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CONFIDENTIAL FILING

Financial Provision After Divorce

HOME AFFAIRS.

In folder: Law Commission Report on Divorce 1990

January 1982

Referred to	Date	Referred to	Date	Referred to	Date	Referred to	Date
~~4.2.82~~							
~~16.2.82~~							
~~23.2.82~~							
~~2.11.82~~							
~~14.12.87~~							
~~16.12.87~~							
~~26.10.90~~							
~~26.10.90~~							
31.10.90							

PREM 19/3023

TO BE RETAINED AS TOP ENCLOSURE

Cabinet / Cabinet Committee Documents

Reference	Date
H(82) 1	12/01/1982

The documents listed above, which were enclosed on this file, have been removed and destroyed. Such documents are the responsibility of the Cabinet Office. When released they are available in the appropriate **CAB** (CABINET OFFICE) CLASSES

Signed J. Gray Date 20/8/2016

PREM Records Team

Published Papers

The following published paper(s) enclosed on this file have been removed and destroyed. Copies may be found elsewhere in The National Archives.

The Law Commission (Law Com No. 192)
FAMILY LAW: GROUND FOR DIVORCE
Laid before Parliament by the Lord High Chancellor pursuant to section 3(2) of the Law Commissions Act 1965
Ordered by the House of Commons to be printed 1990
Published by HMSO

Signed J. Gray Date 20/8/2016

PREM Records Team

DSG

cc: BG

10 DOWNING STREET
LONDON SW1A 2AA

From the Private Secretary

31 October 1990

Dear Jenny,

LAW COMMISSION ON GROUND FOR DIVORCE

Thank you for your letter of 30 October to Andrew Turnbull, enclosing a draft Press Notice which the Lord Chancellor plans to release on the day the Law Commission's Report is published. The Prime Minister is content with the terms of the press release.

I am copying this letter to the Private Secretaries to members of Cabinet, and to Sonia Phippard (Cabinet Office).

Yours sincerely,

Caroline

Caroline Slocock

Miss Jenny Rowe,
Lord Chancellor's Office.

KW

FROM THE PRIVATE SECRETARY

HOUSE OF LORDS,
LONDON SW1A 0PW

30 October 1990

Andrew Turnbull Esq
Private Secretary to the
Prime Minister
10 Downing Street
LONDON
SW1A 2AA

Prime Minister

Brian Griffiths has seen the Lord Chancellor and conveyed your strong reservations about what is proposed. He has also given him a copy of the note you saw last week.

This press release on the publication of the report seems suitably non-committal.

Content that it be issued?

Yes CDS 30/10

Dear Andrew,

LAW COMMISSION ON GROUND FOR DIVORCE

As I think you are aware the Law Commission will be publishing its Report on Ground for Divorce on Thursday 1 November. The Lord Chancellor considers it would be appropriate for the Government to welcome the Report as a contribution to the debate on divorce and related matters, whilst at the same time making it clear that the Law Commission is independent of the Government and this Report is not a statement of Government policy.

I attach a draft press notice on which I should be grateful for comments by close of play tomorrow.

I am copying this letter to the Private Secretaries to all members of the Cabinet and Sir Robin Butler.

Yours sincerely
Jenny Rowe

Miss J Rowe

DRAFT PRESS NOTICE

DIVORCE REFORM

The Law Commission published their report on the ground for divorce today.

The Lord Chancellor said:

> "The Law Commission's report is an important contribution to the debate on divorce law reform. I recognise that people have deep feelings about divorce and the Government will want to consider carefully both the Commission's proposals and the opinions and reactions of others before reaching any view about what, if any, reform is desirable."

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10 DOWNING STREET

LONDON SW1A 2AA

From the Private Secretary

26 October 1990

Dear Jenny,

LAW COMMISSION REPORT ON DIVORCE

Thank you for your letter of 28 September to Andrew Turnbull attaching a copy of the Law Commission's Report on the grounds for divorce. I understand that this is to be published on 1 November. I believe that the Lord Chancellor will be consulting the Prime Minister formally once the report is published but you may like to be aware in the meantime that the Prime Minister has reservations about what is proposed. Professor Griffiths from the Policy Unit here will be in touch with the Lord Chancellor to discuss the Prime Minister's views in more detail.

Yours sincerely,

Caroline Slocock

CAROLINE SLOCOCK

Miss Jenny Rowe,
Lord Chancellor's Office

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PRIME MINISTER

25 October 1990

THE LAW COMMISSION'S PROPOSALS FOR DIVORCE

Divorce is one of the most serious social problems in Britain today. In 1988 more than 180,000 divorce petitions were filed and more than 150,000 divorces granted in England and Wales. Divorce is a shattering experience for all involved, a major cause of one-parent families and a growing body of research evidence suggests it does permanent damage to the children involved.

The Law Commission's proposals are a step in the wrong direction. By removing fault and making divorce a purely administrative process they will further undermine the institution of marriage. They will do nothing to halt the present trends in divorce, except simplify and legitimise them. They should be rejected.

The Law Commission's Proposals

The Law Commission is to publish its proposals for changing divorce law on 1st November.

The Report is a far cry from being an "on the one hand" and "on the other hand" kind of document. It is unambiguous and polemical. The Commission have made up their mind and they are seeking to win others to their position. They have even gone as far as publishing a draft Bill.

What the Law Commission are proposing are not minor changes in the law: they involve

(a) removing fault as a ground for divorce;

(b) conceiving of divorce as a 'process' lasting one year;

(c) the process to be started by a written statement from one or both parties to the court stating with evidence that the marriage has broken down;

(d) the one year period to be a time when both parties should consider, with the help of conciliation and counselling services, the alternatives and practical consequences involved;

(e) and then, after eleven months, one of the parties would be in a position to apply for a decree of divorce which would be granted one month later.

[It is worth noting that conciliation, reconciliation and divorce counselling are used to mean quite distinct things. Conciliation is the process of arranging the consequences of divorce, above all the disposal of property and custody of the children. Reconciliation is the attempt by counselling to bring married couples back together. Divorce counselling - a term whose use RELATE (the old National Marriage Guidance Council) encourage- refers to counselling of couples before, during and, where appropriate, after the divorce. These distinctions apply throughout this note.]

Thus the key features of these proposals are: 'no fault' divorce, divorce as a one-year process, and an increased emphasis on

conciliation.

These proposals would remove fault completely from the divorce law. They would make divorce a purely administrative process separate from any moral dimension. They would be an important symbolic step which would further undermine the institution of marriage. They are the logical end-point to the reforms of the sixties. But they are frankly more in tune with that decade than this.

On balance they will make divorce easier. Although their concern is the welfare of the children, they effectively argue against parents doing their utmost to stay together "for the sake of the children".

The Lord Chancellor's Views

The Lord Chancellor is concerned about the trend in divorce and feels it important that Government should do something. As someone who has affirmed the Westminster Confession all his life he personally regrets the removal of fault. He is particularly concerned that the present proposal should not be seen as making divorce easier. He believes that a compulsory period of reflection which slows down the divorce process could result in improved conciliation, and in some cases though very few, even of reconciliation.

He has made a number of speeches which are sympathetic to the Law Commission proposals, without however endorsing them.

He proposes to make a statement on the day the proposals are published welcoming the work which has gone into the report, but stating that the government will not make its mind up on this

issue until it has had the opportunity to hear the public response.

Issues Raised By The Report

1. Why do we need a change in the law now?

It is hard to claim that there is a widespread demand by the public at large for a change in the divorce law in the direction proposed by the Commission.

The Law Commission's opinion poll showed that 67% of people (including 71% of divorced people) found divorce under the present law "acceptable". This is in marked contrast to the late sixties when the law was seen to be hypocritical and offensive.

The major factor influencing the Commission is the need to reduce the bitterness resulting from divorce. This they claim will be achieved by removing fault. In coming to this conclusion they rely almost entirely on the views of social workers, lawyers and counsellors.

But the public seem keener to make divorce more difficult; though there is a significant minority who disagree. For example, the Commission refer to an NOP survey (Mail on Sunday 1989) which found that 50% thought divorce too easy, 5% too difficult, 31% about right and 7% did not know; and a British Social Attitude Survey (1987) which found that 39% believed divorce should be made more difficult, 27% disagreed and 33% neither agreed nor disagreed.

Conclusion: There seems no great desire by the public to change the law in the direction proposed by the Commission.

2. Should we remove fault completely from divorce?

The case for removing fault is that it would improve the welfare of children involved. The Commission recognises that divorce is accompanied by bitterness, hostility and acrimony. In the vast majority of cases it is the break-up and separation which cause the hardship rather than the divorce itself.

