only be proved by one of five facts: adultery; intolerable behaviour; desertion for two years; two years' separation with the other party's consent to the divorce; or five years' separation without the other party's consent.

There is no time bar on divorce and unlike in England and Wales a divorce can be sought at any time after marriage.

2. Proposals for Reform

In its report on *Reform of the Ground for Divorce*[31] the Scottish Law Commission recommended reform of these facts:[32]

> "The ground for divorce in Scotland should continue to be the irretrievable breakdown of the marriage. It should be possible to establish irretrievable breakdown only by proving

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29 HL Bill 1 of 1995/96

30 "The case for divorce reform" [article by the Lord Chancellor], *The Times*, 17 November 1995

31 Scot Law Com No 116, HC 293 of 1988-89

32 p.1

(a) adultery

(b) intolerable behaviour

(c) separation for one year plus the other party's consent to divorce, or

(d) separation for two years."

The main reason for this recommendation was "to enable spouses, whose marriages had broken down irretrievably to use the non-fault separation grounds in a higher proportion of cases, rather than the more hostile and aggressive grounds of adultery or intolerable behaviour".[33] The Commission said "it is a serious criticism of the existing law that it encourages people who do not want to wait five years for a divorce to make exaggerated or unfounded allegations of intolerable behaviour against their spouses".[34]

These reforms were originally contained in the *Law Reform (Miscellaneous Provisions) (Scotland) Bill* (now the 1990 Act) but were dropped at Committee Stage in the Commons as part of the negotiations on how to proceed with the Bill which was subject to time pressures. The Government had intended that a free vote be taken on these provisions in the Bill and it was thought that they would have taken up a considerable part of the Committee's deliberations.[35] During Lords consideration of Commons amendments Lord Fraser said that "the fact that ... the Lord Chancellor is considering rather different proposals for England and Wales was not a consideration when it was decided that this provision should be adjusted. The divorce laws of the respective countries have been different in detail, if not in principle, for some time. There is certainly no ulterior motive of providing a uniform divorce code".[36]

The Scottish Law Commission *Report on Family Law*[37] also contains proposals for the reform of divorce law but they are limited to the bars to divorce. The Commission recommended a change in the statutory wording of section 1(3) of the *Divorce (Scotland) Act 1976* to clarify the meaning of the defence of lenocinium i.e. active connivance in the spouse's adultery; the abolition of collusion as a separate bar to divorce; and the abolition of the grave financial hardship bar contained in section 1(5) of the 1976 Act.

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[33] para 13.1, *Report on Family Law* Scot Law Com No 135, HC 4 of 1992/93

[34] *ibid*

[35] HL Deb vol 522, 25 October 1990 c.1644

[36] *ibid* c.1644

[37] Scot Law Com No 135, HC 4 of 1992/93

There are, however, no current plans to introduce divorce law reform in Scotland. In a written answer of 19 April 1995 the then Secretary of State for Scotland, Ian Lang, said that he was "considering the Scottish Law Commission report, *Reform of the Ground for Divorce*[38] in the light of the consultation document, *Looking to the Future: Mediation and the Ground for Divorce*, which was issued in England and Wales in December 1993 by my noble and learned friend the Lord Chancellor, but I have no immediate plans to bring forward proposals to reform divorce law in Scotland".[39]

A Scottish Office official reports that there is little pressure for reform in Scotland due to two factors. First, mediation is already widely used in relation to children's issues in Scotland and there is also a Scottish Legal Aid Board pilot study in operation which allows referrals to solicitors qualified as "all issues" mediators as an allowable outlay for legal aid. Otherwise wide use is made of "minutes of agreement" which is a statement agreed by both sides and put before the court detailing areas of agreement between the divorcing couple. Second, much less use is made of the so-called fault based grounds of adultery, intolerable behaviour and desertion than in England and Wales.[40] In 1993, the last year for which figures are available for both Scotland and England and Wales, 62% of decrees granted were based on non-cohabitation grounds and 38% were on fault-based grounds in Scotland.[41] This compares with 27% on non-cohabitation grounds and 73% on fault-based grounds in England and Wales.

However it was reported in the *Herald* that Family Mediation Scotland will be seeking reform to Scottish divorce law similar to those proposed for England and Wales.[42] It favours the abolition of fault in divorce and is very much in favour of the integration of mediation in the divorce process. Rules of Court in Scotland allow referrals by a court to mediation services in suitable cases.

C. Northern Ireland

1. Current Law

The law and procedure relating to divorce in Northern Ireland are similar, but not identical, to English Law.

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38 Scot Law Com No 116 of 1989

39 HC Deb vol 258, 19 April 1995 c.217W

40 *Marriage and Divorce Statistics 1993* OPCS, Table 4.6B

41 *Annual Report of the Registrar General for Scotland 1993*

42 "Scottish divorce reform urged", *Herald*, 16 November 1995

The ground for divorce is the irretrievable breakdown of marriage[43] as evidenced on proof of one or more of the following facts:

- adultery
- unreasonable behaviour
- desertion
- two years' separation with consent to the divorce
- five years' separation

There is a bar on divorce within the first two years of marriage[44] unlike in England and Wales where it is one year.

There is no 'special procedure' in Northern Ireland and so all divorce cases must proceed by way of an oral hearing before a judge.

2. Proposals for Reform

The current Bill does not extend to Northern Ireland. In a written answer of 23 November 1995 the Minister of State, Sir John Wheeler announced that in view of the differences in practice and procedure that exist between England and Wales and Northern Ireland a comprehensive research exercise will be undertaken to examine the operation of divorce law in Northern Ireland.[45] He said that Ministers would "await the outcome of that research before giving careful consideration to the need for reform of the law in Northern Ireland".

Article 15 of the *Family Law (Northern Ireland) Order 1993* would allow for the oral hearing to be dispensed with in cases relying on the separation facts but this has not yet been brought into force.

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[43] article 3(2), *Matrimonial Causes (Northern Ireland) Order 1978*

[44] article 3, *Matrimonial and Family Proceedings (Northern Ireland) Order 1989*

[45] HC Deb vol 267, 23 November 1995 cc 301-2W

II History of Divorce Law Reform in England and Wales

Divorce was a matter exclusively in the jurisdiction of the church until 1697 when Parliament passed a Bill giving the Earl of Macclesfield an absolute divorce from his wife. This was the first occasion of a civil divorce and the procedure was extremely expensive thus making civil divorce available only to a wealthy few.

Modern divorce law, under which divorce is a matter dealt with by the courts, came into being in 1857. The *Matrimonial Causes Act 1857* was enacted following the recommendations of the Royal Commission on the Law of Divorce.[46] Absolute divorce was to be granted on the same basis as had been the practice in private divorce legislation, ie adultery by a wife and aggravated adultery by a husband. Thus divorce became simpler and cheaper. It also became more frequent. Some commentators observed that once introduced judicial divorce would be likely to continue towards progressive liberalisation. In *Man and Superman*[47] George Bernard Shaw said "nothing is more certain than that ... the progressive modification of the marriage contract will be continued until it is no more onerous nor irrevocable than any ordinary commercial deed of partnership".[48] This statement is surprisingly similar to some of the criticism that has been made of the reforms currently proposed.

The next major matrimonial reform related to separation rather than divorce. The *Matrimonial Causes Act 1878* was passed in recognition of the matrimonial problems of the poor. It enabled wives to apply to magistrates' courts for separation and maintenance orders where their husbands had been found guilty of aggravated assault upon them. Subsequent legislation widened the separation grounds to include cruelty, desertion and drunkenness.

In 1923, the law was amended to allow women to claim divorce on the same grounds as men, ie adultery. Thus the *Matrimonial Causes Act 1923* abolished the additional conditions that were placed on wives petitioning for divorce.

The *Matrimonial Causes Act 1937*, which was introduced by A P Herbert as a Private Member's Bill, implemented the majority report of the Royal Commission on Divorce and Matrimonial Causes (the Gorrell Commission) published in 1912.[49] It extended the grounds for divorce to include desertion for more than three years, cruelty and supervening incurable unsoundness of mind. These proposals had been rejected by a minority of three of the Royal

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[46] Command Paper 1604, Session 1852/53

[47] 1903

[48] *The Revolutionist's Handbook*, Chapter 1 (1903)

[49] Cd 6478

Commission members, who argued that they would undermine the stability of marriage. The Act also introduced a time-bar to divorce (ie no divorce petition to be presented within the first three years of marriage) to counter criticism that the widening of the grounds for divorce would weaken the institution of marriage. Special leave could be granted to petition within three years on the ground that the petitioner would suffer exceptional hardship or that the respondent was guilty of exceptional depravity. A petitioner who was himself guilty of an offence, or who had contributed to the offence of the other, or had condoned it, might be refused relief. Divorce clearly continued to be based on the doctrine of the matrimonial offence but for the first time a "no fault" ground was introduced with the "incurable unsoundness of mind" ground.

The enormous social changes following the Second World War led to much public discussion of the whole basis of the law of divorce. Fault-based divorce law began to be subject to increasing criticism as couples wishing to divorce without waiting for a three year desertion period manufactured adultery grounds by providing "evidence" of adultery even if no adultery had actually been committed.[50] Opponents of the fault-based principle argued that both parties were usually to blame to some degree, that courts could not accurately apportion blame and the "matrimonial offences" were symptoms rather then causes of breakdown. It was further argued that Christian notions of the indissolubility of marriage were inappropriate in an increasingly secular society. These arguments have startling resonance with those advanced in favour of no-fault divorce today.

The first legislative attempt to give effect to those arguments was a Private Member's Bill introduced in the 1950/51 session by Eirene White which sought to allow divorce on the grounds of seven years' separation even if one party objected. The measure was controversial and did not have Government backing. It was withdrawn and a Royal Commission on Marriage and Divorce (the Morton Commission) was set up which reported in 1956.[51] Again there was no unanimity in the report. Only one of the nineteen members of the Commission was in favour of abolishing the doctrine of the matrimonial offence. However, nine members were prepared to accept seven years' separation as evidence of the complete breakdown of marriage with divorce being allowed in such circumstances with the consent of the other party. Four of those of members suggested divorce should be allowed in such circumstances notwithstanding one party's objection provided that the separation was at least, in part, due to the unreasonable behaviour of the objector. Fourteen members suggested that a separated couple should be able to live together for a while in an attempt at reconciliation without thereby barring divorce. The report had no real influence.

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[50] Technically collusion was an absolute bar to divorce at this stage.

[51] Cmd 9678 (1956)

The next attempt to legislate for divorce on the ground of matrimonial breakdown was in 1963 when Leo Abse introduced a Private Member's Bill seeking to facilitate reconciliation between estranged couples and to authorise divorce after seven years' separation. Although the reconciliation provisions found favour the "no-fault" concept of separation encountered strong opposition, particularly from the churches. Leo Abse withdrew the controversial aspects of the Bill in order that the reconciliation provisions could go through. A further Private Member's Bill was introduced in 1964 by John Parker which sought to introduce five years' separation, with no prospect of reconciliation, as the ground for divorce. The Bill was unsuccessful.

In 1964, the then Archbishop of Canterbury, following discussions with the Home Secretary and the Lord Chancellor, set up a group to review divorce law in England. The group's membership was widely drawn and included representatives of the legal profession and the clergy, a sociologist, a psychiatrist and the President of the National Council for the Unmarried Mother and her Child. Their report *Putting Asunder - A Divorce Law for Contemporary Society* was published in July 1966 and it explicitly stated that the Christian minority should not impose its views on the secular majority. The report found that the existing law concentrated exclusively on making findings of past delinquencies, whilst ignoring the current viability of the marriage. It proposed, therefore, that breakdown of marriage should replace the matrimonial offence as the basis for divorce but this was to be established by the court inquiring into the current circumstances of the marriage to see if the marriage was still viable. Thus an entirely new "no-fault" framework for divorce was recommended. This report was referred to the Law Commission by the Lord Chancellor for advice. In its subsequent report *Reform of the Grounds for Divorce: The Field of Choice*[52] the Commissioners endorsed the criticisms of fault in *Putting Asunder* finding that the need to prove a matrimonial offence caused unnecessary bitterness and distress to the parties and their children. It also found that the current law did not accord with social reality, in that many spouses who could not obtain a divorce simply left the "empty shells" of their marriages and set up "stable illicit unions". However the Commission rejected the proposals put forward in *Putting Asunder* as impracticable. The inquest procedure would have involved the courts in a lot of extra work and so divorce would have become more expensive. It noted that 93% of divorces were undefended and that breakdown or marriage was not easily triable. It also took the view that the proposals would lead to uncertainty as the results of the courts' inquests would be subjective, varying and unpredictable.

The Law Commission defined the objectives of a good divorce law as follows:

1. to buttress rather than undermine the stability of marriage; and

2. when regrettably, marriage has irretrievably broken down, to enable the empty legal shell to be destroyed with the maximum fairness and the minimum bitterness, distress and humiliation.

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[52] Law Com No 6, Cmnd 3123 (1966)

The Commission also identified four major problems as requiring solution:

(a) the need to promote reconciliation;

(b) the prevalence of stable, illicit unions;

(c) injustice to the economically weaker party;

(d) the need to protect children.

It put forward three alternatives: divorce by consent, divorce based upon separation and divorce or breakdown of marriage but without detailed inquest by the court. Despite the existence of a broad consensus for divorce law reform, the precise nature of those reforms continued to be debated. In 1967, however, a compromise was reached whereby divorce was to be made available on proof of the irretrievable breakdown of marriage, with a matrimonial offence or a period of separation being treated as evidence of breakdown. The Law Commission and the Archbishop's working group accepted this proposal and new divorce legislation was introduced.

The *Divorce Reform Act 1969* (which was subsequently consolidated in the *Matrimonial Causes Act 1973*) followed the Law Commission's proposals and was introduced as a Private Member's Bill. This legislation came into force on 1 January 1971 and is still in force. The main provisions of the legislation are described in detail in the prevoius chapter of this Paper, which sets out the current law on divorce. In brief, irretrievable breakdown of marriage is proved by one of five 'facts': adultery, intolerable behaviour, two years' desertion, two years' separation and consent to the divorce, five years' separation. Although the legislation was intended to embody a "no fault" divorce law the requirement to prove the "no fault" ground of irretrievable breakdown by these facts has meant that in practice it is only the two separation grounds which truly express the "no fault" principle.

The two year separation fact introduced divorce by consent and the five year separation fact introduced divorce without consent and without fault. This latter fact was particularly controversial and was dubbed 'a Casanova's Charter'.