The important question is whether removing fault will reduce bitterness between the parties.

Fault was retained by the Scottish Law Commission's proposals for divorce law reform. And the Report is weak on this issue.

Part of the case for retaining fault is that although no spouses in any marriage are anywhere near perfect, in many marriage breakdowns one partner does bear the main responsibility for the failure of the marriage. In the 'Conciliation in Divorce' research project (sponsored by the Lord Chancellor's Department) 42% of divorced people considered that they and their spouse were "equally responsible" for the breakdown of the marriage, but 46% held that their spouse was primarily or totally responsible. Typically these are in cases of adultery and violence.

Another reason for retaining fault is that the law sets a standard by retaining fault the law distinguishes marriage from just another contract. And it therefore provides a moral base for conduct within marriage. Indeed, this seems to be what most people want and expect. In the public opinion survey 84% found divorce for fault acceptable, when it was part of a system which also included no-fault grounds.

Conclusion: Fault should not be removed from divorce law.

3. Will these proposals make divorce 'easier' or 'harder'?

The Lord Chancellor is particularly keen that these reforms are not labelled "easier" divorce. But, on balance, their impact would be to make divorce easier. This is shown below.

The proposed changes when set against each other on the basis of cost and length of time are as follows:

"Easier" divorce

1. A couple would not have to separate for 2 or 5 years before proceeding.

2. Some would no longer be branded the wrongdoer.

3. Likely cost of divorce to any couple will be reduced.

"Harder" divorce

1. All who currently divorce in under one year would now have to wait longer.

By making all divorce no-fault divorce and reducing the time involved from 2 or 5 years separation to one year, divorce is

being made easier so that it can be presented as less traumatic and more of a normal experience.

It is difficult to see why those who at present divorce in less than one year will perceive these changes as making divorce much harder. Indeed, the major advantage claimed for the change- that increased use of conciliation will encourage the settlement to be worked out in a humane way before the final divorce - is intended to reduce the anger and conflict associated with divorce, to make divorce seem a natural part of life.

Conclusion: On balance these changes are for 'easier' divorce.

4. What about the cost of conciliation?

The report makes a good deal of conciliation. It proposes that at the beginning of the one year process, the court should have the power to direct the spouses to attend an interview so that they can be advised about conciliation services. Although it stops short of recommending mandatory conciliation the whole thrust of the report is towards a national conciliation service, which would be a mixture of public sector services based on the probation service and voluntary agencies such as Relate.

The estimated cost of moving from existing services to a system of national conciliations (on the assumption that the referrals are 15,500 cases per year) is put at between £1.8m - £3.2m depending on whether it is provided through the public sector or voluntary agencies. (These figures assume that part of the cost would be borne by the parties themselves).

There are good reasons for treating this figure with some scepticism:

- increased conciliation services will be only one element in what will be demanded, as the report views conciliation, divorce counselling and marriage counselling all as critical elements in developing a more constructive approach to marriage breakdown; a research project on conciliation commissioned by the Lord Chancellor's Department proposed "The Family Advisory, Counselling and Conciliation Bureau" as a new government agency;

- organisations such as RELATE have already had substantial increases in funding from government, yet they continue to look for more: implementation of the Law Commission's report will only strengthen their hand;

- voluntary sector conciliation and marriage guidance has relied on large numbers of volunteers (10,000+): as more married women return to work it is difficult to see how these numbers can be sustained, without remuneration for 'helpers'.

My personal view is that a national conciliation service is the tip of an iceberg; there is, especially among the middle classes, an army of people who are eager to work in this area, but who are equally convinced that government should pay them.

Conclusion: Conciliation services could prove very costly: they are best increased through the voluntary sector not government.

Strengthening Existing Law : An Alternative Way Forward

An alternative way forward would be to retain the essentials of the existing law but to graft on to it the more positive features of the Law Commission's proposals.

First to strengthen the provision of reconciliation in the existing Act.

The Law Commission place great emphasis on conciliation during the one year period. This reflects the prevailing view among lawyers that there is little scope for reconciliation once divorce proceedings have begun.

This view has been challenged in research for the Lord Chancellor's Department by Davis and Murch. They note that divorce proceedings tend increasingly to be instituted while the parties are still living together or following only a brief period of separation; and that there is a significant "fall-off" in numbers from petition to decree nisi (12 - 15% for 1980-83) and then from decree nisi to decree absolute (roughly 2%). These are not the result of delay in awarding the decree nisi or of fluctuations in the divorce rate. They are the result of genuine "second thoughts". In two research projects, Davis and Murch found that in one case 40% and in another 50% of those divorced said they would have preferred to remain married.

This is not to suggest that all of these marriages might have been 'saved', but it is to support that the scope for reconciliation is possibly greater than conventional wisdom suggests.

As the current law requires the solicitor to a petitioner to certify that he has discussed the possibility of reconciliation, this is an aspect of present procedure which might be strengthened.

At present the first interview with the solicitor is a rather cursory business. This is partly because of the way the "Green Form" Legal Advice Scheme operates. Solicitors have a direct interest in precipitating legal action rather than reconciliation. This needs to be changed.

Second to place a time constraint between petition and decree nisi.

If the government thought that there was value in more time being required between the petition and the decree nisi would it not be possible for the Lord Chancellor through an order to direct the courts to specify a minimum period?

CONCLUSIONS

The Law Commission's proposals are not for tougher divorce. By removing fault completely from divorce law and reducing the time for no-fault divorce they will undermine marriage and legitimise anti-social behaviour. These work against the welfare of children. They do nothing to strengthen reconciliation. They do nothing to deter divorce. They should be rejected.

An alternative way forward would be to strengthen reconciliation and possibly delay the process somewhat - though this requires further thought.

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A Suggested Response

When the report is submitted, your views will be sought. A suggested response might be to:

- welcome the work and thought put into the report;
- emphasise that in view of the major implications of the Report's recommendations, the government will need to listen carefully to the public debate before making a final conclusion;
- whatever your personal conclusion on this matter, make sure that the Lord Chancellor is aware of your views very soon.

Brian Griffiths

BRIAN GRIFFITHS

(069)

I think the Lord Chancellor should see this memo - substantially redrafted. I am very apprehensive of the proposals and think they will end the wrong signals, i.e. they will make divorce easier. The consolidation + reduction period just becomes a period of divorce time. If there is no demand for change surely it would be best to leave well alone etc

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ANNEX A : LAW COMMISSION PROPOSALS

Under present divorce law (Matrimonial Causes Act 1973), the sole ground for divorce is the irretrievable breakdown of the marriage. A petitioner can establish this by proving one or more of five 'facts': adultery, unreasonable behaviour, desertion, separation for at least two years with the consent of the other party, or separation for five years without such consent.

Criticisms Of The Present System

The Commission argues for change by criticising a number of features of the present system:

- it is an untidy mixed-system which combines fault and no-fault;

- 'unreasonable behaviour' is a very elastic if not confusing idea and is open to abuse;

- it is unjust to provide for a 'no-fault' ground for divorce and then in practice deny it to a large section of the population because they lack the means to live separately;

- the inclusion of fault as a ground for divorce increases the acrimony and hostility between spouses and makes the situation worse for children;

- the present law does nothing to help couples become reconciled - indeed the emphasis on past behaviour required by use of "fault" it is argued increases

tension at a time when sensible decisions need to be made, especially about the future of the children.

Alternative Approaches To Divorce

The Commission claimed there was general agreement on the objectives of divorce law:

first — to support those marriages capable of being saved;

second — to enable those which cannot be saved to be dissolved with minimum bitterness;

third — to encourage the amicable resolution of practical issues (the home, finances, children);

fourth — to minimise the harm the children may suffer.

With these in mind the Commission considered seven alternative approaches to divorce law reform.

Four of these were rejected.

A return to Fault was rejected because it was claimed the law is only capable of assessing fault in the crudest possible way, because restricting divorce to fault would not raise standards of marital behaviour in today's society, and because fault is incompatible with irretrievable breakdown of the marriage being made the sole ground for divorce.

Inquest (ie a full judicial inquiry into the history of the marriage with the possibility of saving it) was dismissed because of the likely hostility and bitterness which would

be created by encouraging couples to rake over the past.

Immediate Unilateral Demand was turned down because it provided no safeguard against precipitate divorce.

Finally, **Mutual Consent** was rejected because it could never be a sole ground for divorce for the obvious reason that one of the parties might refuse their consent.

Following their consultations the Commission then considered three possible approaches to reform, two of which it then rejected:

A Mixed System involving fault and no-fault, such as that proposed by the Scottish Law Commission was rejected because it retained fault. This is probably one of the weakest parts of the report.

Separation for a fixed minimum period of time was considered as one of the two most realistic options for reform. It was turned down finally however because it was not as popular in the public opinion poll as other approaches and was rejected by most professionals who responded to the Commission. The basis of this was that it would discriminate against lower income families who cannot for financial reasons live apart without active co-operation from the spouse or a court order. For these such a reform would make divorce very much more difficult than at present using fault.

The approach chosen was what is termed as "**Consideration and Reflection**". This treats divorce as part of a process of facing up to and resolving the practical, social and emotional consequences of marriage breakdown but over a

period of time. This approach allegedly avoids the problems associated with fault and was endorsed by many of those who commented on the discussion paper including professionals engaged in conciliation and mediation as well as the legal profession. One particularly attractive feature of this approach to the Commission and to many professionals in the field is the increased role given to counselling and conciliation services.

(069)

CONFIDENTIAL

PRIME MINISTER

LAW COMMISSION REPORT ON DIVORCE

You saw over the weekend the Law Commission's report on Divorce which is to be published on 1 November; and I mentioned that Brian Griffiths would be advising you on it this week. His note is attached, together with a summary of the proposals and the report itself. Brian is disturbed by the proposals and you may like to read his note in full.

Once the report is published, the Lord Chancellor will consult you formally on your views. But you may think it as well to give the Lord Chancellor an early indication of your reactions to what is proposed. Lord Mackay proposes at the moment to make a statement on the day of publication welcoming the work which has gone into the report but stating that the Government will not make up its mind until it has had an opportunity to hear the public response. But the Chancellor has already made a number of speeches which are sympathetic to the proposals. Privately, he regrets the proposal to remove fault as a grounds for divorce; and does not want to see divorce made easier. But he is attracted to the idea of a compulsory cooling off period which encourages couples to use counselling and reconciliation services.

Brian Griffiths thinks that the proposals would make divorce easier, particularly as they would remove fault as grounds. The Law Commission makes much play of opinion surveys to back its conclusions but Brian points to contrary evidence which shows that most people think divorce is already too easy; and want to see a mixed system where people can divorce by mutual agreement or can point to fault as a grounds. He is also concerned about the potential cost to the taxpayer of reconciliation and conciliation services. Brian proposes instead modification to the existing system. He would like to strengthen exisiting provision in the law for reconciliation once petition for divorce is made; and possibly lengthen the time between petition and decree nisi.

Brian admits his ideas need further work. There may be other weaknesses in the current law which need sorting out. One issue which struck me is that couples in council housing cannot get separate accomodation until they are divorced. This causes many to get a quick divorce by alleging adultery or other fault where none exists and brings the law into disrepute.

Brian suggests you might make the Lord Chancellor aware of your views very soon. Content:

- to indicate to the Lord Chancellor now that the Government will want to give these proposals very careful consideration and that you have doubts about them?

CMS

Caroline Slocock
25 October 1990

BF to me
when Prof Griffiths
gives advice
CBS 23/10

2

PRIME MINISTER

LAW COMMISSION REPORT ON DIVORCE

You may like to have an opportunity over the weekend to take a look at the Law Commission Report on Divorce which is likely to be published in the week beginning 29 October. Brian Griffiths hopes to be able to give you some advice on it early next week after he has had an opportunity to talk to Lord Mackay in full about it. But as the report is bulky, you may like to dip into it over the weekend as you are unlikely to have any opportunity to do so next week.

The report recommends that in future the only grounds for divorce should be irretrievable breakdown and that this should be established after a period of consideration and reflection of one year. During this year the couple should be encouraged (but not forced) to use conciliation and mediation services. The aim of the proposed reform is to reduce the bitterness of the divorce process; remove its inconsistencies and unfairnesses; help couples to save marriages where possible and to separate amicably otherwise. Underlying this is a wish to serve the interests of children who suffer most where divorces are acrimonious.

A key question for Brian Griffiths and Lord Mackay is I know whether these reforms would make divorce easier or harder. A key feature of the reforms is that they would remove the concept of fault as grounds for divorce (although the courts might still take fault into consideration in determining such issues as the care of children).

CBS

Caroline Slocock
19 October 1990

FROM THE PRIVATE SECRETARY

HOUSE OF LORDS,
LONDON SW1A 0PW

28 September 1990

Andrew Turnbull Esq
10 Downing Street
LONDON
SW1

Dear Andrew,

LAW COMMISSION REPORT ON DIVORCE

I attach a copy of the Law Commission's report on the Ground for Divorce, which the Prime Minister may care to see. It has now gone for printing and we anticipate that it will be published in the week commencing 29 October.

Yours sincerely
Jerry Rowe

Miss J Rowe

From: THE PRIVATE SECRETARY

HOME OFFICE
QUEEN ANNE'S GATE
LONDON SW1H 9AT

16 December 1987

Dear Andrea,

TRANSFER OF DIVORCES

I am writing to confirm our telephone call conveying the Home Secretary's support for legislation to remedy the defect in the Matrimonial and Family Proceedings Act 1984 as proposed by the Lord Chancellor in his letter to the Lord President of 14 December. The Home Secretary also agrees that retrospection is necessary as those persons affected were not at fault and may well have "remarried" and borne children.

He is content with the terms of the proposed Arranged Question.

I am copying this letter to the Private Secretaries to the Prime Minister, Lord President, Lord Privy Seal, members of H and L Committees and Sir Robert Armstrong, and to First Parliamentary Counsel.

Yours sincerely,

C R MILLER

Ms Andrea Smith

PRIVY COUNCIL OFFICE
WHITEHALL, LONDON SW1A 2AT

16 December 1987

nbpm

Dear Tanner,

TRANSFER OF DIVORCES

You wrote to Willie Whitelaw on 14 December about the situation brought about by the Court of Appeal decision on 7 December in Nissim v Nissim. This was to the effect that high court and county court officials had been misapplying provisions in the Matrimonial and Family Proceedings Act 1984 and that as a consequence certain divorce and other matrimonial orders purportedly made by the county court were nullities. You sought colleagues' agreement to your making an announcement before the Recess that legislation with retrospective effect would be introduced as soon as possible to give validity to such orders. I am replying in Willie's absence.

I understand that the necessary amendment to the law will take the form of a simple one clause Bill, and it is clearly highly unlikely that this will occupy any significant time in either House. No colleague has commented on your proposal and you may take it, therefore, that you have policy approval from H Committee to make your proposed announcement and that QL Committee would be content for the Bill to be added to the legislative programme for the current session with a view to its being introduced as soon as it is ready. I understand that you will be informing the Opposition before the announcement is made, in the interests of securing their cooperation in achieving a smooth and rapid passage for the Bill.

I am sending copies of this letter to the Prime Minister, members of H, QL and L Committees and to Sir Robert Armstrong and First Parliamentary Counsel.

Yours ever,
John

JOHN WAKEHAM

Rt Hon Lord MacKay of Clashfern
Lord Chancellor
House of Lords

HOME AFFAIRS : Divorce Jan '82

FROM THE RIGHT HONOURABLE THE LORD MACKAY OF CLASHFERN

HOUSE OF LORDS,
LONDON SW1A 0PW

14 December 1987

The Right Honourable
The Viscount Whitelaw CH MC
Lord President of the Council
68 Whitehall
LONDON
SW1A 2AT

Dear Willie,

TRANSFER OF DIVORCES

The decision of the Court of Appeal in the case of Nissim v Nissim on 7 December 1987, reported in The Times on 11 December 1987 has exposed a most unfortunate and embarrassing lacuna in the transitional provisions of the Matrimonial and Family Proceedings Act 1984.

The ordinary practice

As you may recall, since 1967 divorces have all started in the county courts or, in London, in the Principal Registry of the Family Division. Where the divorce was defended, before 1986, the suit automatically transferred to the Family Division of the High Court. But whenever such a suit went undefended before being heard it was sent down again to the county court for disposal.

Many cases followed that course.

The problem

The problem concerns sending cases down to the county courts.

Section 38 of the 1984 Act, which cam into force with most of the rest of Part V on 28 April 1986, is the provision which now enables family proceedings to be transferred from the High Court to a county court. Section 38(2) limits the proceedings that may be so transferred to three defined categories. The first two are not relevant for present purposes. The third is confined to family proceedings transferred from a county court to the High Court under section 39 of the 1984 Act (or under section 41 of

the County Courts Act 1984 - which is not relevant to my present problem).