Since the 1969 Act one further legislative change has taken place, namely the relaxation of the three year bar to divorce. In 1982 the Law Commission recommended that the bar be reduced to one year[53] and this was introduced with little public comment by the *Matrimonial and Family Proceedings Act 1984.*

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[53] *Report on Time Restrictions on Presentation of Divorce and Nullity Petitions* Law Com No 116, HC 513 of 1981/82

A significant procedural change to divorce hearings took place with the introduction of the 'Special Procedure' for undefended divorce cases. This procedure was introduced in 1973 for childless couples divorcing by consent and extended in 1975 to all childless couples save those petitioning on the basis of the behaviour fact and further extended in 1977 to all undefended divorce petitions. The procedure has virtually abolished open court hearings in divorce cases and petitions are considered by a county court district judge on the basis of affidavit evidence. Legal representation is unnecessary and there is no legal aid for the purpose of preparing and presenting a divorce petition. Davis and Murch comment that "It has been suggested that the introduction of the Special Procedure - which did not require legislative change and therefore attracted little public scrutiny - had a more profound impact on the character of divorce than even the 1969 Act".[54] The combined effect of the 1969 legislation and the Special Procedure has been that there is virtually no investigation into the breakdown of the marriage in divorce cases overall and in most individual cases none at all. In the view of some commentators the procedural changes of the 1970s were more radical departures than was the introduction of irretrievable breakdown as the sole ground of divorce.[55]

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[54] *Grounds for Divorce* 1988

[55] see, for example, *Family Law and Social Policy* Eekelaar (2nd edition, 1984)

III Family Law Bill - Provisions and issues concerning divorce

A. The divorce provisions of the *Family Law Bill* [HL] in outline

- The ground for divorce remains the irretrievable breakdown of marriage (*Clause 3*).

- A marriage is to be taken to have broken down irretrievably only if four conditions are satisfied; evidence of adultery, unreasonable behaviour, desertion etc., will not be needed to establish breakdown. The Lord Chancellor said on second reading "I see no merit either moral, intellectual or practical in retention of the requirement to make allegations of fault in order to establish breakdown and to do so quickly."[56]

The four conditions are:

(a) that a statement of marital breakdown has been made by one or both of the parties. This cannot be done before the first anniversary of the marriage (*Clause 2*), which means in conjunction with condition (c) that it will not be possible for an application to be made for divorce until two years after the marriage.

(b) that the statement complies with *Clause 6* and states that the party or parties are aware of the purpose of the period for reflection and consideration and wish to make arrangements for the future.

(c) that the period for reflection and consideration has ended (this is one year beginning with the fourteenth day after the day on which the statement is received by the court (*Clause 7*), and see discussion of the lengths of this period, p.31).

(d) the application for a divorce or separation order has been accompanied by a declaration that, having reflected on the breakdown and considered the requirements as to the future the applicant(s) believe that the marriage cannot be saved.

- *Clause 8* requires the party or parties making the statement to have attended an information meeting before making the statement, see also p.42. Regulations are to be made about the holding and content of such meetings, and *Clause 8* specifies the range of information to be given, including marriage counselling; the importance to be attached to the welfare, wishes and feelings of the children; the ways in which children can be helped to cope with the breakdown of a marriage; the nature of financial questions arising from divorce and services available to help; mediation (see

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[56] HL Deb vol 567, 30 November 1995 c.701

also p.46); the availability of legal advice; the divorce and separation process.

- *Clause 9* requires the parties to produce evidence to the court that they have concluded negotiations about future financial arrangements and arrangements for any children of the family. The Lord Chancellor, presenting the Bill on second reading, stressed the importance of the requirement that all arrangements about children, finance and home have to be decided before a separation or divorce order can be made.[57]

- *Clause 10* preserves the power for the court to bar a divorce altogether where one party can show that dissolution of the marriage would result in substantial hardship (see also p.57). The bar will become available in all cases, and not just, as at present, in cases brought after five years separation.

B. The general principles underlying the proposals for divorce law reform

Clause 1 of Bill 82, brought from the Lords on 11 March 1996 sets out the general principle underlying the new proposals for divorce and the objectives to be borne in mind by the court and all those involved. Such a statement of principle was not in HL Bill 1 as first presented.

On 11 January 1996, Lord Stallard proposed a new clause defining the general objectives of the Bill:[58]

Lord Stallard moved Amendment No. 1:

Before Clause 1, insert the following new clause -

GENERAL OBJECTIVES

The general objectives of this Act are as follows -

(a) to support the institution of marriage;
(b) to ensure that all practicable steps with a view to preventing the irretrievable breakdown of marriage are taken:
(c) to ensure that the parties understand the practical consequences of divorce before taking any irreversible decision; and
(d) to minimise the bitterness and hostility between the parties and reduce the trauma for the children.

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[57] HL Deb vol 567, 30 November 1995 c.703
[58] HL Deb vol 568, 11 January 1996 c.277-278

Lord Stallard reminded the Lord Chancellor of precedents in the *Children Act 1989* and the *Education Act 1993*, while Lord Irvine of Lairg mentioned the "broad purpose clause" which became section 1 of the *Legal Aid Act 1988*.[59] Lord Stallard's new clause reflected clearly the Government's objectives as set out in the White Paper[60] but omitted the last of these "to keep to the minimum the cost to the parties and the taxpayer." He explained that he was disappointed with the text of the Bill, and saw the setting out of general objectives as providing an opportunity for judging the Bill "to see where and when it falls short of those objectives".[61] There was support for the amendment, and the Lord Chancellor agreed with the objectives as a yardstick by which later amendments should be judged. He wished to look further at the possibility of including within its ambit Part III of the Bill which dealt, at that point, with family homes and domestic violence, and of adding the minimising of costs to the list. He invited Lord Stallard to withdraw the amendment: "We can return to whether or not it should be altered or formally incorporated into the Bill at a later stage."[62]

The Lord Chancellor proposed a revised new clause on the first day of the report stage, 22 February 1996. This omitted sub-section (c) of Lord Stallard's amendment and added sub-section c (ii) about costs:[63]

The Lord Chancellor (Lord Mackay of Clashfern)
moved Amendment No. 1:

Before Clause 1, insert the following new clause -

THE GENERAL PRINCIPLES UNDERLYING PARTS I AND II

The court and any person, in exercising functions under or in consequence of Parts I and II, shall have regard to the following general principles -

(a) that the institution of marriage is to be supported;
(b) that the parties to a marriage which may have broken down are to be encouraged to take all practicable steps to save it;
(c) that a marriage which has irretrievably broken down and is being brought to an end should be brought to an end -
  (i) with minimum distress to the parties and to the children affected; and
  (ii) without costs being unreasonably incurred in connection with the procedures to be followed in bringing it to an end.

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59 *ibid* c.282
60 *Looking to the future*, Cm 2799, p.18
61 c.281
62 c.296
63 HL Deb vol 569, 22 February 1996 c.1145

He explained why this new clause had not been extended to Part III:[64]

> Amendment No. 2 is intended to spread the clause to the whole of the Bill. This is deliberate on my part. I am strongly of the view that Part III of the Bill deals with a somewhat different subject matter. For example, the importance of marriage is emphasised in that part. We have put into that part, which has been the subject of some consideration and doubt in some quarters, Clause 36. This clause ensures that courts will consider the situation as between married and unmarried people when they make use of powers under that particular part of the Bill.
>
> If one looks at the provision in my clause with regard to saving marriages, I think it would be quite difficult to apply that appropriately in the case, for example, of violence between spouses in the matrimonial home. In that case, although the objective of saying the marriage is important, the immediate objective so far as concerns Part III of the Bill is to provide protection for the parties from that violence. I believe that these might be seen to be in conflict.

Lord Simon of Glaisdale moved an amendment to add "that the interest of any child affected is paramount". This reflects the general principle set out in section 1 of the *Children Act 1989* that in court proceedings "the child's welfare shall be the court's paramount consideration." The Lord Chancellor opposed the amendment: "In my submission, the correct approach is to say that matters concerned with the welfare of the children are subject to the provisions of the *Children Act* which, in my view, is a well balanced, practical and efficient method of dealing with that most important matter."[65]

Lord Robertson of Oakridge drew attention to the continuing needs of children after divorce:[66]

> **Lord Robertson of Oakridge:** My Lords, I welcome the amendment in general but I have one reservation: it concerns the reference to children in paragraph (c). As drafted it could be taken to imply that the children's needs and problems can be disposed of at the time when the marriage is brought to an end. Unfortunately, that will seldom be possible as the effects of divorce on a child often continue well into the future.
>
> I mention four areas where problems may affect children after divorce. First, there may be arguments about access. Secondly, there are situations in which parents compete for children's goodwill by offering expensive presents and treats. Thirdly, there are instances where parents' main priorities are to rebuild their social life and find another partner. The children come off second best and may experience a sense of rejection

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64 c.1155
65 c.1177
66 c.1147

which has lasting effects upon them. Lastly, when mother's new partner moves into the house in place of father, children are at a higher risk of abuse. In his book *Homes and Battered Children*, published in 1994 by the Family Education Trust, Mr. R. Whelan calculated that the risk of abuse was 33 times higher than if children had remained with their own married parents.

He suggested that the Lord Chancellor's amendment should include some phrase such as "with regard to the present and future needs of the children".

The Lord Chancellor acknowledged Lord Robertson's contribution when, on third reading on 11 March 1996, he moved a further amendment to ensure that children's interests would continue to be looked at after the divorce settlement. This amendment added what is now *sub-section c(ii)* and *clause 1* (which is now also *Part I*) reads as follows:[67]

PRINCIPLES OF PARTS II AND III

1. The court and any person, in exercising functions under or in consequence of Parts II and III, shall have regard to the following general principles -

(a) that the institution of marriage is to be supported;
(b) that the parties to a marriage which may have broken down are to be encouraged to take all practicable steps to save it;
(c) that a marriage which has irretrievably broken down and is being brought to an end should be brought to an end -

(i) with minimum distress to the parties and to the children affected;
(ii) with questions dealt with in a manner designed to promote as good a continuing relationship between the parties and any children affected as is possible in the circumstances; and
(iii) without costs being unreasonably incurred in connection with the procedures to be followed in bringing the marriage to an end.

When Lord Stallard's amendment was first discussed on 11 January 1996, it was seen by him and by others partly as providing a statement of principle which would guide subsequent amendment of the Bill to enable it to achieve what was intended. Lord Rawlinson of Ewell did not think that the Bill in its present form would do so, but said that the objectives set out in the amendment, if accepted, would provide the framework within which it could be improved, "Then it is up to us with the amendments which follow, to change the Bill to make it achieve what the amendment hopes it will achieve."[68] Lord Stallard also said "It is up to us legislators to ensure that the law will be clear... and clearly understood by those who will be mediating, counselling and so on."[69]

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[67] Bill 82 of 1995/96
[68] HL Deb vol 568, 11 January 1996 c.291
[69] c.281

The version of the clause introduced by the Lord Chancellor on 22 February 1996, reinforces the intention that the statement of principle should guide the courts and everybody involved in the divorce process on the interpretation of the statute. As long ago as 1975, the Committee on the Preparation of Legislation chaired by Sir David, now Lord, Renton, recorded that there were "Demands for immediate certainty in legislation from the Government, who want to be sure that the Bill gives complete and predictable effect to policy."[70] The Committee recommended that:

> "The adoption of the 'general principle' approach in the drafting of our statutes would lead to greater simplicity and clarity...We would, therefore, like to see it adopted wherever possible."[71]

The Renton Committee also recorded that many witnesses, including members of the judiciary and lawyers, had advocated express statements of purpose to delimit or otherwise clarify the scope and effort of legislation. The Committee recommended that statements of purpose should be used for these reasons, and that they should be contained in a clause in the Bill and not in a preamble.

Both the Renton Report and the more recent Hansard Society Commission's *Report on the Legislative Process* of November 1992 contrasted English drafting practices with that of most countries in Western Europe and the Community, where reliance is placed on broad objectives and statements of principle. The Hansard Society Commission, writing before the case of *Pepper v Hart* [1993] All ER 86 discusses the English legal tradition that the courts derive their interpretation of legislation from the text alone, according to which view "the intention of legislation is irrelevant."[72] This view has been challenged by the fact that the courts have frequently been willing to look beyond the words of an Act and to seek to discover what Parliament intended. It has been argued "that drafts of bills should adopt a purposive approach and draw legislation up in more general terms which enact the law in clearly expressed general principles, which would help the courts to interpret and apply that intention."[73]

The major interpretation of the decision in *Pepper v Hart* is that if legislation is ambiguous or obscure, the courts may in certain circumstances take account of statements made in Parliament by Ministers or other promoters of a bill in construing that legislation - though as Earl Howe said in answer to a question on 5 April 1995 "Textual clarity and precision, and the avoidance of ambiguity, will continue to be high priorities in drafting legislation."[74] The Parliamentary-Secretary, Office of Public Service, David Willetts, replying to a debate on 13

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70 Cmnd 6053, para10.12
71 *ibid*, para 10.13
72 *op cit* para 224
73 *op cit* para 226
74 HL Deb vol 563, 5 April 1995 WA26

December 1995 on Government Bills, also stressed the need for legislation to be drafted "clearly, accessibly and with the eventual user in mind... there is no point in having simple statements of principle in statutes if, in the end, the law is uncertain. Certainly must be paramount"[75] It remains to be seen whether in the light of *Pepper v Hart* general declarations or statements of purpose will tend to lessen the need for the consultation of Parliamentary sources to aid in the interpretation of legislation or whether their existence will draw attention to the need to examine such sources in even more detail.

C. The One Year Period for Reflection and Consideration

Clause 7 of the Bill was described by the Lord Chancellor as dealing "with matters which are at the very heart of the Bill"[76] and being "one of the most important parts of the Bill [c949]. Baroness Young, one of the leading opponents of the clause, agreed that "the issue is central to this piece of legislation" [c952].

Clause 7 provides that a period of one year must pass commencing on the fourteenth day after a statement of marital breakdown is received by the court before an application for a divorce or separation order which relates to that statement can be made to the court. This period is to be one of reflection (on whether the marriage can be saved with an opportunity to effect a reconciliation) and consideration (of what arrangements should be made for the future).[77] Given the controversial nature of this provision, perhaps the best way to reflect the arguments is by reference to the Lords debates on the clause.

Introducing the **Second Reading** of the Bill the Lord Chancellor said:[78]

> It is of course vitally important that marriages are not dissolved if they could be saved and therefore important that the mechanism used for testing breakdown is one which we are satisfied will do just that. The provisions in the Bill are that the breakdown would be established by the passage of an absolute period of time without that period being abridged in any circumstances. The provision would require a person wishing to initiate proceedings to attend a compulsory information session before the period of time starts to run which might lead to divorce. This will not only mark the seriousness of the step being taken but also ensure that essential information is conveyed to people contemplating divorce in the most effective way possible. Information provided will include information about the various services available to help people, including marriage guidance, mediation and legal services. I believe that this will be done most objectively and effectively if done by those who provide the services. It will also deal with alternative options to divorce and the consequences of divorce for the parties and their children. Regulations will provide for exceptions to personal attendance-for example, disability-when alternative arrangements will be made for the information to be conveyed. It is not intended to force spouses to attend together and so

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75 HC Deb vol 268, 13 December 1995 c.929
76 HL Deb vol 568, 23 January 1996 c.947
77 Explanatory Memorandum to the Bill
78 HL Deb vol 567, 30 November 1995 c.702

the victims of abuse will not be in any way at risk as a result of this provision.

The period of time would be commenced by the lodging of a neutral statement. By that I mean a statement which does not make allegations and does not, at that early stage, state that the marriage has already irretrievably broken down and that the maker of the statement wants a divorce. The spouse or spouses making the statement would be required to declare that he, she or they believe the marriage to have broken down and declare that they understand that the purpose of the period which will follow before an application to the court can be made for either a separation or a divorce order, will be for reflection on whether the marriage can be saved and consideration of the arrangements for the future, should divorce be proceeded with.