Section 39 of the 1984 Act also came into force on 28 April 1986 enabling family proceedings to be transferred in the opposite direction, that is to say from a county court to the High Court. Section 39(2) limits the proceedings that may be so transferred under this section to two categories, namely family proceedings commenced in a county court or divorce county court and such proceedings transferred down from the High Court under section 38.

My problem arises in connection with divorce proceedings which started before April 1986 in a county court and where an answer was filed to the divorce petition - so that it then became defended - before that date. In these circumstances the registrar was obliged to transfer it to the High Court under Rule 18(5) of the Matrimonial Causes Rules 1977. Of these transfers up which took place before 28 April 1986, many remained defended and were disposed of by the High Court. Such cases pose no problem.

However, some cases subsequently became undefended again. When that happened many of them were transferred back to the county court after 28 April 1986 in the same way as they had been transferred back before that date. The receiving county courts accepted the transfers, just as they always had and in due course the matters were disposed of in the county courts where decrees nisi, followed by decrees absolute were pronounced and any necessary ancillary orders were made by the county court concerned. On a practical level this course of action was entirely sensible.

The decision of the Court of Appeal

You will see from the copy of the Law Report in The Times, that this intricate and technical point has now been taken to the Court of Appeal which has decided that the absence from section 38(1) of any reference to transfers up to the High Court made under Rule 18(5) has the effect of preventing any purported transfer down having any force or effect whatever. As Ewbank J emphasised -

> "Where suits had purportedly been transferred back to county courts after that date, any orders subsequently made in them by county courts were nullities."

As my department became aware earlier this year that the Courts might take this view, arrangements were then made stopping further transfers down, but it is possible that several hundred

cases may be caught by the Court of Appeal's judgment. In many such cases the parties will have married again and children may well have been born.

The solution

We must clearly put this right at once by validating all such orders made since 28 April 1986 and all such proceedings in county courts.

I should be grateful for the agreement of H and L Committees to my announcing by means of an inspired question in the House of Lords (on the lines of the draft attached) before the recess, our intention to introduce retrospective legislation as soon as it can be prepared. In view of the shortage of time I should appreciate any views before close of play on Tuesday 15 December.

I am copying this letter to the Prime Minister, John Wakeham and colleagues on H and L Committees and to Sir Robert Armstrong and First Parliamentary Counsel.

Yours ever,

James.

Suggested Draft Inspired Parliamentary Question for the Lord Chancellor's Answer in the House of Lords

QUESTION

To ask Her Majesty's Government what action it proposes to take in the light of the decision by the Court of Appeal in Nissim v. Nissim (The Times, 11th December 1987) that orders made in proceedings commenced in a county court, transferred to the High Court otherwise than under s.39, Matrimonial Causes Act 1984 or s.41 County Courts Act 1984, and then purportedly re-transferred to the county court, were nullities.

ANSWER

The Government proposes to introduce legislation at the earliest opportunity with retrospective effect. That legislation will give validity to all orders made in the circumstances identified in the judgment of the Court of Appeal.

Divorce decrees a nullity in re-transferred cases

Nissim v Nissim

Before Lord Justice May and Mr Justice Ewbank

[Judgment December 7]

Family proceedings which had been commenced in a county court and transferred to the High Court otherwise than under section 39 of the Matrimonial Causes Act 1984 or section 41 of the County Courts Act 1984 could not be transferred back to the county court.

Where, therefore, a divorce suit had been transferred to the High Court under rule 18(5) of the Matrimonial Causes Rules (SI 1977 No 344) upon the filing of an answer and had consequently been in the High Court on the date when rule 27 of the 1977 Rules (which provided for transfer to the county court) had been revoked and sections 38 and 39 of the Matrimonial and Family Proceedings Act 1984 had come into force, an order made after that date purporting to transfer the suit back to the county court was invalid and subsequent orders purportedly made in the county court (including the decree nisi) were null and void.

The Court of Appeal so held, dismissing an appeal by the husband, Mr Louis Nissim, from a purported order of Peterborough County Court (Judge Young) on November 30 in a divorce suit.

Section 38 of the Matrimonial and Family Proceedings Act 1984 provides: "(1) At any stage in any family proceedings in the High Court the High Court may, if the proceedings are transferable under this section . . . order the transfer of . . . the proceedings to a county court.

"(2) The following family proceedings are transferable to a county court under this section . . . (*a*) . . . family proceedings commenced in the High Court . . . ; (*b*) wardship proceedings . . . ; (*c*) all family proceedings transferred from a county court to the High Court under section 39 below or section 41 of the County Courts Act 1984 (transfer to the High Court by order of the High Court)."

Mr Edward Grayson for the husband; Mr Timothy Clark for the wife.

LORD JUSTICE MAY said that this appeal had brought before the Court of Appeal for the first time a lacuna in the provisions of the 1984 Act. Divorce proceedings had been instituted by the wife in 1985 in the county court. In January 1986 the husband filed an answer and the suit had consequently been transferred to the High Court pursuant to rule 18(5).

On April 28, 1986, rule 27 of the 1977 Rules, *inter alia*, had been revoked by the Matrimonial Causes (Amendment) Rules (SI 1986 No 634) and sections 38 and 39 of the 1984 Act, *inter alia*, had been brought into force by the Matrimonial and Family Proceedings Act 1984 (Commencement No 3) Order (SI 1986 No 365).

In November 1986, the parties having agreed that the prayer in the petition should be stayed and a divorce granted on the prayer in the answer, the district registrar in the High Court had purported to transfer the suit back to the county court under rule 27 of the 1977 Rules.

There was no reference in section 38(2) to proceedings which had been transferred under rule 18(5) and, since the effect of section 39(1) was to make all family proceedings in the High Court transferable except those not referred to in section 38(2), the district registrar's order had therefore been made without jurisdiction and was a nullity.

It followed that the suit remained in the High Court and that orders which the county court had purported to make in the suit subsequently had also been nullities, including the decree nisi and the order under appeal. There was therefore nothing to appeal against and the appeal had to be dismissed.

The High Court would now have to pronounce a decree nisi and give directions for the future conduct of the proceedings.

MR JUSTICE EWBANK, concurring, emphasised that all divorce cases which had been begun in a county court and transferred to the High Court before April 28, 1986 and had been in that court on that date had to remain in the High Court because there was no power to transfer them back to county courts.

Where suits had purportedly been transferred back to county courts after that date, any orders subsequently made in them by county courts were nullities.

Solicitors: Jeffreys Orrell & Co, Peterborough; Michael & Co, Leicester

2

Home Affairs

PRIME MINISTER

Divorce

You may like to be aware of the attached proposal by the Lord Chancellor which is being circulated to members of H. He proposes offering to a backbencher a bill to implement a number of recommendations of the Law Commission on Divorce. The principal proposal is to reduce the period which must elapse from the date of a marriage before a divorce petition can be entered from three years to one year. The Lord Chancellor favours this change on a number of grounds which are set out in his letter.

2 November 1982

2

HOUSE OF LORDS,
SW1A 0PW

2 November 1982

Prime Minister

4/11

My dear Willie:

I am writing to you and all our colleagues on H Committee to seek approval for the policy of the Law Commission's report (Law Com. 117) entitled "Financial Relief After Foreign Divorce" which was published on 21st October 1982.

The proposals are designed to alleviate the problem facing a spouse in England who is validly divorced under foreign law but who cannot obtain sufficient maintenance or other financial award from the courts in that foreign jurisdiction. Despite the fact that assets of the marriage may exist in England and Wales, the English court has no power under the present law to make any financial adjustment following a foreign divorce so that the wife may be forced to live on supplementary benefit, even if her ex-husband is in a good financial position. In recent years there has been a small but steady stream of cases coming before the courts which has both highlighted this gap in the law and illustrated the hardship to which it may give rise. The view that the law is in need of reform has been widely expressed, both judicially and academically.

.../2.

The Right Honourable
William Whitelaw CH MC MP
Home Office
Queen Anne's Gate
London SW1H 9AT

The Law Commission proposed that a court in England and Wales should have the power to make, effectively, the same orders for financial support and the division of property following a foreign divorce (i.e. a divorce obtained outside the United Kingdom) as they may following a divorce in this country, but that the law should contain special safeguards to ensure that the new power can only be used in suitable cases.

The court will also have power to grant injunctions preventing the other party to the marriage from disposing of his property in this country in order to avoid such an order being made. Such injunctions can prevent that party transferring the property out of England and Wales or otherwise dealing with it.

It is not expected that there will be any significant financial and manpower implications. There are two respects in which these proposals will tend to increase the calls on public resources, by increasing the demand for legal aid and the work load of the courts. It is impossible to estimate how many cases there will be since at present most would-be claimants are presumably advised not to pursue their claims, but the safeguards mentioned in paragraph 3 above should ensure that the number will not be large. At the same time the proposals should, if implemented, eliminate some of the expensively contested cases on the recognition of foreign divorces and, in cases where the English-based claimant is in straitened circumstances, dependence on social security will be diminished.

Some of the recommendations regarding jurisdiction conflict with the provisions of the European Judgments Convention (enshrined in the Civil Jurisdiction and Judgments Act 1982) and it is proposed that the court shall have jurisdiction only where that Act does not apply. There are no other EC Implications.

.../3.

There is a draft Bill appended to the report, but, although the policy is relatively straight-forward, the Bill is technically complicated and runs to a total of twenty clauses. However, only approximately five of these clauses relate to the policy; the remainder are concerned with the powers of the court where the court accepts jurisdiction. The Bill would suit a lawyer private member.

In view of the short time before the Private Member's ballot on 11th November, I would ask for comments, if any, before that date.

yrs:

From: THE RT. HON. LORD HAILSHAM
OF ST. MARYLEBONE, CH, FRS, DCL.

FROM THE PRIVATE SECRETARY

HOUSE OF LORDS,
SW1A 0PW

Pme

29th October 1982

Dear Tim,

Further to our recent telephone conversation, I now enclose for the information of No. 10 a copy of the letter which the Lord Chancellor sent to members of H Committee about the Law Commission's Report on time restrictions for divorce and nullity petitions.

You may also care to note that we have included in the list of Bills which might be offered to a Private Member a Bill to give effect to the recommendations of the Law Commission in its Report no. 112 on the financial consequences of divorce.

Yours sincerely,

D E Staff

D E Staff

T Flesher Esq
Private Secretary to the
Right Honourable Prime Minister
10 Downing Street
London SW1

HOUSE OF LORDS.
SW1A 0PW

26 October 1982

My dear Willie:

TIME RESTRICTIONS ON THE PRESENTATION OF DIVORCE AND NULLITY PETITIONS

I am writing to you and to our colleagues on H Committee to ask you to agree that the short Bill attached to the Law Commission's Report No. 116 on Time Restrictions for Presenting Divorce and Nullity Petitions should be offered to a Private Member. The Report was published on 21 October 1982 and seems to have been generally favourably received.

DIVORCE

The main recommendations of the Report are aimed at the time restrictions on petitions for divorce. At present 3 years must elapse from the date of the marriage before a petition may be presented save with the leave of the court on the grounds of "exceptional hardship" or "exceptional depravity". It is proposed that this period should be reduced to one year but that the court's power to allow a shorter period should be removed. The Law Commission argue that the proceedings for leave based on exceptional hardship or depravity encourage applicants to make the most unpleasant allegations possible and that such proceedings are not only inherently distasteful and difficult to decide, but are likely to provoke the respondent into contesting matters concerning maintenance, property and the children which otherwise might have been resolved by agreement. On the other hand, a 3 year wait for a divorce seems long if not qualified by a discretion such as that which exists at present; this has led the Law Commission to recommend removing the discretion and reducing the time limit to one year. These proposals if implemented would save court time and expenditure from the Legal Aid Fund under three heads:-

(a) there would no longer be any "exceptional hardship etc." applications (currently about 2,000 a year);

/(b) the number of

The Right Honourable
William Whitelaw, CH, MC, MP,
Home Office,
Queen Anne's Gate,
LONDON,
S.W.1

(b) the number of judicial separations (currently 6,000 a year) would be halved since that is the proportion which is presented within 3 years of the marriage to be followed, after 3 years have elapsed, by a further petition for divorce; and

(c) negotiated settlements (regarding maintenance, property and children) would be facilitated in the cases covered by (a) and (b).

NULLITY

The other recommendation tackles the time restriction whereby a marriage may not be annulled on certain grounds (e.g. lack of consent) unless a petition is presented within 3 years of the marriage. There is no discretion to extend the time for such proceedings and the Law Commission conclude that in these cases (unlike divorce cases) an inflexible rule can cause serious injustice (e.g. where the petitioner's delay is attributable to mental disorder). Accordingly they recommend that the courts should be empowered to allow such proceedings to be brought at any time. There are no more than about 120 such nullity proceedings a year, so any additional expenditure would be negligible.

GENERALLY

While these proposals result in some savings to the Legal Aid Fund, on matters of this kind savings on the scale envisaged are probably of small importance in relation to social policy. There are no EEC implications.

The Bill, which consists of 4 clauses, is straightforward and would be suitable for a Private Member. I myself see no objections to the proposals and would support them. Traditionally such matters are often left for a free vote but I would canvass such support from colleagues as may be necessary.

If you or any member of the Committee should have doubts I should be grateful if you would let me know by 2 November in order that a paper may be circulated to be discussed at a meeting before 11 November when the ballot for Private Members' Bills takes place.

yrs:

Lord Home Affairs

23 February 1982

THE FINANCIAL CONSEQUENCES OF DIVORCE

The Prime Minister was grateful for the Lord Chancellor's letter of 22 February. She has noted this without comment.

W. F. S. RICKETT

M.H. Collon, Esq.,
Lord Chancellor's Office.

FROM:
THE RT. HON. LORD HAILSHAM OF ST. MARYLEBONE, C.H., F.R.S., D.C.L.

HOUSE OF LORDS,
SW1A 0PW

22 February, 1982

Prime minister 2

WR 22/2

The Right Honourable
The Prime Minister

My dear Margaret.

The Financial Consequences of Divorce

I understand from an exchange of letters between our Private Secretaries that you are concerned that the point of view of divorced women who have not remarried may have been overlooked in the Government's consideration of the recommendations in the Law Commission's recent report on the financial consequences of divorce. I would like to emphasise that from the very first I have made myself the personal champion of their rights against a particularly well organised lobby on the other side, and am quite satisfied that the Law Commission has got it about right and adequately safeguarded their legitimate interests and cause for concern.

It is true, as you have been informed, that there is no really organised pressure group exclusively concerned to represent the interests of women in that position, but that does not mean that their side of the case has been overlooked. On the contrary, in replying to the very many letters I have received since resuming office as Lord Chancellor, many of them prompted by the Campaign for Justice in Divorce, which is the main organisation representing the other side of the case, I have been at pains to point out that divorced women do indeed have a claim to be maintained, certainly where they have young children to look after or where they are elderly, unattractive or infirm or have had their employability much reduced as a result of many years spent as a housewife; and I have certainly not lost sight of these matters in my consideration of the Law Commission's report.

The scope of the Law Commission's recommendations has been exaggerated by some organs of the press (largely because, for some reason, they have put their political and not their legal correspondents on the job) though fortunately not by all. In fact, as the Law Commission itself points out, their proposals are not radical - they merely represent a shift of emphasis in the legislation - and they would only affect a minority of cases. There are some who would have liked a more far reaching change in the law; for example, when the report was published in December a representative of the Campaign for Justice in Divorce is reliably reported as having said of it that "They have wasted

/Contd.

a whole year preparing this report" or words to that effect. But in my view the report strikes the right balance and its proposals would improve the law by removing the wholly unrealistic objective which the courts are presently set, namely of putting the spouses back into the financial position they would have been in had the marriage not broken down, and instead requiring them to give overriding priority to providing for the children and then seeking, where possible, to promote the mutual self-sufficiency of the parties. The legislation would clearly have to be prepared with some care but I have enough confidence in the courts to think that they will not apply it in such a way as to deprive divorced women of necessary support in cases where they really need it.

I think I should add that, on the party network, I have been in touch with Janet Young whose Advisory Committee very properly made the same kind of comment as yourself. The Baronesses in the Lords (e.g. Eve Macleod) came to me spontaneously and welcomed the present proposals of the Government. A great deal of harm (in my view) was done by the publicity given to the report of the Scottish Law Commission which appears to have recommended an arbitrary cut-off which neither the English Law Commission nor I would recommend for England.

yrs.

L.H.

I think the Married Women's Association has the point well in mind, despite the fact that second wives are (understandably) on the other side.

FILE

ds

16 February 1982

Financial Consequences of Divorce

Thank you for your letter of 11 February, and for the papers which accompanied it. The Prime Minister has now seen these. She has commented that they confirm her in her belief that the voice of those women who will be harmed by the Government's proposals has not been heard.

W F S RICKETT

M.H. Collon, Esq.,
Lord Chancellor's Office.

FROM THE PRIVATE SECRETARY

HOUSE OF LORDS,
SW1A 0PW

11th February, 1982

Willie Rickett Esq.,
Private Secretary to
The Right Honourable
The Prime Minister,
10 Downing Street.