The general view of those who were consulted by the Law Commission and by the Government, following the issue of our consultation paper, was that a sufficient period of time should elapse in order to demonstrate quite clearly that the marriage had irretrievably broken down. The period should be sufficiently long to give parties a realistic timescale within which to reflect on whether the marriage could be saved but also a realistic time within which the practical questions about children, home and finances could be resolved. The length of time which most respondents favoured was 12 months. Those who work with children pointed out (and this is a thought which I would commend to your Lordships) that although 12 months may not seem long to us, 12 months is a very long timeindeed in the childhood of a young child living with uncertainty. Those consultees who work with children considered that, if the divorce process period went on too long, this would be bad for children. A lengthy period would prolong the agony not only for the adults but also the children, which could be damaging. Hardship could be caused by the imposition of a period longer than 12 months. It probably has to be accepted that there are limits to how much longer the period can be made without causing too much hardship-particularly to children. Do we really want to make things harder for children? Are things not hard enough for those children who are innocent victims of marriage breakdown?

For those who are the victims of violence, the remedies which will be available under Part III of the Bill will be adequate to protect them during the 12-month process.

For the Opposition, Lord Irvine of Lairg responded [c707]:

So, we support the no fault principle. But, with respect for what has come from the noble and learned Lord, the 12-month embargo on obtaining a divorce is too restricted. If the parties are able to make sensible and prompt arrangements to protect the interests of the children, we see no merit in holding them to a marriage which is dead and from which both want to escape. We shall be tabling amendments to that effect.

Let me give an example from the recent experience of a solicitor who is a distinguished family law specialist. A man who was separated from his wife more than 10 years ago was diagnosed in February this year as dying from cancer. He and his wife had not divorced; neither of them had seen any need to do so. He was living with his new partner. She became pregnant. He wanted, so far as he could, to provide for her and their child after his death. His lawful wife was entirely supportive. She too was living with another. The lawful husband had substantial pension policies. Within a few months he was able to obtain a divorce from his wife with her full agreement and the co-operation of the courts. The divorce was in June this year. He died in September. His new wife now has the benefit of a widow's pension under his occupational scheme, to the great benefit not just of herself but of their child too. Happily, the child was born in the summer. I should be astonished if the noble and learned Lord could think other than that the courts should be given flexibility to grant divorces in less than a year in exceptional cases.

But also, we hold firmly to the view that, if fair arrangements have not been made, there should be no pressure, just because a year has elapsed, to make an unfair arrangement which will bind the children and the parties for years to come.

Lord Jakobovits, the former Chief Rabbi, was interested in a waiting period before marriage. Lord Simon of Glaisdale, a former Law Lord, reflected on the legal issues surrounding 'quickie divorce' [cc746-50]. Baroness Young, a leading critic of the Bill's proposals, said [c732]:

> I now turn to the detail of the Bill. I ask myself whether it will do anything to buttress marriage. The Bill has been hailed as the ending of the quickie divorce, and I welcome that. I am glad that newly married couples will not be able to divorce in under two years, and that other couples will in all cases have to wait a year. The reality of that, as I understand the figures, is that for 77 per cent. of couples who probably get divorced in six months, the wait of one year would add a further six months to that period. However, I agree with the principle. I should like to see that waiting period extended, and I shall table an amendment accordingly. I support it because I believe it acts as what has been described as a cooling off period. I was interested to read the statistics from Relate. Research shows that 51 per cent. of divorced men and 29 per cent. of divorced women would have preferred to stay married. I profoundly hope that the longer waiting period may help them. As the Bill stands, however, the wait is only one year. That means that a man or woman can be divorced against his or her will after a year without any reason being given. Therefore, although the wait deals with the quickie divorce, it considerably shortens the time taken in divorces with agreement after two years or without agreement after five years. That issue needs to be addressed.

Lord Archer of Sandwell, winding up for the Opposition, supported the arguments for flexibility [c783]:

> Of course there will be arguments about the thin ends of wedges. I recollect the procedures in the Matrimonial Causes Act 1937, which was referred to by the noble and learned Lord, Lord Simon, where no party was permitted to initiate divorce proceedings within three years of the marriage. Whatever the subsequent legislative history to which the noble and learned Lord referred, he will remember-as I remember days when I was a young barrister and I appeared before him on exactly that kind of application, because it was found necessary to mitigate exceptional cases. The courts were given a discretion in proper cases to dispense with the provision. It did not mean the virtual end of the rule. The courts gave leave only in exceptional cases. I hope that the committee will hear evidence on that before we reach any dogmatic conclusions.

Concluding, the Lord Chancellor replied [c787]:

> I believe that one needs something to start the year off. I believe that it should be as simple as possible. Therefore, so far as I am concerned, one needs to say- and this seems to be the reality if one is thinking of divorce-that one's marriage has broken down. The next stage, after a year, is that in the light of all the circumstances, one believes that one's marriage has broken down in such a way that it cannot be retrieved or healed. That appears to me to be a reasonable basis for proceeding.
>
> I do not believe that this Bill makes divorce easier. A number of noble Lords have supported this view. I do not entirely understand what that phrase means and therefore it may be more difficult to respond to remarks that I did not fully hear about it. It is quite clear that the period required for some 75 per cent. of divorces will be longer than it is at the present time. I strongly suggest to your Lordships that there is a very uncertain sound about fault sent out by the present system in which reliance on that enables one to get a quick divorce. I shall be very interested to see the amendments of those who are proposing to abolish the quick divorce and the basis on which that proceeds.

In **Committee**, consideration of the clause began with proposed amendments by the Opposition, seeking to clarify the calculation of the time period under certain circumstances of mediation and attempted reconciliation. The Lord Chancellor intervened in Lord Irvine of Lairg's speech to explain the provisions of the clause in this respect:[79]

> It may help to shorten the matter if I confirm that the intention of the Bill - I certainly would wish to consider whether it can be clarified - is to give parties the option of stopping the clock running so that the period of attempted reconciliation is additional to the year. If the parties go for, say, a year trying to reconcile, then that is not counted within the period.
>
> My noble friend Lady Young talked yesterday about all that had to be done within the period, and spoke for a lengthening of the period. If the parties are able to try to effect a reconciliation, the period spent on that stops the clock. There is no question of that, as it were, being counted against them in the running of the period. The noble Lord is right in saying that that is the intention, and not what he originally thought that the intention was.

Lord Irvine urged that the terms of the clause be clarified, and concluded [c924]:

> Those are the proposals which I now think it right to put before the Committee for consideration: to ensure that the relationship between mediation and reconciliation is clearly established alongside a duty in the mediators to inform parties who come before them in the mediation process that mediation is not a process which has a momentum of its own and precludes the option of reconciliation. On the contrary, that option remains and should be followed by the parties, if they so desire.

Responding, the Lord Chancellor said that "the intention of Clause 7 is that the parties should reflect on whether or not the marriage can be saved. That is the keynote of the clause. The purpose of that is to enable them to consider in every possible way, including attempts at reconciliation, what can be done.... [T]he intention is that whatever consideration is given to these matters does not stop the clock running, except in the situations where subsections (5) and (6) apply....[If they] agree to make a real attempt at reconciliation they can stop the clock running. If everything works, the whole business is finished and they go on living together happily as a married couple would like to do" [c927]. He continued [cc927-8]:

> On the other hand, if they have been working at it for three months or so and the attempt fails, instead of the period expiring a year after the notice it will expire 15 months after the notice, because the three-month attempt at reconciliation will not be counted in the year. Surely we are all in favour of doing what we can to encourage reconciliation. Therefore, this gives additional time in which an attempt at reconciliation can be made, but it is a joint effort on the part of two people.
>
> The current law has a somewhat different effect on attempts at reconciliation. Under the present law, if the reconciliation is for an aggregate period of six months or more after the discovery of the adultery complained of, or the final act of behaviour alleged takes place, there is prejudice to the parties in going ahead with a divorce based on that adultery or conduct. We want to do everything possible to facilitate and encourage reconciliation.

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[79] HL Deb vol 568 cc922-3, 23.1.96

He concluded [c929]:

> We do not want at all to discourage reconciliation, but we do not want to use an original statement for too long. The original statement that initiates the procedure should not be allowed to function for too long. That is why I believe that we should give a reasonable time to encourage reconciliation but not allow the original statement to continue to be effective as a start to this matter for too long. I thought that 18 months was about right. To make the period as short as 12 months very much constrains the possible attempt at reconciliation. I shall certainly take advice on the drafting and look again at that matter.

and [c930-1]:

> The other side of the matter is that the purpose of the period is to demonstrate that the marriage has irretrievably broken down. It seems to me to be perfectly satisfactory that a period during which the parties agree that they are making an attempt at reconciliation which has reasonable prospects should not count to proof of that. If the attempt breaks down, I accept that there may be additional bitterness. It is one of the risks. I hope that risk is well worth running in most cases. But if the attempt breaks down, there is a further cooling-off period. In fact, it may be all the more important to have a further cooling-off period, if there has been a certain rush of blood to the head as the reconciliation attempt broke down. The importance of a further cooling-off period may be even greater because cooling off is, perhaps, the best remedy that we can devise for sudden rancour.

The amendment was withdrawn. The Committee then turned to the key amendments to *clause 7*, those seeking to alter the 12-month period. Baroness Young moved a series of amendments to extend it to two years with consent or five years without, or to two years or to 18 months in all cases. She said [cc933-4]:

> Many people will argue (and I have heard it argued in Committee) that once everybody has made up their minds to go ahead, it is terrible to keep people waiting one year. But curiously, when one looks at the statistics, it is clear that in Scotland, where over 50 per cent. of divorces take between two and five years-and in Northern Ireland over 70 per cent. take that time-there has been no public outcry. It seems to work perfectly satisfactorily. I do not understand therefore why it is thought that there may be a public outcry in England and Wales.
>
> The reason why the statistics in Northern Ireland are so different is that the special procedure does not apply. As we know, the special procedure was introduced in 1973 as a statutory instrument and was not a decision by Parliament in quite the same sense. I believe that this is a matter which is very much at the heart of this Bill and which a great many people believe is quite wrong; namely, that at the end of a year it should be possible for one spouse to divorce the other against the wishes the partner and in such a short period of time.

For the Opposition, Lord Irvine opposed the amendments [cc934-5]:

I take the view that in their proposals, *Looking to the future*, the Government get the balance on this subject right. Paragraph 4.12 states,

"A period of twelve months will provide sufficient time to establish that the breakdown of the marriage is irretrievable, and for couples who make acceptable arrangements for living apart".

Then in paragraph 4.13 the proposals address the very point which the noble Baroness, Lady Young, addresses through these amendments. It says,

"A shorter period will do neither of these and a divorce could be granted without any adequate reflection and consideration. A longer period would offer no incentive for couples to deal with the past. Not only would it increase distress but it would act as an encouragement to walk out of the marriage, form a new relationship, and take on new family responsibilities before fulfilling the obligations and responsibilities towards the previous marriage and children. A longer period would also result in greater distress to the children, and increase their insecurity about arrangements for their future".

That I believed at the time, and still believe, represents sound judgment. What must be explored in the debate on this amendment is the purpose of the longer periods proposed because it is incumbent on the mover of the amendment to put his or her cards clearly on the table. I have to ask this: are these amendments put forward on the basis that divorce should be made more difficult to get and that people should be kept out of a divorce for longer as a matter of principle or, on the contrary, are they put forward on the basis that if both parties want divorce then they really need two years and one is not sufficient for reflection and consideration but if only one person wants a divorce, against the wishes of the other, then he or she actually requires five years for reflection and consideration?

The contrast between the periods proposed-two years for both parties, but five years for a single party seeking to divorce against the wishes of the other-suggests to me that the intention lying behind these amendments may be somewhat penal in nature and not that these longer periods are truly required for the statutory purpose, which is a sufficient period for reflection and consideration.

Baroness Elles wondered "about the wisdom of having a specified term of one year in all circumstances... I do not think that it is possible to specify any definite period that can meet each individual situation" [c936]. On the other hand, Lord Marsh found it "extraordinary" that "a year is too short a period in which to have thought about it, weighed up the consequences and realised what the break-up means for everyone concerned... frankly I can see no reason why the parties should suddenly begin to understand all that simply because they are in the second year of that period" [c936]. The Bishop of Oxford doubted if extending the period would significantly reduce the number of divorces, but Lord Stallard claimed that the Bill "makes divorce too easy and is an incentive for people not to try to make the marriage work when there are difficulties but to take the easy way out" [c938]. Lord Perth, who had proposed the 18-month period, denied that it was a "penal one". He said that the longer period may have two consequences: "First, it may make those contemplating marriage take it more seriously. Secondly, if the marriage goes wrong, a reconciliation is more likely" [c940].

The Lord Chancellor responded in some detail, beginning by setting out the purpose of the clause:

I agree with the view that the proposed amendments deal with matters which are at the very heart of the Bill. I believe that it is necessary to have a period for consideration and reflection. That period should be a minimum period and fixed by law, as a clear indication of the value and solemnity that

we attach to marriage. However, the question of what that period should be is a difficult one and is a matter of judgment.

The Government set out in the White Paper the reasons which persuaded us that a year was the right period.... The period is for consideration and reflection. One of the conditions in addition is that there should be a resolution of the matters that arise between the parties consequent upon the divorce. That cannot be allowed to produce a divorce in less than a year. However, if the processes require longer than a year then, automatically, that will happen by virtue of the provisions.

and [c947]:

The longer the period the more it is necessary to think what the period is intended to do.

There is also the point that the longer the period the more pressure there is for special arrangements to be made for exceptional circumstances. It is extremely important that marriage is recognised as having the consequence of a definite period as a minimum associated with it. I am not very much in favour of extending the period if, as it were, the counter to that is a power in the court to shorten the period in special circumstances. That blurs the message which otherwise a clear minimum period sends.

He said that he believed "that consent or no consent is not as relevant to this situation as at first sight appears", referring to the power in *clause 10* allowing courts to make an order preventing dissolution of a marriage in certain circumstances, and to the resort to the hardship bar [c948]. "It would not be right to distinguish between consent and no consent for showing that the marriage has irretrievably broken down. In that case the minimum period should apply whether or not the parties are anxious to divorce because, apart from anything else, it is right that before the divorce is granted they should consider what arrangements should be made" [cc948-9]. He also emphasised the position of children of a marriage, saying that he wanted to avoid situations where "two rather selfish parents are so concerned to safeguard what they see as their definite futures apart - and therefore want to get a divorce as quickly as possible -that they neglect the responsibilities they have already incurred in their union in which children have been born." [c949].

Replying to the debate, Baroness Young said that she wanted "to see marriage buttressed". She believed "that the high divorce rate is having a devastating effect on society". She agreed with Lord Perth that one signal sent out by the Bill to couples contemplating marriage (or divorce) "is that at the end of a year one can get a divorce, and one can do so against the wishes of the other partner" [c949]. While accepting that the Bill does away with the 'quickie divorce', she still believed that it would make divorce easier. She denied allegations that she was "trying to punish a lot of people", stating that she believed in marriage, and in individual responsibility. If the Bill did result in more divorces "then of course more children will suffer.... The truth of the matter is that all modern research shows that, difficult as marriage

may sometime be, children are better off in a difficult marriage where the partners stick together than if they divorce" [c950]. She withdrew her amendment.