Prime Minister

MHC 12/2

Dear Willie,

Financial Consequences of Divorce

In your letter to me of 4th February you asked if you could have by Thursday 11th February a note summarising the representations made by the organisations representing divorced women on the Law Commission's discussion paper. I enclose a note. You said that the Prime Minister was particularly concerned to know whether sufficient weight had been given to the views of first wives; you will see from paragraph 1 of the note that there were in fact no major organisations which specifically put forward the views of first wives. Nevertheless I hope that the paper will be of use. I also attach, although you did not specifically ask for it, a copy of an analysis prepared by the Law Commission of professional and academic consultation.

Yours ever,

Michael Collon

M.H. Collon

In other words the voice of those women who would be heard by these proposals has not even been heard.

MHC

Law Commission's Report on the Financial Consequences of Divorce

(Law Com. No.112) Summary of the Views of Former Wives

1. The request from No. 10 is for a summary of the views received by the Law Commission from organisations representing divorced women. In fact there were no major organisations specifically putting forward the views of first wives. The only group which puts their case exclusively is Fair Family Division from whom some thirty members submitted a copy of the same single page of comments (a copy of these is attached Flag A). The Married Women's Association have been known on other occasions to support the cause of divorced wives but their views on this occasion were relatively neutral and very briefly stated.

2. This note therefore covers the views of all those on the attached list Flag B, which consists of all the women's associations referred to in Appendix 2 to the Law Commissions Report, some of the professional women and a number of other organisations who must by their very nature have the position of first wives in mind. The approach adopted has been to analyse the views submitted by these persons and bodies on the relevant questions rather than to summarise the views of each person or group (although this could be done if required), because of their number and because it seemed more useful to do so. The main point that emerges is that no overall view was expressed by or on behalf of women. (An analysis of the views of all professional persons and bodies was prepared by the Law Commission and a copy accompanies this note).

3. In paragraph 5 of their Discussion Paper the Law Commission stated that they hoped that a reaction to the publication of the paper might enable a clearer picture to be formed both of the different views which are held and of the likelihood of reaching a reasonable degree of consensus on whether the law is in need of reform and if so in what direction reform should go. In Law Com.112 (paragraph 23) they say that the response to the

.../Discussion Paper

Discussion Paper indicated a substantial consensus that what was required was a change of attitude or emphasis in the law rather than a radical restructuring involving a wholly novel statutory framework.

Analysis of Comments

a) The nature of marriage

4. Many of the consultees considered thought that the traditional definition of marriage being the 'voluntary union for life of one man and one woman to the exclusion of all others' was still valid (The National Council of Women of Great Britain, The Mothers' Union, Women's National Commission, National Board of Catholic Women, Church of England Board for Social Responsibility, National Council for the Divorced and Separated, National Federation of Women's Institutes, Methodist Division of Social Responsibility). On the other hand, for example, Mrs. Deech, a fellow of St. Anne's College, Oxford, said that one could not generalise about the expectations and intentions of parties entering into a marriage. The National Marriage Guidance Council said that the nature of contemporary marriage was too varied to admit a single definition.

b) Should there be a life long commitment?

5. The National Board of Catholic Women held to the view that marriage involves life long rights and duties which would include financial support for spouse and children. The Church of England Board felt that there has not yet been a sufficient change in the economic position of women to justify saying that the concept of life long support is out of date (i.e. where appropriate). Fair Family Division pointed out that since a husband can insist on a divorce against the will of his wife (although the reverse of course is also true), the obligations of the husband should continue after divorce.

6. However many did not think that a life long commitment should necessarily be reflected in the financial settlement. The National Council of Women of Great Britain suggested that there was a life long moral obligation which they thought should be underpinned in law,

.../but indicated

but indicated that its practical application ought to depend on the facts of each case. The Mothers' Union said that they doubted whether the support of one spouse for the other should necessarily be life long. The National Federation of Women's Institutes and the National Association of Townswomen's Guilds both thought that the concept of life long support was out of date. The National Marriage Guidance Council stated that marriage guidance counsellors have found that the emotional relationship between divorcing parties continues long after divorce and that where a person remains financially dependent on her former spouse, it is the harder for her to break free. Rights of Women and the Equal Opportunities Commission also disagreed with life long support.

c) What should the financial consequences of divorce be?

i) those who favour the present law (model 1 in the issues paper)

7. Out of all professional persons and bodies consulted only five were unequivocally in favour of the present law. Those in this group were Fair Family Division and the Methodist Church. Divorce Counselling and Advisory Service were possibly in favour as they say that the 'court must be left with the discretion it now has'.

ii) proposed changes

8. It follows from the preceding paragraph that most thought that the present overriding objective given to the courts by section 25 of the Matrimonial Causes Act " - to place the parties ... in the financial position in which they would have been if the marriage had not broken down" was unworkable. The reforms suggested varied. Some favoured doing away with the overriding objective in section 25, but otherwise leaving the section intact; the court would simply be directed to make whatever order it considered appropriate in the light of all the circumstances, including those circumstances listed in section 25 (Women's National Commission, Church of England Board, The National Council of Women of Great Britain, Married Women's Association). Others supported some system with the idea of need playing an important part, also rehabilitation and a clean break where possible, (for example the Mothers Union, the Equal Opportunities Commission, Mrs. Deech, the National Union of Townswomen's Guilds, National Marriage Guidance Council).

There was absolutely no support for the idea of restoring as a general rule the parties to their premarital positions.

.../

d) Some specific points made

i) adequacy and appropriateness of maintenance in general

9. Equal Opportunities Commission pointed out that in 1976 the total number of single parent families was 750,000. Of those 660,000 were headed by lone women, 230,000 were headed by divorced mothers. Figures showed that 60% of all one parent families had incomes very little above supplementary benefit level compared with 20% of all two parent families. Of this total, 70% of all families headed by lone women were living on less than 14% while only 21% of all families headed by lone men were in the same position. One Parent Families also make the point that there is a considerable amount of evidence that maintenance plays a comparatively small part in the total income of most one parent families. Only 6% were totally dependent on maintenance. This is why both organisations, together with Gingerbread, prefer the idea of state support in the case of divorce - for example one parent family benefit with a clawback from the non custodial parent. This was outside the scope of the exercise undertaken by the Law Commission, because they saw no purpose in seeking to investigate proposals which would involve a major shift from reliance on the enforcement of private law financial obligations against individuals towards a system under which social security benefits would be acknowledged as and become the primary method of making proper financial provision for families affected by divorce. However these views are useful in highlighting the fact that maintenance is not of practical importance in the majority of cases.

10. The problems of the adequacy of maintenance together with the difficulties of enforcement were also pointed out by the Women's National Commission, Fair Family Division and Rights of Women.

ii) Job opportunities for Women

11. The Discussion paper made the point very clearly that despite the development of the role which women play in the labour market,

.../not only

not only do they still encounter many disadvantages in finding and keeping suitable employment but their difficulties are accentuated if they are married (paras 45 - 57). This point is taken up by Church of England Board, Ms. Groves, Women's National Commission, Equal Opportunities Commission, Rights of Women and Divorce Counselling and Advisory Service.

iii) Second wives

12. The argument that the income of a second wife should not be used to support a first wife was put forward by, for example, The Mothers' Union and National Council for the Divorced and Separated. However neither the National Council for the Divorced and Separated nor Ms. Groves were impressed by mention of resentment felt by second wives at the financial burden on the new marriage, because the husband's commitments were known at the time the marriage was contracted. Fair Family Division pointed out that second wives should not be expected to claim priority.

e) Private representations

13. It may just be worth mentioning that of the comments from private individuals received by the Law Commission, rather more women than men chose to express their views and most of the commentators appeared to write with some direct experience of divorce, to have remarried again and to have had dependent children from former marriages.

f) Conclusion

14. As was stated at the outset, no overall view was expressed by the professional women or womens' organisations whose views were considered by the Law Commission. With their concern with the priority of the needs of children, a concern expressed by the vast majority of those consulted, and their limited proposals for changes to section 25, whatever view one takes of the recommendations of the Law Commission, it could not be said that they are made against the wishes of most women. In fact these proposals are really a question of a shift of emphasis rather than a major change in the law and it is thought they will only significantly effect a minority of cases; but in those cases they

.../will help

will help the courts to do justice better than at present. However these proposals will not and are not intended to prevent orders for maintenance being made or continued in all appropriate cases, where for example a divorced wife is aged or incapacitated or has the care of young children or has her earning capacity impaired or destroyed by a marriage of substantial duration.

11th February 1982

FAIR FAMILY DIVISION

49

Mr. R.S.G. Norman,
Law Commission,
Conquest House,
37/38 John Street,
LONDON, WC1N 2BQ.