Lord Coleraine then moved amendments to the effect that "unless and until husband and wife are agreed that their marriage is at best an empty shell, the divorce process shall not end but may continue for up to three years from the making of the statement which originated the process" [c953]. The Lord Chancellor responded that "merely to make consent vital within the period is to ignore the nature of the marriage as requiring continued commitment... if the period is reasonable for consent, how does it become too short for considering matters where the parties do not consent?" [c956]. He continued [cc958-9]:

> I am not aware of any body of opinion expert in this area which suggests that after year has passed the probability of anything in the way of a reconciliation would arise. In other words, it is not in any way established that lengthening the period beyond a year is likely to increase the chances of a reconciliation. As I said, it is a matter of judgment. That is why I feel that there may be special circumstances in a particular case to which the court should have regard. But I do not believe that as a general rule it follows that reconciliation is likely to be assisted by going along with a period of more than a year. I do not see that the question of whether or not the parties are consenting or in any kind of agreement affects that.

Lord Irvine moved amendments seeking to empower the court, when satisfied that certain conditions are met, to dissolve the marriage *before* the 12-month period had elapsed. He said that it would be a pity if the "vast improvement" in the Bill - the 12-month period - were to be "made unusually restrictive by robbing the judges of any discretion to do justice in the rare cases where a divorce should be granted before the expiry of the 12-month period" [c961]. Baroness Young opposed the amendments because "to shorten the period would send out an even worse signal to everybody.... We are on a slippery slope" [c964]. The Lord Chancellor also opposed the proposal believing that the 12-month period was the minimum necessary period required to achieve the purpose of the clause [c966]:

> My feeling-it is quite a strong one-is that in order to ensure that a marriage has indeed broken down before a divorce can be granted, it is necessary to provide a period for reflection and consideration. That is stipulated as the general period. If no improvement takes place in the relationship it may be right to extend the period in certain circumstances and the provisions are drafted to allow for that. I do not think it right to make a provision that would shorten the period because I think that it is necessary to send out the clear signal that marriage is an important relationship and that a year is required before it can be dissolved once one or both of the parties has initiated the necessary procedure.

and [c967]:

> I do not know that I want to go into details about how divorces have

been affected by different legislation. I do not believe that it is possible to use history to show what the effect of this legislation will be. It is wise to consider many matters other than the precise change in the divorce law when one looks at the past. In the meantime, I am of the strong view that a minimum period for consideration and reflection is necessary to show that the marriage has irretrievably broken down. That minimum period is judged, rightly, to be one year. It would not be appropriate therefore to give the court power to abridge it.

Lord Irvine withdrew his amendment.

At **Report Stage**, Baroness Young again sought to extend the period, to 18 months in cases where children are involved:[80]

I hope that my noble and learned friend the Lord Chancellor will feel able to consider the amendment. It is intended to be a compromise. The amendment proposes the extension of the year for reflection and consideration to 18 months where children are involved. That is the same principle as applies in the Bill as now drafted. At the same time, it provides for the opportunity for reconciliation throughout that time, something with which both I and my noble and learned friend the Lord Chancellor agree and wish to see. I do not think that the amendment conflicts with the principles which he has advanced.

The amendment is a compromise, in that it retains the one year period for reflection and consideration for those couples without children both of whom consent to the divorce. At an earlier stage in our proceedings, there was quite a lot of discussion about the different provisions for those couples who have children and are divorcing and those couples who do not have children and are divorcing. This is an attempt to draw a distinction between the treatment in each case. As I had understood it from our earlier discussions, that is what your Lordships would like to see.

The amendment also provides that a court could not hold it against a spouse for failing to make an informal agreement. It therefore takes the pressure off a couple facing mediation for at least six months. Coupled with some of the subsequent amendments, it creates in effect a kind of free zone for the first six months although reconciliation could take place.

The Duke of Norfolk strongly supported the amendment because of its attempt to preserve marriage with children. Lord Stoddart urged the Lord Chancellor to accept the proposed compromise. However Lord Irvine opposed an increase in the period for reflection, believing that "an extension of six months would be likely to prejudice the children by increasing the uncertainty of what is to happen to their parents' lives" [c1709]. The Lord Chancellor said that the 12-month minimum period was a proper one for all marriages: "It is not affected by whether or not there are children of the marriage." He said the Bill took full account of the interests of children, and considered the question of uncertainty upon children: "It seems to me as a matter of principle that it cannot be right to require that, just because there are children, those children should be subjected to a longer period of stress than is necessary for

[80] HL Deb vol 569, 29 February 1996 c.1703

the purpose of determining that the marriage has broken down irretrievably" [c1712]. Baroness Young did not accept that there was no distinction between couples with and without children [c1715]:

> I was very surprised to hear the argument that we should not draw a distinction between couples with children and couples without children. It seems to me that there is a very clear difference. For couples without children, when they both consent, I accept that a year would be quite long enough. But where there are children, a great many other considerations apply and we should consider those.

She believed that "we must always hope for reconciliation. A longer period of time makes that more likely to be considered" [c1715]. She withdrew her amendment.

At **Third Reading** on 11 March 1996 Baroness Young made a final attempt to amend the *clause 7* period by again presenting her compromise amendment, this time linked to *clause 2*. Generally the debate, perhaps the most comprehensive on this issue, followed the arguments deployed in the earlier proceedings. She cited support from a number of senior clergy such as Cardinal Hume and the Bishop of London, and claimed that a longer period "provides a longer opportunity for reconciliation to take place"[81], citing divorce-related statistics within UK jurisdictions and in the EU. She doubted the validity of 'uncertainty for children' arguments used by her critics. She concluded [c622]:

> We have to determine what is the effect of divorce on children. The pain of the child does not end with the divorce, it goes on. If we can prevent the divorce, we can ameliorate at least some of the pain. It is the divorce itself, not the procedures, which affects children. It is often the acrimony involved. There are later amendments which try to buttress marriage and do something which I believe my noble and learned friend the Lord Chancellor wishes to achieve, as I do-less acrimony than there is at present.
>
> I believe that it is right to extend the period of one year to 18 months for reflection and consideration. That would apply where there are children. It would provide a greater opportunity for reconciliation. It would help those couples who are uncertain. It would, in particular, help those couples where one spouse does not want the divorce, to see whether they cannot find some way of coming together.
>
> I accept that where both parties consent to a divorce and where there are no children, a year is the right time. I am content to go along with that, but where other people are to be considered, especially the children, a year is a short period in which to consider whether to take the extremely important step of divorce-of ending a marriage-with all the consequences that that entails, not just to the two people who are divorcing, but to the children.
>
> In weighing up this matter, we must consider the effect that all this will have on the fabric of our society. I said at the beginning of the Second Reading of the Bill that I regarded it as the most important piece of legislation this Session. Its effects are profound and far-reaching. I can speak only for myself, but I have never weighed so carefully all the arguments and considered so hard and so long about anything because the effects for us all are profound. That applies wherever we may live.

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[81] HC Deb vol 570, 11 March 1996 c.620

> The amendment gives us an extra six months, which is not a long time. It offers a better chance to hold more marriages together. That is something which I believe to be right in the Bill; it is right for the couple concerned and the children, and it is right for society as a whole.

Lord Irvine repeated his view that "I start from the basic position that it can make no sense to compel parties to remain married if the marriage is dead. The law cannot compel parties to remain together. Even if it could, which it cannot, compelling them to live together would cause greater harm to the innocent children...The law can deny divorce...To deny divorce does not prevent breakdown" [cc622-3]. Baroness Elles supported the amendment, claiming that "what has not been taken into account is that a year in the life of a child is a short time, in particular if the child is at school" [c623], as did Lord Stoddart, stating that it was his side which had made compromises on the statutory period. A number of peers, all speaking for the first time on the issue, also supported the amendment. However, Earl Russell contended that he could not understand how Baroness Young could achieve her aim of buttressing marriage by denying divorce.

The Lord Chancellor said that the pre-legislative consultation on his proposals was "decisively against" the proposition of a longer period where children were involved [c643], and doubted the relevance of Baroness Young's figures to the argument. He emphasised that the Bill made a "fundamental change" in divorce law by making the 12-month period a minimum, and cited the relevance of the hardship bar as a relevant consideration where children are involved. Responding, Baroness Young regretted the Lord Chancellor's stance, and defended her statistics, especially comparative divorce figures. She pressed her amendment to a division, which was lost 109-157.

The Lord Chancellor then moved an amendment to *clause 7*, which was agreed to, to add to *clause 7(1)(a)* that the statutory period was also to allow the parties "to have an opportunity to effect a reconciliation." He hoped that would meet the request by Lord Simon of Glaisdale, at report stage, to rename the *clause 7* period one of 'reconciliation, reflection and consideration'. Lord Mackay said that the renaming as such would not be appropriate as "reconciliation is an outcome, not a process, and the period of reflection and consideration a means of reaching that outcome." [c651].

Lord Irvine then moved what he said was a narrower version of his earlier attempts to allow a court discretion to shorten the 12-month period, by emphasising that it must be used only when necessary in the interests of the children involved. Earl Russell supported the amendments, and proposed similar amendments in domestic violence situations. The Lord Chancellor, while recognising the narrowness of the amendments, remained unconvinced of any value in reducing the minimum period even in such circumstances [cc656-7]:

> I submit that a power to abridge is inconsistent with the principal aim of the one-year period,

which is to establish beyond doubt that the breakdown of the marriage is irretrievable. In my submission, it is an unbridgeable period, making a clear and absolute statement about the importance of marriage and its obligations and of parenthood. It is on that basis that I sought to deal with the earlier amendments.

I believe that introducing extensions of any kind to that rule will weaken the way in which the period is perceived. After all, where one party is anxious for a quick divorce, such a provision could well lead to allegations being made against the other party in order to show that a quick divorce would be fair and just and there may be a consequent increase in hostility, bitterness and trauma for the children.

I mentioned previously-and it was referred to again- that hard cases make bad law. I stand by that remark and remain firmly of the opinion that we need a principle which emphasises the importance of a year as a test of whether a ground for dissolution exists. I remain unconvinced that the existence of particularly difficult circumstances should alter our adherence to that principle. I do not wish to make any exceptions to the requirement that parties may apply for a divorce only after a 12-month period for reflection and consideration and, indeed, when the parties have been married for at least two years.

The Government wish to have a definite period which is clear and unequivocal for everyone, without any exceptions. If it were impossible to meet the problems raised except in this way, I should think the matter worthy of consideration. But the explanations of the noble Lord and the intervention of the noble Earl, Lord Russell, show that such problems may well subsist even where an order of divorce has been granted. I am anxious to protect children but I do not feel that this is the wisest way in which to do so in the context of this Bill.

D. Information Meetings

Clause 8 of the current version of the *Family Law Bill* [HL] is intended to enable the Lord Chancellor to make regulations about information meetings. The clause will require a spouse who is making a statement of marital breakdown, whether individually or jointly, to attend an information meeting before making the statement, except in certain circumstances which are to be prescibed by regulations. Where one spouse has made a statement, the other will be required, except in similarly prescribed circumstances, to attend an information meeting before making or contesting an application to the court on certain prescribed financial or property matters or on a matter concerning a child of the family.

Information meetings (or information sessions as they were initially called) did not form part of the Law Commission's proposals for divorce as a "process over time". However in the Government's Green Paper it was suggested that it should be ensured that all those contemplating divorce "are well informed about the law, procedures and consequences of

divorce and are directed to services appropriate to their needs" and that there should be a single first port of call for everyone wishing to initiate the divorce process".[82] At that time it was envisaged that a personal interview might be offered during which essential information about the divorce process would be given. This interview might then be backed up with information packs and possibly a video. The content of the interview would cover legal information (but no individualised legal advice) about divorce law and procedure (including costs and legal aid), information on marriage guidance with a view to possible reconciliation, and an explanation of mediation with a view to encouraging the use of mediation by ensuring proper information about the process in given at an early stage. Several options were put forward about who would conduct the interviews.

In its subsequent White Paper the Government said that it took the view that "couples need a better understanding of the consequences of divorce and of the effects of divorce on children **before** their marriage is dissolved". It was concerned that the tendency in England and Wales is to use a solicitor's office as the automatic first port of call without first becoming aware of the range of services and the range of options which are available to separating and divorcing couples.[83] It was reported that consultation had shown support for making attendance at such an interview a pre-condition of commencing the divorce process and for published literature to be supplemented with face-to-face explanations.

The following advantages of a compulsory single first port of call were identified:[84]

- It provides an opportunity to consider whether divorce is the right course of action;
- It ensures that all persons obtain the same access to information about the divorce process and related matters; and
- It raises awareness of support services, and encourages couples to consider family mediation rather than arms-length negotiations through lawyers or litigation.

Consultation revealed no support for creating a new organisation for the giving of information and there was strong objection to the information-giver being involved in making decisions relating to eligibility for state funding. The White Paper reported that the preferred model for information-giving in Australia and relevant states of the United States (ie in jurisdictions where there is "no fault" divorce) is that of bringing a number of parties together at the same time for the giving of information. There had been some concern that face-to-face interviews might be off-putting for some and that they could easily slip into the giving of individual

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82 Chapter 8, *Looking to the Future: Mediation and the ground for divorce - a consultation paper* (Cm 2424, December 1993)

83 Chapter 7, *Looking to the Future: Mediation and the ground for divorce - The Government's proposals* (Cm 2799, April 1995)

84 para 7.7

advice. Thus it was proposed that information should be given to those intending to divorce by way of a group session and possibly by way of a video with an opportunity for a general discussion with a small panel of professionals afterwards.[85] This service would be free of charge. It was also proposed that attendance at an information session should be a condition precedent to starting the divorce process. Special arrangements would be made for elderly and disabled persons as well as for those in prison or for whom English is not their first language. In the case of a spouse who was not initiating the divorce process it was proposed that they would not be required to attend a session although they could do so if they so desired and would be required to do so if they wished to comment on the divorce application or to make an application in their own right in respect of finance, property and the children.

The Government's proposals in relation to information meetings have been described as "perhaps one of the most contentious and uncertain parts of the Government's proposals".[86] They have been criticised on the grounds that it is not clear whether the primary purpose of the sessions is procedural or educational and that the primary intent is ambiguous in that the sessions seem to be directed both towards trying to save marriages and to civilising divorce. Indeed, initiators of divorce and non-initiators may very well have different preoccupations in this regard. In addition, there are some areas where the provision of objective information may well prove rather difficult, as in the case of information about the effect of divorce on children, which is a notoriously contentious area.