10th November, 1980

Dear Sir,

The above group consists of women who feel that a great deal of injustice exists in the present law governing the financial consequences of divorce. With reference to the report presented to Parliament in October, under Section 3(1)(e) of the Law Commission Act 1965, I should like the following points to be considered:-

BREACH OF CONTRACT. As a result of the Divorce Reform Act 1969, a husband can insist on divorce against the will of his wife even although she may have honoured every marital commitment; therefore his obligations and responsibilities should continue after divorce.

The present law fails to make adequate provision for a first wife. Difficulties arise in enforcing a Court Order for maintenance, and inflation soon reduces the value of any Order. It is a considerable burden for the wife to keep making applications to the Court and to fight for her survival, when an index-linked order would solve this problem. The legal costs are counter-productive for both parties.

EQUALITY IS A MYTH. A woman's contribution in the home is not sufficiently recognised. After sacrificing the best ECONOMIC years of her life, her earning capacity is limited by age, lack of current training and experience. Meanwhile her husband has advanced his career, with the help and support of his married status. A woman who has been at home, caring for the family, during a long-term marriage, is not in a position to support herself.

ECONOMIC REALITIES. The starting point for assessing financial provision is only one-third (as opposed to one-half) of the joint resources. In practice, the minimum has become the "norm" and most wives find that they are getting considerably less than one-third; judgments are extremely inconsistent and one's fate is decided by the attitude of a registrar towards the circumstances, although the law requires that, so far as practicable, the wife should be kept in the position she would have been in had the marriage not broken down. It is difficult to understand how a woman is expected to keep her standard of living on less than one-third of the income whilst a husband needs the remainder. A second wife cannot expect to claim priority - unless, of course, the 1969 Reform Act was intended as a Casanova's charter.

In conclusion, a "clean break" may sound an ideal solution but this is totally unrealistic for the reasons set out above.

Yours faithfully,

KSA Bagg (mrs)

Reply 13/11/80

MIDHURST HOUSE
55 PRINCES AVENUE,
WORTHING
WEST SUSSEX BN13 1RR

Related

Church of England Board for Social Responsibility

Mrs. R. Deech

Divorce Counselling and Advisory Service

Equal Opportunities Commission

Fair Family Division

Gingerbread

Ms. D. Groves

Married Women's Association

Methodist Division of Social Responsibility

The Mothers' Union

National Association of Townswomen's Guilds

National Board of Catholic Women

National Council for the Divorced and Separated

The National Council of Women of Great Britain

National Federation of Women's Institutes

The National Marriage Guidance Council

One Parent Families

Rights of Women

Women's National Commission

56-70-28

THE FINANCIAL CONSEQUENCES OF DIVORCE : THE BASIC POLICY (LAW COM. NO. 103)

ANALYSIS OF PROFESSIONAL AND ACADEMIC CONSULTATION

Introduction

1. At the latest count the Commission has received 468 relevant comments from private individuals[1] and 45 from what one might call "professional and academic" commentators. There have also been a number of published comments on the various "models" which were outlined in the Paper.[2] This note deals only with the comments of the "professional and academic" group, a list of whose names is attached. A number of bodies have promised to send us their views but have not yet done so.[3]

2. Although the Scottish Law Commission's forthcoming Report on Aliment and Financial Provision is not strictly speaking a "comment" on the Issues Paper, it examines in some detail (amongst some 17 "models") the various possibilities for reform that we canvassed; and it is perhaps worth remembering that it was written in the full knowledge of what the leading commentators south of the border were saying. Its conclusions and recommendations are obviously relevant to our own analysis.

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1 Many of which were very lengthy and helpful. Most came from those who had either themselves been divorced or who had married a divorced person, but some came from people with no personal experience of the divorce laws: see further the analysis of lay consultation.

2 E.g. Levin, "Maintenance : The Law Commission's Discussion Paper" (1981) Fam. Law 67; Metcalf, "Divorce and the Right to Life-long Maintenance" (1981) N.L.J.669. Some of the comments made to us were also published and reviewed in the press : e.g. One Parent Families, Maintenance: putting the children first (1981); Equal Opportunities Commission. The Financial Consequences of Divorce : Comments by the E.O.C. (1981).

3 E.g. Rights of Women and the Law Society.

Analysis of comments

a) The nature of marriage

3. One of the reasons given in the Issues Paper[4] for not immediately tackling the question of the financial consequences of divorce was the fact that it seemed to raise difficult problems "about the nature of marriage, and about the respective functions of husband and wife." These were viewed (implicitly) as matters on which we could not, without further guidance, come to any conclusions.

4. Many of the commentators in this group agreed that some effort should be made to determine the true nature of marriage today. A number suggested that this could best be ascertained by a parliamentary debate,[5] whilst the Senate and the Society of Conservative Lawyers felt that the time was now ripe for another Royal Commission on Marriage and Divorce. A few commentators felt that we were being unduly hesitant in our approach and that our proper function was to "lead" opinion on this sort of matter.[6] Whatever (it was said by one commentator) people's intentions were about marriage, "family laws have not generally been based on a principle of ascertaining or giving effect to intentions e.g. custody, nullity."[7] A further group[8] felt that even although it was important to ascertain the spirit in which people nowadays enter matrimony, the marriage itself usually

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4 At paras. 4 and 92.

5 e.g. Campaign for Justice in Divorce (CJD).

6 W. Harper. It should be added however, that he thought that marriage was nowadays quite clearly terminable at the will of the parties, and that this should be reflected in the financial settlement of their affairs.

7 Ruth Deech - also an ex member of the Commission's legal staff.

8 E.g. the Senate, the Society of Conservative Lawyers, the National Marriage Guidance Council (NMGC) and the Bristol Registrars. Cf also the Lord Chancellor's comments in his address to the Family Bar Association, p.8.

created an entirely new situation which on divorce should be dealt with on its own merits and not in the light of any pre-existing intentions.[9]

5. Most commentators expressed concern and alarm at increasing number of divorces, but they offered differing views on the effect which they thought that they were having on the nature of marriage. A substantial number[10] thought that the "traditional" definition of marriage given in Hyde v. Hyde and Woodmansee[11] was still valid today, and the churches in particular expressed considerable anxiety lest any further change should undermine, or should be seen as undermining, the concept of marriage as a lifelong commitment. On the other hand a smaller number of commentators[12] argued that society, by permitting divorce, especially "no-fault divorce", no longer necessarily intends marriages to be life-long; and that a distinction should be drawn between people's hopes and people's intentions of marriage. It followed automatically from what this latter group were saying that divorce should not involve even the possibility of a lifelong financial commitment. Others still felt that the nature of contemporary marriage was too varied to admit a single definition. [13]

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9 See further para. 6, below.

10 National Council of Women (NCW), Mothers Union (MU), Women's National Commission (WNC), National Board of Catholic Women (NBCW), Society of Conservative Lawyers, Methodist Church Division of Social Responsibility (Meth. Church), Church of England Board of Social Responsibility (C of E). Interestingly the National Council for the Divorced and Separated (NCDS), a self-help group for the divorced, said that the majority of their members who had remarried or who hoped to do so, hoped for a "lifetime union".

11 (1866) L.R. 1 P. and D. 130, 133.

12 CJD, Deech, Harper, EOC (para. 4.2). This argument was canvassed at para. 31 et seq of the Issues Paper.

13 e.g. NMGC.

6. Interestingly however, many of those who supported a "traditional" definition of marriage, did not think that it should necessarily be reflected in the financial settlement of the parties' affairs on divorce.[14] This perhaps challenges one of the main assumptions on which our Paper was written. The Mothers' Union and the National Council of Women, for instance, both fell into this category. The National Council suggested that there was a lifelong moral obligation which they thought ought to be "underpinned" in law, but indicated that its practical application ought to depend on the facts of each case; and the Mothers' Union said that they doubted whether "the support of one spouse for the other should necessarily be life-long" and pointed particularly to the case where the "disability" or "inadequacy" has nothing to do with the marriage.