Some concern has been expressed about the attendance at an information session of one spouse who feels at risk of violence from the other. The Lord Chancellor has said that he does not intend to force spouses to attend together and so the victims of abuse would not be at risk in any way.[87] Concern has also been raised about the embarrassment for some of attendance at a group session, perhaps especially in small communities,[88] and about the privacy and confidentiality of sessions as a person wishing to ask questions might not wish to do so in front of a group.[89] It was also suggested that the fact that a session is taking place could be public information and that tabloid newspapers could "doorstep" them.[90] It has also been suggested that the venue for information sessions is important and that they should not be held in lawyers' offices or in a room at a court unless the rooms have been specifically designed for the purpose.[91]

Attendance at the pilot information meetings would be voluntary but as they are based on the

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85 para 7.15

86 Tony Wells, Director of the National Council for Family Proceedings (Newsletter, Winter 1996)

87 HL Deb vol 567, 30 November 1995 c.702

88 HL Deb vol 568, 22 January 1996 c.835

89 see, for example, Lord Archer of Sandwell in Committee: HL Deb vol 568, 22 January 1996 c.831

90 HL Deb vol 568, 22 January 1996 c.835

91 HL Deb vol 568, 22 January 1996 c.833

current law there are doubts about how much can be learnt about their effectiveness, although Lord Archer said that they would provide some useful guidance.[92]

During the Second Reading debate on the *Family Law Bill* in the House of Lords the Lord Chancellor announced that he proposes to experiment with pilot studies in a number of different ways to try to ascertain how best to give information.[93] He suggested that a video may be a good option. It has been suggested that it will be difficult to run pilot schemes when at the time of their operation the sessions will have to give information about the present law rather than the reforms which would follow on from enactment of the Bill.

At the Bill's Committee Stage in the House of Lords Baroness David said that National Family Mediation hopes it will be able to run some of the schemes "in order that its professional non-legal, child and family-focused approach to the provision of information, may be evaluated, along with others".[94] The Lord Bishop of Oxford said that the bishops place "great store" on the information sessions, seeing them as a crucial feature of the Bill. He said that the context in which the information is purveyed and the people who purvey it are desperately important. Baroness Hamwee said that she found the word "session" too prescriptive because it suggests something large and communal such as a group. Lord Archer of Sandwell also expressed misgivings about the phrase believing that it conjured up "the kind of public procedure that will ensure that some people will not avail themselves of it".[95] The Lord Chancellor said that he seeks "to ensure that people do not just obtain the information but that they obtain it in such a way that they understand it".[96] He said that it was his present view that the Bill, with its new provisions, should not come into force until the pilots are concluded.[97]

The Lord Chancellor proposed a period of two years as being reasonable for testing out the information-giving methods.[98] It is hoped that this will ensure that detailed views can be given about the operations of the techniques and would give the pilot schemes a reasonable chance to work before the assessment of which to adopt. He said he would not wish to hurry the implementation of the Bill in a way which might prejudice the information-giving arrangements which he saw as being at the heart of the Bill.

When the Bill came to be considered on Report in the House of Lords the Lord Chancellor introduced a series of amendments to change the phrase information "sessions" to "meeting"

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92 HL Deb vol 569, 22 February 1996 c.1182
93 HL Deb vol 567, 30 November 1995 c.787
94 HL Deb vol 568, 22 January 1996 c.833
95 c.839
96 c.836
97 c.837
98 c.839

and to make it clear that parties would not be required to attend meetings together.[99]

At Committee Stage the Lord Chancellor had said he was loath to depart from the phrase "information session" as he believed it indicated that more than one interest would be presenting information. He also took the view that it emphasised the importance of the information-giving process and the need for that process to be effective and felt that the phrase gave him some flexibility to decide on the best model for the provision of information.[100]

The Lord Chancellor gave an assurance at Report Stage that he would consult all the relevant organisations of which he was aware about the regulations relating to information sessions.[101] In response to an amendment moved by Baroness David on Report the Lord Chancellor said that he was minded to bring forward an amendment at Third Reading which would require legal representatives to inform not only about marriage counselling and mediation but also about the need for parents to consider the welfare, wishes and feelings of their children when they are deciding arrangements for the future.[102] He duly moved an amendment at Third Reading which is intended to require legal representatives to inform parties about these issues as well as more general matters such as the divorce and separation process, the nature of financial questions which may arise, and the availability of mediation, independent legal advice for each of the parties and other services designed to help them.[103]

The Bill provides for regulations in relation to information meetings to be made by statutory instruments which would be subject to the negative resolution procedure. In its memorandum to the Scrutiny of Delegated Powers Committee the Lord Chancellor's Department submitted that the detailed provision relating to the meetings would be inappropriate for primary legislation as they are organisational matters which may need to be updated from time to time.

E. Mediation

Mediation is a central plank of the Government's divorce law reform proposals. The provisions in the Bill for mediation represent a significant change in thinking about the way in which the legal disputes surrounding marital breakdown are dealt with. The present system

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[99] HL Deb vol 569, 22 February 1996 cc 1180ff
[100] HL Deb vol 568, 22 January 1996 cc 837-8
[101] HL Deb vol 569, 22 February 1996 c.1186
[102] HL Deb vol 570, 22 February 1996 c.39
[103] HL Deb Vol 570, 11 March 1996 cc 659-662

is based on an adversarial model for resolving disputes. Critics of the present system argue that it encourages divorcing spouses to take opposing stances in relation to the issues surrounding the divorce thus adding to the stress and pain of the divorce and affecting the cost of the divorce both to the couple concerned (which diminishes the finance that might be available to the family after the divorce) and to the State where one or both of the parties are legally aided. Mediation is a way of resolving disputes through negotiation and agreement without resort to traditional adjudication through the courts.

It is important to define clearly the concept of mediation and to distinguish it from reconciliation and conciliation.

Reconciliation is a form of marital counselling which seeks to bring the parties back together and to save their marriage.

Conciliation used to be a term used interchangeably with mediation but more recently there has been a trend towards using the term to refer to divorce counselling which seeks to help the parties deal with the emotional consequences of the divorce.

Mediation is the term now used to mean a process which seeks to bring the parties together to negotiate agreed arrangements in relation to the children, finance and property. It seeks to improve communication between the parties and to help them co-operate in bringing up their children. Mediation does not seek to reconcile the parties or to offer marriage or divorce counselling. However, if the need for reconciliation or counselling should become apparent during the mediation sessions, the mediator would refer the parties to an appropriate agency for assistance in those directions and may suspend the mediation sessions in order that those options can be pursued. In view of this it is said that the mediation process is better suited to identifying those marriages which can be saved than the adversarial legal process. The Government's consultation paper on divorce[104] made the following comments about mediation:[105]

> **7.5** Mediation also enables spouses to accept responsibility for the breakdown, to acknowledge responsibility for the ending of the marriage, to address face to face the questions of fault and blame and to deal with feelings of hurt and anger. Where the conduct of one spouse or another is in issue and is proving an impediment to an amicable settlement of the arrangements, mediation offers an opportunity to address what went wrong with the marriage.

and:[106]

> **7.7** The overall objectives are to help separating couples reach their own agreements about the future, to improve communications between them, and to help them co-operate in

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[104] *Looking to the Future: Mediation and the Ground for Divorce* Cm 2424, December 1993
[105] para 7.5
[106] para 7.7

> bringing up their children. The couple are specifically encouraged to focus upon their children's needs rather than their own. Unlike current legal processes, mediation is capable of taking the different attitudes and different timescales of the spouses into account. It empowers them to plan the future for themselves at a pace which suits both of them, and as part of that exercise to examine the past.

However the following criticisms have been made of the mediation process: mediation could become a coercive process in which the parties might reach an agreement to please the mediator rather than because they genuinely agree on the solutions; a weaker or less articulate party might be easily led to settlement; it could increase the expense if legal advice is also sought; there is no empirical evidence of the effectiveness of mediation. Proponents of mediation would point out that the role of properly trained mediators is to guard against the first two matters.

In its discussion paper on the ground for divorce the Law Commission made suggestions for divorce as a process over time but it did not contain a lot of discussion on the issue of mediation.[107] It said that "the conditions and procedure which we describe ... should give both the opportunity and incentive for such conciliation to take place but we would not suggest that it be made a mandatory requirement".[108] However, following consultation mediation became a more central part of the reform proposals.

One of the criticisms of the present law identified by the Law Commission was that it distorts the parties' bargaining positions. In its report *Family Law: The Ground for Divorce*[109] the Commission stated:[110]

> When a marriage breaks down there a great many practical questions to be decided: with whom the children are to live, how much they are going to see of the other parent, who is to have the house, and what are they all going to live on? Respondents to Facing the Future told us that the battles which used to be fought through the ground for divorce are now more likely to be fought through the so-called ancillary issues which in practice matter so much more to many people. The policy of the law is to encourage the parties to try and resolve these by agreement if they can, whether through negotiation between solicitors or with the help of a mediation or conciliation service.

It continued:[111]

> **3.37** Many respondents also attached particular importance to the provision of adequate counselling and conciliation services during this time. The National Campaign for the Family, for example, argued that there should be professionally monitored counselling and conciliation services available in all localities, with trained staff and a firm funding base. As we explain in more detail later, counselling

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[107] *Facing the Future: a discussion paper on the ground for divorce* Law Com No 170, HC 479 of 1987/88
[108] para 5.33
[109] Law Com No 192, HC 636 of 1989/90
[110] para 2.15
[111] paras 3.37-3.38

and conciliation are two very different things: counselling may either help a couple who wish to try to save their marriage or give support to one or both of them, or to a child, who is suffering particular trauma or distress from the breakdown of a marriage which cannot be saved. Conciliation or mediation provide a neutral figure who helps both parties to negotiate an agreed solution to the issues concerning their children, and sometimes their property and finances, which will have to be resolved if the divorce proceeds. It was considered important that both such services should be available for all couples (and their children) who want them and that opportunities to make use of them should be built into the procedure itself.

3.38 We share our respondents' views of the importance of both counselling and conciliation services. Indeed, we think this just as great whether or not the law of divorce is to be changed. Similarly, we would consider our proposals a great improvement upon the present law, whether or not more resources were to be made available for these services; but there is no doubt that, just as our proposals would provide a much more constructive and less damaging context for both counselling and conciliation to be successful, so would our proposals greatly benefit from increased provision for them. We say this because we believe that it is by the provision of these services, to the people who want and need them, that the most harmful emotional, social and psychological effects of marital breakdown and divorce can best be avoided or mitigated. The law and legal processes cannot do this, although they can, and at present do, make matters worse. The law's processes are principally designed to adjudicate disputes and to oblige people to meet their financial and legal liabilities. This is an important element in the model which we propose.

The costs and benefits of various conciliation services have been the subject of a major research study conducted by the University of Newcastle. The Commission summarised the study's findings as follows:[112]

The question of whether mediation should be voluntary or compulsory was also considered by the Law Commission.[113] It was reported that the majority of the respondents to the consultation paper did not believe that it should be compulsory and that the professionals practising in the field had said that compulsory mediation was unlikely to be successful and indeed might be counter-productive. The Commission pointed out that there would be some cases that were unsuitable for mediation and discussed some problems that could arise in relation to mediation, including the possibility for the exploitation of the weaker party if the mediator was not sufficiently skilled in dealing with such cases and the potential for delay. The Commission recommended, therefore, that mediation should be voluntary.

It also recommended that the court should have the power to give a direction that the spouses meet a specified mediator in order to discuss the nature and potential benefits of mediation in their case.

In December 1993 the Government published its consultation paper *Looking to the Future: Mediation and the Ground for Divorce*[114] following a Lords debate to take note of the Law Commission proposals. The Government accepted in that green paper that mediation should be voluntary and acknowledged that this is particularly important in cases where violence is

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[112] para 5.30(iii)
[113] para 5.34
[114] Cm 2424

involved. It also recognised that it would be impractical to require mediation by those who refused to attempt to mediate. The green paper considered how best to maximise the advantages of mediation:[115]

7.23 If the Government decided to integrate mediation into a reformed law of divorce in England and Wales, it would be necessary to:

- ensure that a reformed divorce law and procedures were in line with the philosophy of mediation, ie based on encouraging couples to resolve disputes directly themselves without partisan negotiations at arms length;
- provide, wherever possible, greater access to comprehensive mediation, ie mediation of all issues arising from the separation and divorce;
- set the system in place at no additional cost to the parties and the State; and
- minimise the need for legal advice.

7.24 In order to achieve this, an integrated system of mediation and divorce law would have to:

- have the capacity to deliver good quality, professional mediation services in volume;
- provide incentives to mediate and disincentives to seek legal advice unnecessarily or to begin partisan arms length negotiations unnecessarily;
- offer timely access to legal advice, where necessary;
- set standards for mediators and provide the mechanism for monitoring these standards;
- provide for means testing for those who may be eligible for public funding;
- operate within a budget;
- and provide for a high level of organisational and management control to ensure delivery.

The subsequent White Paper *Looking to the Future: Mediation and the Ground for Divorce*[116] reported that consultees had considered that, in general, the advantages of mediation outweighed its disadvantages and that questions of professional standards and organisation were seen as the key to maximising the benefits of mediation.[117] During the consultation period an evaluation of mediation of five pilot studies set up by National Family Mediation was carried out but the Relate Centre for Family Studies at Newcastle University and supported by the Joseph Rowntree Foundation. The main findings of the research have been summarised as follows:[118]

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[115] paras 7.23-7.24
[116] Cm 2799, April 1995
[117] para 5.11
[118] *Social Policy Research Findings No 48,* February 1994

- During comprehensive mediation, 80 per cent of couples reached some agreement (39 per cent on all issues and 41 per cent on some issues). Most were satisfied with these agreements.

- Comprehensive mediation had beneficial effects beyond the practical agreements reached: communication between couples improved and bitterness and tension were reduced.

- Couples chose to mediate divorce settlements primarily because they were seeking a civilised, amicable and co-operative process.

- Comprehensive mediation is not an easy option. Making it work took time and effort, both from the couples concerned and from the mediators.

- Solicitors continue to be influential in mediation. They recommend or suggest use of the services; act as lawyer mediators and consultants in the process; and maintain their traditional role as advisers representing clients who mediate.

- Those using comprehensive mediation regarded it as a cost-effective alternative to the traditional legal process; but the cost of providing mediation varied between services and was heavily subsidised by practitioners working for low rates of pay.

The Government noted in particular the evidence that mediation is effective at reducing bitterness and tension, improving communication between couples and helping couples to reach agreement on a wide range of issues.[119] It concluded that mediation is a more constructive means of making arrangements for a life apart.[120] It took the view that mediation should not be compulsory but that couples should be better informed about mediation and that there should be encouragement to use this means of making arrangements.[121]

The research referred to above has been criticised by the Chairman of the Solicitors Family Law Association who believes that financial mediation is still largely untested:[122]

> The research to date has been limited and evaluative rather than comparative. The Government relied heavily on research undertaken by the Joseph Rowntree Association into five pilot projects run by National Family Mediation, but this was based on questionnaires returned by only 54 users of all-issues mediation. The group was by definition self-selecting and nearly all had access to their own solicitors during mediation. Even then, 20% failed to reach agreement on any issues and only 39% agreed everything. The SFLA wanted to inform its response to the divorce reform proposals by seeking the views of our clients and in the summer of 1995 members were asked to send questionnaires to the ten clients to whom they

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[119] para 5.15
[120] para 5.27
[121] para 5.28
[122] The Family Law Bill - key concerns, *Family Law*, February 1996

next happened to write. The responses went to a central point and the results were analysed. Forty-eight per cent said they would not feel comfortable mediating and less than one-third thought that the issues could be resolved amicably through a mediator. Thirteen per cent cited domestic violence as a concern. Seventy-seven per cent said that if they were to mediate they would want access to their own solicitor throughout the process. These views were not expressed out of ignorance about mediation. Eighty per cent correctly defined mediation when given a range of options, before being given a proper definition for the purposes of the rest of the survey. The findings support the view that mediation is probably suitable for at best 30/40% divorcing population.

This led the Chairman to comment that "the Government has made a fundamental mistake in maintaining that mediation is suitable for the majority of couples going through divorce and in anchoring its reform proposals to this misconception".

He also expressed doubt about Government statements that mediation will not be compulsory in view of *clause 26* of the Bill which provides for an amendment to the *Legal Aid Act 1988* to the effect that there should be a presumption, when considering the granting of legal aid for representation in proceedings, that mediation will be more appropriate 'except to prescribed ... proceedings or in prescribed circumstances'. He argues for independent legal advice to be available to everyone, whatever their means and at all stages if the new system is to be fair and just.

At a National Solicitors' Network conference in November 1995 the Lord Chancellor expressed the view that some commentators have failed to appreciate his statements that most couples going through separation and contemplating divorce, both before, during and after the mediation process are likely to need separate legal advice in support of mediation. He said that "it is ... appropriate that, whereas the mediator may give them legal information, they should have separate access to legal advice - that is advice on the application of the law to their own personal circumstances. What mediation replaces is arms-length lawyer-led negotiation with the other partner".[123]

The history of mediation and of the current family mediation organisations was described in Appendix C of the Green Paper and is reproduced in this paper at **Appendix A** together with some information of the setting of professional standards for mediators.

Further Reading

Dingwall and Eekelaar, *Divorce Mediation and the Legal Process,* 1988

University of Newcastle upon Tyne Conciliation Project Unit, *Report to the Lord Chancellor on the Costs and Effectiveness of Conciliation in England and Wales,* March 1989

Thelma Fisher (Ed), *Family Conciliation within the UK: Policy and Practice,* 1990

Relate Centre for Family Studies, *Mediation: the Making and Remaking of Co-operative Relationships - an evaluation of the effectiveness of comprehensive mediation,* April 1994

NFM, FMS, FMA, *The Policies and Standards of the UK College of Family Mediators,* September 1995.

F. Legal Aid and Payment for Mediation

There are two different kinds of legal aid for civil proceedings:

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[123] LCD Press Notice, *Current laws are a passport to swift divorce on demand,* 10 November 1995

1. *Legal Advice and Assistance*, also known as the Green Form Scheme, which covers help from solicitors, including giving general advice, writing letters, negotiating, getting a barrister's opinion and so on, for up to two hours' work, or three hours in matrimonial cases involving the preparation of a petition. Under what is known as Assistance by Way of Representation (or ABWOR) it also covers the cost of a solicitor preparing a case and representing a client in most civil cases in magistrates' courts, which are now known for this purpose as Family Proceedings Courts. The proceedings in this court include separation, maintenance (except child maintenance where the Child Support Agency has jurisdiction), and a number of proceedings concerning children such as those involving residence or contact, paternity and defended adoption proceedings. Legal advice and assistance under the Green Form Scheme does not generally extend to cover representation in court in cases other than those which come within the remit of ABWOR.

2. *Civil Legal Aid*, which covers work leading up to and including civil proceedings, including representation by a solicitor and, if necessary, a barrister.

Civil Legal Aid is not generally available for undefended proceedings for a decree of divorce. As has already been explained, such proceedings are now dealt with using the "special procedure" and do not generally involve an appearance in court. Legal advice on preparing a divorce petition may be obtained under the Green Form Scheme. Subject to certain rules, Civil Legal Aid is available for proceedings concerning maintenance or other forms of "ancillary relief" to applicants who otherwise satisfy the eligibility criteria.[124]

The net cost of legal aid in matrimonial proceedings in 1994-95 was £296.6 million. Most of this expenditure (some 90 per cent) was concerned with divorce cases, with the remainder concerning proceedings under legislation such as the *Domestic Violence and Matrimonial Proceedings Act 1976*. Expenditure in 1994-95 on legal advice and assistance in cases of divorce and judicial separation amounted to £28.1 million while spending on ABWOR in maintenance cases amounted to some £0.8 million. These and other divorce statistics are set out in more detail in Appendix B of this paper.

1. The Statutory Charge

A person to whom legal aid is granted is subject to three financial obligations. They are:

i) to pay any assessed contribution out of income or capital;

ii) to pay what the court considers a reasonable sum towards the other side's costs; and

iii) to pay his or her own legal costs out of any money or property recovered or preserved.

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[124] For more information see the *Legal Aid Handbook 1995*, especially p.56-74 and p.90-91

This last obligation is what is known as the legal aid statutory charge. The Legal Aid Board which administers the legal aid system on behalf of the Lord Chancellor, has a first charge for the benefit of the legal aid fund on any property (including money) which is recovered or preserved for a person as a result of proceedings for which that person received legal aid. The charge also covers rights under any compromise arrived at to avoid, or bring to an end, the proceedings for which that person has been legally aided.

The principle behind the charge is that as far as possible the legally assisted person should be put in the same position in relation to proceedings as an unassisted person, whose first responsibility at the end of the proceedings is to pay whatever legal costs are not being paid by the other side. It is designed to prevent an assisted person from making a profit at the expense of legal aid and thus the taxpayer, and is intended as a deterrent to running up costs unreasonably.

The Legal Aid Board may enforce the charge in any manner which would be available if the charge had been given by contracting parties. If it affects land it may be registered as a charge against the property.

Under the *Legal Aid Act 1988* responsibility for legal aid was transferred from the Law Society to the new Legal Aid Board. Provisions concerning the statutory charge are set out in the *Civil Legal Aid (General) Regulations 1989*.[125] They allow the Legal Aid Board to postpone the enforcement of charges over money as well as over property, and permit the substitution of charged property. They also provide for interest to accrue on all outstanding charges registered after 1 December 1988. The rate of interest is intended to be within the broad range of current interest rates and may be raised or lowered by statutory instrument. It was lowered from 10½% to the current rate of 8% by the *Civil Legal Aid (General) (Amendment) (No 2) Regulations 1993*[126] with effect from 1 September 1993.

The Legal Aid Board's power to postpone the enforcement of charges over property in the form of money rather than land is limited and is rarely exercisable except where money has been awarded to be used to purchase a home for the assisted person or his or her dependants. The Legal Aid Board thus has first call on any money or property recovered or preserved for a person following proceedings for which that person received legal aid, up to the amount which the Board has paid out in legal costs to solicitors and counsel on behalf of the assisted person and which has not otherwise been recovered through an order for costs made against the other party involved or through contributions which the assisted person has previously paid. Damages and other sums received by the assisted person, such as costs from the other side, must be paid to the solicitor for the assisted person, who has to pay them to the legal aid office. The Board will pay the costs of solicitors and barristers and other fees, costs and expenses out of the legal aid fund. It will then retain against the sum which has been paid out any *inter partes* costs and the amount of the statutory charge and pay the balance to the assisted person.

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125 SI 1989/339 - regulations 96-99

126 SI 1993/1756

The Legal Aid Board may waive the solicitor's advice and assistance charge (payable by a person who has received Legal Advice and Assistance under the Green Form Scheme) on the grounds of grave hardship and distress. The Board has no power, however, to waive the statutory charge imposed on successful litigants who have received Civil Legal Aid.

Legal aid application forms contain warnings about the effect of the statutory charge, but the Legal Aid Board is firmly of the view that it is the solicitor's responsibility to ensure that the client is kept fully informed about its implications throughout the case just as it is a solicitor's professional duty to keep a client informed about costs in a particular case.

2. Legal Aid for Mediation in Family Matters

Part III of the *Family Law Bill* is intended to enable the Legal Aid Board to enter into contracts for the provision of mediation services, in accordance with directions given by the Lord Chancellor. It amends the *Legal Aid Act 1988* by inserting a number of new Sections which, amongst other things, set out specific requirements as to the conduct of mediation provided under such contracts. The new Sections also contain wide powers enabling the Lord Chancellor to make regulations restricting contracted mediation services to prescribed disputes, setting levels of financial eligibility for these services and making arrangements for the payments of contributions by legally assisted people towards the costs of providing mediation for them. The Lord Chancellor will also be able to make regulations enabling the Legal Aid Board to recover its costs from a legally-aided person who recovers or preserves property as a result of mediation through the imposition of a charge on the property in favour of the Board. It will therefore be possible for a statutory charge to be imposed on property following mediation in much the same way as it may currently be imposed following proceedings for which a person received legal aid. The regulations will be able to set out the circumstances in which property is to be taken to have been, or not to have been recovered or preserved and the circumstances in which the recovery or preservation is or is not to be taken to be the result of any mediation.

As has already been mentioned, some commentators have expressed doubts about Government statements that mediation will not be compulsory, in view of *clause 26* of the Bill, which provides that for the purposes of determining whether to grant legally-aided representation for proceedings relating to family matters, mediation is to be considered more appropriate than taking proceedings except for prescribed descriptions of proceedings and in prescribed circumstances and, following an amendment moved by the Lord Chancellor during the Bill's Report stage in the House of Lords, where a mediator has certified that mediation does not appear to be suitable.[127]

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[127] HL Deb vol 570, 4 March 1996 cc 95-103

During the debate on the Bill's Second Reading in the House of Lords the Labour peer Lord Irvine of Lairg, who described the divorce provisions in the Bill as being "driven by Treasury urgency to cut the legal aid budget", said:[128]

> Mediation is an anodyne word but the lot of a fearful and intimidated wife in the mediation process will not be a happy one, despite prior legal advice and the skills and courtesy of the mediator. She will have been told what her legal goals should be; but, unrepresented, in the real world it is unlikely that she will be able to present her case effectively. So I ask: are all lawyers to be excluded from mediation or only lawyers for legally aided parties?
>
> I have another question. Will the noble and learned Lord confirm that it is the intention of the Bill to make fundamental changes to the present arrangements for legal aid representation in divorce cases? Will he confirm that the effect of Clause 24 is to place upon the Legal Aid Board in divorce cases the duty to refuse legal aid representation in favour of mediation? Clause 24 means that the Legal Aid Board must, not may, refuse legal aid representation in family proceedings on the grounds that: "mediation is to be considered... as more appropriate".
>
> So that is the general provision. The Bill states that it will be subject to exceptions, but they are not defined in the Bill and we should like to be told what those exceptions are to be. Your Lordships are being asked to legislate for a two-tier system - proper legal advice and representation for those who can pay and the lowly prospect of the mediation room for the rest. Mediation, which is all that will be on offer from the Legal Aid Board after some early legal advice, is not truly voluntary.

In moving his amendment designed to rebut the presumption in favour of mediation where the mediator feels that mediation would not be suitable the Lord Chancellor made the following comments about how it was intended that the presumption in favour of mediation should operate:[129]

> Let me try to explain how I see this operating in practice, because I think it is extremely important that in this area any refusal is an informed refusal. I do not want people just to say, "I do not like the sound of mediation". We want them to understand precisely what is involved because I think there is a public interest, apart altogether from questions about money and so on, in trying, if we can manage it, to get the process that generates least heat in this area. It may help to set out how I intend that the presumption should operate.
>
> In short, it is assumed that a party requiring legal representation might first approach a solicitor. The solicitor would establish whether the case fell into one of the prescribed categories of proceedings, which automatically rebutted the presumption. As I indicated earlier, such cases might be public law Children Act cases or applications for protection measures against domestic violence, Those are two examples which occurred to me as falling into the regulations under head (a). If the case fell into a prescribed category the solicitor could then make an application to the Legal Aid Board for a certificate for representation. If the case did not fall into a prescribed category the presumption could only be rebutted in prescribed circumstances.
>
> The amendment makes clear that one of those circumstances will be that a mediator has certified that the parties were unsuitable and/or the case was inappropriate. The solicitor would therefore need to refer the client to a mediator for an assessment of suitability for mediation. An important criterion of any such assessment will be the attitude of the parties. Any unwillingness to mediate which is persisted in despite assurances and explanations given by a mediator indicates that mediation will not succeed, and so a party or parties who are unwilling are likely to be deemed unsuitable for

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128 HL Deb vol 567, 30 November 1995 cc 708-709

129 HL Deb vol 570, 4 March 1996 cc 95-96

mediation. There would, in any event, be little point in forcing such persons into mediation.

On the other hand, it seems from experience that in practice it is not uncommon for parties to say no to mediation if asked in very general terms, particularly by a solicitor and particularly one in whom the client has confidence. However, once parties have met with a mediator and had the opportunity to discuss what is involved and its benefits, they often change their minds and become willing at least to try one or two sessions, assuming their partner is also willing. If, despite such a meeting, parties remain unconvinced, they will have been made fully aware of mediation and at least will be making an informed decision not to attempt mediation. It is important that parties are put in a position of fully understanding mediation and how it might help them. Therefore, the object of a suitability assessment is to enable clients, in consultation with a mediator, to make an informed decision about what is the right course of action for them and not to force them into mediation.

Statistics on legal aid in divorce proceedings are set out in the statistical appendix to this paper.

G. Hardship - the Lords amendments to Clause 10

Section 5 of the *Matrimonial Causes Act 1973* provides that a decree in which the petitioner alleges five years separation may be opposed by the respondent "on the ground that the dissolution of the marriage will result in grave financial or other hardship to him and that it would in all the circumstances be wrong to dissolve the marriage". Where a decree is opposed on these grounds and no other fact can be relied on by the petitioner to prove that the marriage has irretrievably broken down the court may dismiss the divorce petition if it would otherwise have granted it, but, having considered all the circumstances, agrees that the dissolution of the marriage would cause grave hardship.

The White Paper[130] proposed that the hardship bar be retained in all cases rather than for divorces after five years. It noted "The Government does not intend to change the present statutory wording or the way in which the law in this area is now applied", considering that jurisprudence on the use of the bar was now well established, and that retention would be useful in a few cases [para 4.47]. The hardship bar would however be revocable on a change of circumstances.

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[130] *Looking to the Future: Mediation and the Ground for Divorce* Cm 2799 April 1995

Clause 10 of the Bill, as originally introduced to the House of Lords, accordingly provided that an order preventing divorce could only be made if the court was satisfied that grave financial or other hardship would be caused to the other party by the dissolution of the marriage and that it would be wrong in all the circumstances (including the conduct of the parties) to dissolve the marriage.

At Committee Stage in the Lords a number of peers expressed concerns about *clause 10*, arguing that the current provisions under section 5 of the 1973 Act were very rarely invoked. The Lord Chancellor was concerned about introducing new phrases into the law because of the difficulty of reaching a settled interpretation but promised to consider the issues.[131]

At Report Stage on 4 March 1996, the Lord Chancellor moved a series of amendments, removing the term 'grave' in relation to the hardship experienced on dissolution of the marriage with the word 'substantial' which he considered 'a less strict test'.[132] He emphasised that the bar applied to both financial hardship and other hardship.

The Lord Chancellor also moved amendments to *clause 9* (previously clause 10) to extend the provision of the bar to encompass the children of the family as well as the parties to the marriage. He emphasised that the court would need to be satisfied that the actual dissolution of the marriage would cause substantial financial or other hardship to a child or children for the hardship bar to be applied. An application for an order preventing divorce could be applied for only by a party to the marriage, even if this application was asserting that the dissolution would result in hardship to children. Therefore children themselves were not to be involved in making such an application. The Lord Chancellor noted "we cannot have a situation in which we pitch child against parent in a battle about whether the marriage should be legally dissolved".[133]

In response to queries from Baroness Young and others, the Lord Chancellor noted that the court had no power to prevent parties separating, and hardship arising from that separation was not something that the court could control. The hardship provisions therefore applied to the divorce (ie. the ending of the legal status of the marriage). He noted that "substantial" had been added to the term hardship to make the bill intelligible by ordinary people,[134] and that the word "grave" indicated a higher standard of hardship.

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131 HL Deb vol 568, 23 January 1996 c.1013

132 HL Deb vol 570 4 March 1996 c.26

133 HL Deb vol 570 4 March 1996 c.26

134 HL Deb vol 570, 4 March 1996 c.30

The Lord Chancellor also stated that "hardship" with reference to children referred to objective hardship, instancing a disabled child who might be faced with moving from specially adapted accommodation. He emphasised once again that the court would be considering the hardships occasioned by divorce and could not prevent the breakdown of a marriage.[135] At Third Reading[136] Baroness Young expressed concerns that the new drafting was a cosmetic change which would not greatly affect the operation of the hardship bar.

The hardship provisions are now to be found in *clause 10* of the Bill before the Commons. The clause also provides for a court to consider a cancellation of an order preventing the divorce if circumstances change or to include conditions which have to be met before a cancellation application is made, and defines hardship to include the loss of a chance to obtain a future benefit as well as the loss of an existing benefit. This definition is taken from section 5 of the *Matrimonial Causes Act 1973.*

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135 HL Deb vol 570 4March 1996 c.30

136 HL Deb vol 570 11 March 1996 cc 665-670

IV Pensions On Divorce [Clause 15]

A. Introduction

The inclusion of this clause in the Family Law Bill represents a defeat for the Government. It is the second time in one year that the Government has been defeated on the issue of sharing pensions on divorce. The first time was during the passage of the Pensions Act 1995, which originally contained no provisions on divorce, and the second was last month during the passage through the Lords of this Family Law Bill, which originally had no provisions on pensions.[137] Lady Hollis, the mover of the amendments on both occasions, described the intentions of her supporters as follows:

> "When we discussed the Pensions Bill last spring we tried to make more equitable the financial provisions of divorce. Now we are dealing with a family law and divorce Bill in which we are trying to make more equitable the financial provisions of pension."[138]

As a result of the cross-party pressure during the Lords Stages of the Pensions Act, the Government drew up proposals of its own which incorporated Lady Hollis' amendment. These are now contained in the Pensions Act 1995 section 166 and 167 (the latter for Scotland) although these have not yet come into force. The result is an extension of the present system, with provision for *earmarking by the pension scheme*, rather than the more radical *pension splitting* which many of the advocates of reform would have liked but which the Government considered to be "a step too far."[139]

The intention of clause 15 of the Family Law Bill, in contrast, is to introduce *pension splitting*. The difference between the two approaches was explained in the report of the Pension Law Review Committee (known as the Goode Report) - the report which underlay many of the other reforms in the Pensions Act:

> "There are two alternative approaches to financial provision on divorce. One is ongoing support, which may be varied by agreement or court order from time to time and maintains a continuing financial link between the parties. The other is the 'clean break' by a once-for-all settlement which extinguishes the financial obligations of each party to the other. Translated into pension rights, the contrast is between splitting the value of the future pension rights, by giving the spouse of an active or deferred member a share in the member's accrued rights before the pension comes into payment, and splitting the pension payments themselves by earmarking a part of each payment to the spouse. Put another way, the continuing link approach would give the spouse a share of the fruits of the pension entitlement as these fall from the tree, whilst the clean break approach would give him a share in the tree itself." [para 4.16.3][140]

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137 HL Deb 14 March 1995 c752-4

138 HL Deb 25 January 1996 c1129 and HL Deb 29 February 1996 c1635-7

139 SC D 22 June 1995 780

140 Generally referred to as *the Goode report*, its full title is Pension Law Reform: the report of the pension law review committee, Cm 2342

B. Existing Provisions

Because there has been much publicity concerning pensions on divorce, it is sometimes forgotten that even now - before the Pensions Act comes into force - the courts have a duty under the Matrimonial Causes Act 1973 section 25 to "have regard to all the circumstances of the case" when making orders for financial provision after a divorce. Section 25 states that first consideration is to be give to the welfare of children under age 18 and then lists the factors (numbered a to h) to which the court is to have "particular regard". These include such factors as the ages of the parties concerned, any physical or mental disability, their present and future earning capacity etc.

Two of the factors to which the court is to have particular regard are generally considered to have specific relevance to pensions: point a) which includes the income, property and other financial resources which each of the parties to the marriage has or is likely to have in "the foreseeable future" and point h) which refers to the value to each of the parties "of any benefit (for example, a pension) which by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring".

In practice it appears that the courts have not always taken the value of pension rights into account. This was a point made several time during the passage of the Pensions Act and Lord Mackay, Minister for Social Security, said:

> "It is clear from most of the anecdotal evidence which has been quoted in the House and in the media that pension rights may not always be taken into account in divorce settlements.
>
> That is borne out by the very recently received preliminary results of the research project which my department has commissioned - research which has quite wrongly been represented as being unnecessary. Interviews with a sample of divorced women whose husbands were in an occupational scheme reveal that some two-thirds of the women concerned say that pension rights were simply not discussed during the settlement process..."[141]

There have been several criticisms of existing provisions. In particular, it has been argued that the use of the phrase "in the foreseeable future" has often been taken to mean within 10 years or has led to the disregard of benefits such as pensions which are due some year hence; no method of valuing the pension is specified; the ex-wife is not entitled to a widow's pension; and even if the courts do decide to use their power to order deferred or contingent maintenance (eg maintenance to be paid when the pension becomes due for payment), in practice it may be avoidable not least because the wife might need to keep tabs not only on her husband but also on his pension entitlement and even then might have to go to court years after the divorce in order to ensure that she did receive what she was due.

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[141] HL Deb 14 March 1995 c749.

C. The Pensions Act 1995

These criticisms have been addressed, at least partially, by the reforms to be introduced under the Pensions Act although their practical effect remains to be seen. During the passage of the Pensions Act the Government said that the divorce reforms would apply to financial settlements effected from 6 April 1996 in respect of payments made on or after 6 April 1997.[142] More recent statements say that the Government plans to introduce regulations under sections 166 and 167 of the Act on 1 July 1996 as it is concerned to ensure full consideration of the proposed regulations, which will bring these sections into force, and to allow consultees sufficient time to comment on the proposals.[143]

A Consultation Document and Compliance Cost Assessment were deposited in the Library in February this year.[144] The Document describes current provisions and the reforms contained in the Pensions Act as well as setting out in detail the issues for consultation. It says that there are basically three amendments to the Matrimonial Causes Act 1973 as well as the removal of the reference to "foreseeable future" in so far as pensions are concerned. Firstly, the Act specifies more fully the court's duty into take into account pension rights and clarifies what orders the court can make. Secondly, it gives the courts a new power to direct the trustees or managers of a pension scheme to make a payment to the party without pension rights when the benefits of the scheme become due. Thirdly, it extends the power of the court to make lump sum and deferred lump sum orders payable on death under a pension scheme.

The reforms do not change the court's basic duty contained in section 25 of the Matrimonial Causes Act, which is to "have regard" to a range of factors. Nor do they directly address the more fundamental demand for a pensions "clean break" between the couple at the time of divorce. For this to be possible both under the existing system and the Pension Act reforms, there would generally have to be other assets, such as a house, against which to offset the pension. In many cases, advocates of reform argue, the ex-wife will still have to wait until her husband's pension becomes due before she can receive anything; if he dies before retirement, she will not be entitled to the pension (although under the reforms she might be entitled to a lump sum death benefit) and if he dies after retirement, the pension will stop.

D. Pressure For Splitting

The pressure for further change has come from a range of bodies, including *Fairshares,* a group of divorcees who have been campaigning during the passage of both Bills and most of the bodies concerned with pensions such as the Pensions Management Institute, which in 1993 produced a report in favour of pension splitting, and the National Association of Pension Funds, whose efforts were commended by Lord Mackay, the Lord Chancellor during the debates on this Bill. Other bodies such as the Equal Opportunities Commission, the Law

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142 SC Deb D 22 June 1995 c779

143 HC Deb 2 February 1996 c952

144 Dep 2780

Society, the Institute and Faculty of Actuaries, and the Association of Pension Lawyers, have all made it known that they favour splitting. In addition to these can be added Harry Cohen's Ten Minute Rule Bills in the 1993/94 and 1994/95 Sessions.[145]

The main obstacle to the "clean break" which many of the current advocates of reform desire lies in the nature of pension rights as they have developed in this country, including the Inland Revenue rules which lay down the conditions on which tax reliefs are available.[146] The result is that pension rights (to a future pension), as opposed to a pension in payment, cannot be split; they belong to the member of the pension scheme who cannot assign his or her rights.[147]

The Goode Report, published in September 1993, recommended that further detailed work should proceed on the basis of the PMI's general approach (ie including pension splitting). [148] It demonstrated that the PMI's report was not the only study that had been made in this area and listed previous studies and proposals for reform:

- Law Commission, *Financial Provision in Matrimonial Proceedings,* Law Com No 25, 1969
- Occupational Pensions Board, *Equal Status for Men and Women in Occupational Schemes,* Cmnd 6599, 1976
- Law Commission, *The Financial Consequences of Divorce,* Law Com No 112, 1981
- Lord Chancellor's Department, *Occupational Pension Rights on Divorce: A Consultation Paper,* 1985
- Michael Meacher, *Pensions, Couples and Divorce: Consultation Paper,* Labour Party 1990
- Law Society, *Maintenance and Capital Provision on Divorce,* 1991
- Pensions Management Institute (PMI), *Pensions and Divorce,* 1991
- Pensions Management Institute, *Pensions and Divorce,* Report of the independent working group on pensions and divorce appointed by the PMI in agreement with the Law Society, 1993

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145 HC Deb 1 November 1994 c1333-1355 and 25 January 1995 c365-267

146 This is explained in the relevant section of the Goode Report referred to above.

147 The case of Brooks versus Brooks which received a great deal of coverage in the press shows that there can be exceptions to this rule but its impact may be limited to a relatively small range of situations.

148 Recommendation 172

E. The Bill

The first attempt to introduce a pension-splitting amendment during the passage of this Bill was at the Committee Stage of this Bill in Lords. [149] On that occasion Lady Hollis withdrew her amendment. A few weeks later and a few days before the Report Stage of the Bill, the Government announced that it would publish a Green Paper on pension splitting. The press notice issued by the Government said that it believed that the provisions in the Pensions Act would go a long way in assisting the court in achieving an equitable settlement between divorcing couples.

Lord Mackay, Minister for Social Security was quoted as follows:

> " The government has considered the matter very carefully. Baroness Hollis herself has acknowledged her amendments leave a number of important issues unresolved. Earlier reports on the issue (by the Pensions Management Institute, Law Society, Goode Committee) acknowledged the complexity.
>
> Pension splitting raises many matters both in principle and as to how it might be achieved in practice. It raises serious questions concerning equity, complexity and cost which have to be balanced against any perceived advantages. These are not simply matters of detail.
>
> The Government believes that to act hastily now could result in an unworkable and impractical scheme which may have as yet unforeseen and undesirable results. We have thus concluded that legislating in the Family Law Bill would be premature.
>
> The government is fully prepared to consider all the issues and options, in an open-minded way, with all parties. We therefore intend to start work immediately on the Green Paper with a view to publishing it in the Summer.
>
> Consideration needs to be given to matters like the status an ex-spouse would have within the scheme compared to existing categories of member and beneficiaries; the types of benefit rights that could be given to ex-spouse of scheme members; the way in which an ex-spouse would be accommodated within the rules governing the tax approval status of pension schemes.
>
> There are also wider questions as to the implications for taxation, pensions, trust, inheritance and intestacy law and the potential consequences for second families.

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[149] HL Deb 25 January 1996

> Then there is the need to explore and consult on the costs to all involved schemes (particularly unfunded schemes, if ex-spouses of members could transfer out their share of the member's pension), employers, employees and their families. Additionally there is a need to consider the potentially very significant Exchequer implications from tax losses if divorced couples were to offset the split pension against two personal tax allowances. and the implications for married couples who, without an extension of similar tax treatment, might consider their position to be inequitable.
>
> Any consideration of pension splitting must acknowledge the practical implications for all who would be affected. For example, questions arise as to how to handle the unfunded State Earnings Related Scheme (SERPS) and its contracted out equivalent, the Guaranteed Minimum Pension (GMP). The PMI report admitted this was an extremely difficult issue.
>
> Consideration also needs to be given as to how any move to introduce pension splitting would fit in with the arrangements being put in place following last year's Pensions Act. Those measures will have an impact on the treatment of pensions when people divorce and will be of substantial benefit to divorcing couples."[150]

Lady Hollis introduced another amendment on Report[151] which was passed by 178 votes to 150 and is now Clause 15 of the Bill. She argued that although there undoubtedly were numerous technical issues, these were fewer than in the case of earmarking. Speaking for the Labour Party she also quoted the pensions industry, peers and peeresses from the cross benches and the Government in support of her case, arguing that it was not a party political matter. Her basic argument in favour of splitting was that:

> " If you ring-fence the largest single asset so that it cannot be split at divorce, you cannot have financial fairness at divorce."

In relation to the amendment itself, Lord Mackay argued that although it had the benefit of simplicity, it gave the courts no indication as to how they could realise their desire to split a pension. He described it a "wholly incomplete and unworkable" way to deal with an extraordinarily complex and sensitive subject. It was silent on the necessary changes in pension, tax and trust legislation. No powers were given to Minister and, indeed, a fistful of Henry VIII powers would be necessary to allow him to amend primary legislation by secondary means.

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150 Department of Social Security Press Notice 22 February 1996

151 HL Deb 29 February 1996 c1610-1637

Note on costs

One of the points of disagreement has been the cost of these proposals (and of those that would result from implementation of changes to the Pensions Act). The Government estimates that costs to the public sector are likely to arise from several sources including a) the cost to the unfunded public sector schemes arising from transfers out of the scheme taken by divorced people and b) losses to tax revenue arising eg where the pension is transferred to a partner who is subject to a lower tax rate. Against such costs would have to be set savings to Income Support arising from the assumption that some pensioners who would otherwise have to claim Income Support would no longer have to do so.

The figures have been amended as the debate has continued. The latest official figures are reproduced below together with the explicit assumptions on which they are based. Some of the advocates of reform, such as the National Association of Pension Funds, argue that there are measures that would reduce the costs.[152] For example, it argues that the costs to the public sector from early transfers out of the public sector schemes could be removed by forbidding such transfers although the Government has argued that this would give rise to other issues that would need to be resolved.

Costs to unfunded public sector schemes:[153]

> "The effects on the costs for unfunded public service schemes would depend on the specific arrangements for splitting pensions on divorce. If pensions were split with the non-member taking a transfer value, this would bring forward benefit and PSBR costs. The main schemes affected are those covering the NHS, teachers, civil servants, the armed forces and police and fire services, but a number of smaller schemes are also affected.
>
> The broad estimates below, produced by the Government Actuary's Department, assume splitting of accrued pension rights equally in all new divorce cases involving current (but not former) employees who are members of these schemes. They are also assume divorce rates by age derived from information for the three years 1991 to 1993. The sums brought forward could add up to £1/2 billion annually to scheme benefits and PSBR costs in the early years gradually reducing to something less than £50 million by 2020 (at constant prices)."

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[152] Proposal for Inclusion In The Family Law Bill

[153] HL Deb 11 January 1996 cWA 34-35

Tax costs and savings to income-related benefits:[154]

The tax costs and income related benefits savings would build up steadily over time as people whose pensions were split on divorce reached retirement age and benefits became payable. It is expected that the savings on income related benefits would level off at around the year 2020, while tax costs would continue to rise. An indication of the possible growth path is shown in the following table.

£ million

Year	*Tax costs*	*Income related benefit savings*
2000	negligible	negligible
2005	10	5
2010	20	15
2015	40	20
2020	80	20
2025	120	20
2030	160	20
2037	200	20

Notes:

1. Estimates are full year costs/savings at constant prices.
2. Tax costs include loss in tax revenue and increase in tax relief as a result of additional pension contributions.
3. Savings are additional to those arising from changes under the Pensions Act 1995. For example, the savings on income related benefits under the measures in that Act would amount to about £50 million in the year 2020.
4. Tax costs are rounded to the nearest £10 million; income related benefit savings are rounded to the nearest £5 million.

[154] HL Deb 27 February 1996 cWA 98

Appendix A

Family Mediation - History, Organisations and Training

The history of family mediation and the then current position of the two main mediation organisations in England and Wales was set out in Appendix C of the green paper on divorce:[155]

C1 From 1978, when the first local mediation services were established in England, family mediation in this country developed initially in the context of resolving disputes about the residence and contact arrangements for children. Sometimes the initiative came from District Judges or divorce court welfare officers at the court where a custody or access dispute was to be tried. Alternatively, where an independent conciliation or mediation service existed locally, couples could be referred to it by a number of agencies - including local solicitors, GPs and Citizens Advice Bureaux - or could approach the service directly.

C2 Family mediators generally hold professional qualifications, have undergone specialist training in mediation, and are paid for their services - although usually at relatively modest rates by comparison with other skilled professionals in the private sector, such as solicitors.

C3 In 1985 the Lord Chancellor's Department commissioned a major research study of the costs and effectiveness of various mediation schemes by the Conciliation Project Unit (CPU) at the University of Newcastle Upon Tyne. The CPU's Report, published in 1989, confirmed that mediation is effective in reducing the areas of dispute and in increasing the parents' well-being and satisfaction with the arrangements made. These benefits were generally greater where the mediation took place away from the courts.

C4 Court based mediation, valuable as it often is, appears to have a number of disadvantages: there may be pressure to reach a settlement quickly and at a very late stage of the divorce process; the authority of the District Judge or court welfare officer conducting the mediation may influence the conduct of the separating couple and thus influence the outcome; and there may be some conflict between the court welfare officer's role in reporting to the court on the interests of the children and their role in helping the couple to reach agreements.

C5 Most of the local family mediation services in England and Wales are affiliated to the National Association of Family Mediation and Conciliation Services (National Family Mediation), and many mediators are members of the Family Mediators Association (FMA). Both organisations have recently agreed a joint Code of Practice.

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[155] *Looking to the Future* Cm 2424, December 1993

National Family Mediation

C6 National Family Mediation is an independent umbrella organisation which aims to ensure out of court mediation of a high standard is available to assist couples who disagree over the arrangements that have to be made on separation or divorce, principally in respect of children although some services are now able to assist couples in respect of financial and property issues. Until late 1992 it was known as the National Family Conciliation Council (NFCC).

C7 It is an association of 58 services providing mediation in various parts of the country, the funding of which is largely charitable with some indirect funding from the probation service and local authorities. The central headquarters is small and currently funded by charitable trusts. Most local services charge clients fees on the basis of income on a sliding scale.

C8 Local services are only affiliated if they meet organisational and professional criteria, which include their mediators being trained by the national organisation, and adopt the National Family Mediation Code of Practice.

C9 It deals with about 6,500 cases per annum.

The Family Mediators' Association (FMA)

C10 The FMA has similar objectives to enable couples to reach their own agreements on disputed issues before, during and after divorce. It operates a system of training, supervision and accreditation for its mediators.

Cll It charges a fee to the couple seeking mediation and a fee to those who train as mediators. This income is used to cover the cost of training and payments to the mediators. In the case of solicitor mediators, the fee generally goes back to the firm.

C12 Mediators must be lawyers of five years standing, social workers, counsellors or similarly qualified professionals. They operate in pairs consisting of a lawyer and a non-lawyer although FMA are exploring the use of one mediator rather than two in appropriate cases. Accreditation requires 5 years relevant experience before training, followed by training and a period of supervised practice.

C13 FMA offers comprehensive mediation covering all areas which may be in dispute, ie the children, the family home and the financial arrangements. All FMA mediators, whether lawyers or not, are trained to undertake comprehensive mediation.

Cl4 It deals with about 1,500 cases per annum.

In September 1994 National Family Mediation identified an urgent need for a single professional body for mediation as the only effective way of maintaining standards in the face of a growing and diverse private sector. A joint symposium with Family Mediation Scotland and the Family Mediators' Association was held in January 1995 and this resulted in the formation of the UK College of Family Mediators whose policies and standards were published in September 1995. The aim is to set and maintain national high standards for mediation and to preserve the voluntariness of mediation.

In January 1999 membership and control of the College will transfer from its parent bodies to the individuals who will then be its registered members. This means that the College must then be ready to undertake the full role of a professional regulatory body. Dame Margaret Booth, who is chairman of the UK College of Family Mediators, writing in *Family Law* has made the following comments about the issues to be resolved before the College becomes a full professional regulatory body:[156]

> Training, including on-going training, must be an important aspect of the College, although it will by no means confine its membership to those who have trained there. All who achieve an approved level of competence will be eligible for registration. But the maintenance of that expertise and its development by means of practical experience will be for the College to oversee and how this can best be achieved is still to be resolved. Also to be resolved are the relationships between the College and other organisations working in mediation.
> The financial implications for the College with the centrally funded public sector and the legal aid franchise working side by side with the fee-paying private sector pose further problems. Sound and practical solutions to these and many other questions must be worked out. Different methods and approaches must be harmonised and even differences in vocabulary need to be resolved. Three years is a short enough time in which to achieve so much. The support and help of everyone involved in mediation will be crucial. But there can be no doubt that this is the way forward and the College must be made ready to serve all mediators and the public for whom they work.

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[156] *Family Law*, February 1996

Appendix B

Divorce statistics

It first became possible to obtain a divorce in England and Wales in 1857. For many years there were relatively few divorces and the first year in which more than a thousand were recorded in England and Wales was 1918. At this time the number of divorces in Scotland averaged 500 a year. Numbers increased slowly in subsequent years, rising above 5,000 in England and Wales for the first time in 1936.

There was a short boom in divorces immediately after the second world war, following which the numbers remained fairly steady until the mid 1960s, when there was a rapid increase. Following the Divorce Reform Act 1969, growth has continued but at a steadier pace. Table 1 shows the number of divorces in the United Kingdom since 1946 and divorce rates for England and Wales are illustrated in the graph.

Table 2 analyses the facts on which the petition was based in divorces in the three jurisdictions of the UK. A much higher proportion of divorces in England and Wales than in Scotland or Northern Ireland are based on adultery or behaviour; separation as a fact is more important in Scotland and Northern Ireland. Nearly three quarters of all divorces are granted to wives, as Table 3 shows.

Although statistics for the number of divorce petitions withdrawn are not published, it is clear that a considerable number of petitions that are filed do not result in the granting of decrees. In the five year period from 1990 to 1994, for example, an average of 183,500 petitions for divorce were filed each year in England and Wales and an average of just under 155,000 decrees nisi were granted[157].

The number of children affected by divorce has risen in the latest couple of years. The figures for 1983 to 1994 are given in Table 4. The latest estimates (for 1992) suggest that there are 1.4 million one-parent families containing 2.3 million dependent children in Great Britain. Of these, some 500,000 families containing more than 900,000 dependent children came about through divorce and about 330,000 families containing more than 600,000 dependent children came about through separation[158].

Table 5 compares crude divorce rates[159] in the United Kingdom with several other countries: of these, only the United States has a higher divorce rate than that in England and Wales.

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[157] Petitions filed for nullity are not included. Source: OPCS Marriage and Divorce Statistics 1993 Table 4.9.

[158] Population Trends No 78, Winter 1994, pages 6-9.

[159] No account is taken of differences in marriage rates between countries.

Table 6 looks at recent trends in the numbers of live births outside marriage. In the last thirty years the proportion of all births occurring outside marriage has risen form less than one in ten to almost one in three. Births occurring to unmarried couples in stable relationships are included with others occurring outside marriage but some idea of the numbers involved can be gained from statistics for England and Wales on registrations of births. In 1994, for example, nearly 55 per cent of all births outside marriage were registered jointly by both mother and father living at the same address. 20 per cent were jointly registered by parents at different addresses and 26 per cent were sole registrations[160]. The implication[161] is that only about 14 per cent of all live births are to parents not married or cohabiting.

Considerable interest has been expressed in the relative rates of partnership breakdown of married and cohabiting couples, especially those with children. This is an area where there has been some controversy which centres on the way in which relatively new data - in this case from the British Household Panel Study - are used. The second wave of the BHPS, carried out in the last quarter of 1992, made dynamic analyses of cohabiting unions possible for the first time by collecting complete histories of all spells of marriage and cohabitation from a representative sample of more than 9,000 adults in Britain.

Recent work looks at the likelihood of a couple splitting between wave one (1991) and wave three (1993). The analysis found 3.2 per cent of married couples splitting but 18.3 per cent of cohabiting couples. The difference was highly statistically significant[162]. In cases where children were present, 5 per cent of married couples split compared with 22 per cent of cohabiting couples. The sample size for cohabiting couples with children was small (53 cases in total) but the difference was statistically significant[163]. Controlling for age reduces the difference slightly but, even when this is done, it appears that cohabiting couples with children are some 3½ times more likely to split[164].

The costs of marital breakdown

Concern is often expressed at the costs to the public purse of marital breakdown. Although these cannot be accurately assessed, some estimates of the main sums involved can be made, although some of them are very rough indeed. Figures are for 1994-95 unless otherwise stated.

Legal aid

In England and Wales, spending on legal aid in matrimonial proceedings totalled £357.2 million, but this was offset by receipts (contributions, damages etc) of £60.6 million making a net cost of £296.6 million. The bulk of this expenditure (some 90 per cent) is concerned with divorce cases, the remainder concerning proceedings under legislation such as the

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[160] Population Trends 82, Winter 1995, page 44.

[161] On the assumption that all joint same-address registrations are to cohabiting couples.

[162] $\chi^2 = 130.3$.

[163] $\chi^2 = 29.1$.

[164] Nick Buck & John Ermisch **Cohabitation in Britain** Changing Britain (Official newsletter for the ESRC Population and Household Change Programme) October 1995 pages 3-5.

Domestic Violence and Matrimonial Proceedings Act. Spending on legal advice and assistance in cases of divorce and judicial separation totalled £28.1 million and on assistance by way of representation in maintenance cases some £0.8 million[165].

In Scotland, spending on legal aid in cases of divorce and separation totalled £11.1 million and on legal advice in family and matrimonial cases totalled £11.0 million[166].

Court costs

There are costs associated with processing divorce applications in the courts but few estimates of them have been published. The latest published figure is for 1990-91 when, in England and Wales, they totalled £20.5 million gross but only £3.6 million after receipts from court fees[167].

Social security

Expenditure in Great Britain on social security benefits for lone-parent families totalled £9,148 million in 1994-95. Not all of this relates to lone-parent families resulting from marital breakdown and child benefit would be paid regardless of the marital status of parents. Spending on other benefits - income support, family credit, housing benefits and one parent benefit - is more directly attributable and totalled about £8,000 million. The proportion of this that is paid to families in which lone parenthood results from marital breakdown can be estimated in various ways but most methods suggest that 60 per cent is a reasonable estimate. Spending on social security benefits for those whose marriages have failed was, therefore, probably of the order of £4.8 billion.

This total is not necessarily the social security cost of marital breakdown because many of the benefit recipients may well have been on benefit if they had still been married. Allowing for this is difficult but work done for the marriage research charity One plus One suggests that expenditure should be reduced by 10 per cent to allow for this factor. Doing this would produce a total of £4.4 billion; allowing more would reduce the costs to £4 billion or less[168].

Tax allowances

The estimated cost in 1994-95 of the additional personal allowance against income tax for a one parent family was £255 million. As with social security spending it is necessary to apportion this to those families resulting from marriage breakdown; this produces an estimate of £150 million[169].

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[165] Legal Aid Board Annual Report 1994-95 HC 526, 1994/95, Tables Civil 12, Advice 4 & 6, General 4.

[166] Scottish Legal Aid Board Annual Report 1994/95 Appendices 3 & 4.

[167] HC Deb 11.11.91 c348W.

[168] Social Security Statistics 1995 page 3; One plus One.

[169] Tax ready reckoner and tax reliefs (HM Treasury, July 1995) Table 10.

Children in care

Net expenditure by local authorities in Great Britain on all care for children and families is estimated at £2,150 million. It was estimated in 1984 that 6½ per cent of children in care were there as a direct result of marital breakdown; applying this out-of-date estimate produces a very crude estimate of the social service costs of marital breakdown of £140 million[170].

Health service

There are no reliable figures available for the costs of marital breakdown in terms of consultation, prescription and treatment but an estimate of ½ per cent of total NHS costs has been used in the past. This would produce a total cost in 1994-95 of about £190 million[171].

Other costs

It is impossible to estimate other costs which could be attributed to marital breakdown, such as costs to the police, courts and prisons of dealing with the secondary effects of broken marriages, the costs on terms of lost productivity and absenteeism, housing costs and so on.

Summary

Overall the figures presented here - which are dominated by social security costs - sum to some £5 billion. This is a very crude total and should be used with caution.

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[170] CIPFA Personal Social Services Statistics 1994-95 Estimates Table 4; H Giller and J Crook in **Community Care** magazine cited by One plus One.

[171] Public Expenditure Statistical Analyses 1996-97 (Cm 3201) Table 1.5.

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Appendix C

The Family Law Bill - Lords Debates

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 January1996 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 Febraruy 1996, cc1610ff

Third day: HL Deb vol 570, 4 March 1996, cc10ff

Third Reading - HL Deb vol 570, 11 March 1996, cc618ff

Related Research Papers include:

Civil Justice

95/105	Family Homes and Domestic Violence Bill [HL] [Bill 141 of 1994-95]	25.10.95
96/39	Family Law Bill [HL] [Bill 82 of 1995/96] Domestic Violence	21.3.96