7. A further refinement of this argument, that "traditional" marriage did not automatically mean a lifelong financial relationship after divorce, emerged particularly clearly in the views expressed to us by the Senate. In para. 5 of their memorandum they say:

"It seems to us that whether marriage is regarded as a life-long union or as a potentially short-term relationship there will still be those cases in which financial support clearly ought to come to an end and those cases in which it clearly ought to continue indefinitely. The reason for this is that (whatever form the law takes) in ancillary relief proceedings the court has to look at the situation which has actually arisen rather than the situation which ideally

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14 Compare however the view of the F.D. Judges who agreed with our statement in para. 92 that it was not "possible to reach any clear conclusion on the policy of the law regulating the financial consequences of divorce without first forming a judgment on the nature of marriage, and in particular on the question of how far marriage should involve legally enforceable life-long rights and duties." Nevertheless they themselves had no "collective" opinion on this question. (See also EOC para. 4.1).

should have arisen and a general theory of the rights and obligations of marriage simply does not help one to differentiate between the widely varying sets of circumstances which occur on divorce."[15]

The same view is also perhaps implicit in the Lord Chancellor's address to the Family Bar Association when he says[16] ... "divorce itself creates the situation with which the Court must deal as equitably as it may ...."

8. It should be noted however that the argument that it is not necessary to form an opinion on the nature of marriage before deciding on a policy for the financial consequences of divorce can "work both ways". It can also be used to justify the possibility of continued support after divorce.[17] The Society of Conservative Lawyers and the Bristol Registrars both pointed out that in most cases the situation "which has actually arisen" at the time of the divorce involves children.[18] In the view of the former[19] "it is because of the needs of the children, that mothers are entitled to life-long support. Further, it is because on marriage women accept the possibility of motherhood that married women are entitled to life-long support in principle".

9. It is interesting that the Scots in their Report appear to have adopted the more pragmatic line, and to have refrained from any detailed discussion of the contemporary nature of marriage. Perhaps however their task has been eased by the fact that it has always been a part of Scots law

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15 For similar reasons they also doubt the validity of CJD's (and others') argument that the change to "no fault" divorce requires a new approach to financial consequences.

16 At p.10. See also Nat. Fed. of W.I.s and NMGC (p.1).

17 See e.g. the Senate's comments at para. 8.

18 It is estimated that in 60% of divorce actions, children under the age of 16 are involved.

19 The Bristol Registrars have "no strong fellings" as to whether the concluding direction of s.25 should be retained.

"that the obligation of aliment between spouses ceases on divorce."[20]

b) The financial consequences of divorce

(1) Introduction

10. Although numerous permutations can be, and indeed were, suggested for a law governing the financial consequences of divorce,[21] the views of our commentators fell into three main categories:

(a) Those who favoured retaining the present law ("Model 1" in the Issues Paper).

(b) Those who favoured giving the courts a discretion, which might or might not be combined with specific guidelines (effectively "Model 2" in the Issues Paper).

(c) Those who favoured a "guiding principle" other than that presently contained in section 25.

In view of the complexity of many of the opinions expressed to us, any sort of "head count" would be an unreliable starting point for analysis. Nevertheless certain trends do seem to emerge.

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20 See para. 3.12.

21 See for instance the Scottish Law Commission's seventeen possible principles. Many of these duplicate one another however.

(2) Retention of section 25 of the Matrimonial Causes Act

11. Only five of the consultees seemed to unequivocally favour retaining the present law.[22] The vast majority regarded the concluding direction of section 25 "to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other," as either impracticable[23] or inconsistent with a divorce law based on irretrievable breakdown.[24]

12. As against the majority view (that "it is undesirable to have a statutory provision on the books which everyone agrees is unworkable")[25] those who favoured the present law

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22 Lord Scarman, Association of County Court and District Registrars, the Methodist Church, the Society of Conservative Lawyers, and a "self-help" group called Fair Family Division. Additionally however there were a couple more commentators who possibly favoured the present law:e.g. Ormrod L.J. who favours the retention of a wide discretion and thinks the concluding direction of s.25 is overidealistic, but concludes that it "has done no harm because from the outset it was recognised that it was no more than an unattainable ideal". See also the Divorce Counselling and Advisory Service who say that the "court must be left with the discretion that it now has" but who do not comment explicity on the general applicability of the concluding direction of s.25.

23 e.g. EOC, WNC, MU, NBCW, the Senate, the C of E, FD Judges, Lay Observer, Family Welfare Association (FWA), NMGC, Justices' Clerks' Society. See also the Lord Chancellor's views at p.8 of his address to the Family Bar Association. A number of others e.g. One Parent Families regarded the approach as so fundamentally mistaken as not even to require specific comment.

24 e.g. EOC and CJD. Cf. Ormrod LJ who says that s.25 is "the essential counterpart to no fault divorce".

25 FD Judges, para. 3.

suggested that it was because marriage involved "irreversible effects and disadvantages" that the possibility of lifelong financial support after divorce should be retained. Lord Scarman suggested that the concluding words of section 25 were of value if they applied to some cases, and "there are very many cases to which they are applicable".[26] The Association of County Court and District Registrars thought that even if the statutory objective could only be attained in "exceptional cases, nevertheless it is a goal which should be pursued in all cases and achieved where it can. The attempt to reach the objective is generally felt as the most important duty laid on registrars by s.25 and to be the guiding light by which the whole section is to be understood."

13. Not all of those who wished to see section 25 retained however wished to see it unaltered. In particular the Registrars suggested that the concluding direction might be altered to ensure that a party seeking financial provision should not be put in a <u>better</u> position than they had been in at the time of "dissolution".[27] Conversely not all of those who wished to see the overriding principle of section 25 dropped, wanted to see it disappear altogether as a consideration for the court. The Senate, the Church of England Board for Social Responsibility and the National Board of Catholic Women all suggested that the possibility of putting the parties in the position in which they would have been had they remained married should be added to the guidelines presently contained in section 25.[28]

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26 cf. Dunn LJ's comment which says that the concluding direction is impracticable in "all but a small minority of cases."

27 Invariably of course it is the date of separation that is more important in terms of financial impact.

28 See further para. 15, below. See also the present s.25(1)(c).

14. The Scots Report makes only passing mention of a section 25 type approach, partly no doubt because "no one has ever married under Scots law in the legally justified expectation that he or she would be supported for life even after divorce."[29] They suggest that a direction to seek to preserve the economic position of divorced spouses implies a continuing obligation of support and that this is inconsistent with the idea that divorce should terminate a marriage.[30] In practice, they say, it is capable of causing injustice. Additionally they criticise section 25 for internal inconsistency, on the basis that its concluding direction is undermined by the list of factors to which the court also has to have regard - particularly those that emphasise the duration of the marriage and the contributions made by the parties.[31]

(3) Repeal of the direction to the court to seek to put the parties in the financial position in which they would have been had the marriage not broken down : a discretionary approach.

15. There was considerable support[32] amongst our professional and academic commentators for abandoning the

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29 Para. 3.12. Prior to 1977 of course "people may have married... in the legally justified expectation that if they did not commit any matrimonial offence, and if the law was not changed, they could not be divorced against their will, but that is a different matter" : ibid.

30 Para. 3.43.

31 Para. 3.47

32 From NCW, WNC, Married Women's Association, F.D. Judges, Lay Observer, Tom Arnold M.P., Dunn L.J., The Senate, the C of E, the Bristol Courts Scheme and (?) the Bristol Registrars and Ormrod L.J.

concluding direction of section 25,[33] thus leaving financial settlements on divorce largely in the hands of the judiciary.[34] In favour of such an approach it was said that "Every case is different and requires a tailor-made solution"[35] and that the advantages of flexibility greatly outweigh the

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33 The Family Division Judges suggested that the simple substitution of the concluding direction of section 25 by a formula such as "to make such orders as may be reasonable" would probably not result in a major change of policy. This is because the possibility of lifelong support is also contemplated in section 28(1) of the Act. The majority of them felt that any change of policy in the law should be worked out by the courts in the exercise of their suggested discretion "to make such orders as may be reasonable." Cf. the Lord Chancellor's remark that "The answer must be that the statute governs, but the case law must illustrate and guide."

34 Some commentators also suggested additional modifications. See further below.

35 Dunn L.J. See also Ormrod LJ's recent decision in Sharpe v. Sharpe, The Times, 17 Feb. 1981 where his Lordship observed "it was often said that the Court of Appeal was inconsistent when considering family finances. Each family was unique, and often decisions decided on different facts or even similar facts, were not always helpful ... The judge had to go through the exercise of section 25. There was no need to look at the reported cases". The NMGC said "We should be surprised if the Law Commission managed to find any escape from a system that gave the courts a broad discretion to do what was appropriate in the light of the parties' needs and circumstances".

possibility of uncertainty. This group of commentators were divided however on whether the present "guidelines" were adequate; and some of the Family Division Judges even doubted whether they were needed at all. In regard to the latter point the division of views amongst the judiciary is perhaps particularly illuminating, with a number of Family Division Judges, on the one hand, advocating a complete discretion "to make such orders as may be reasonable",[36] and the Bristol registrars[37] on the other suggesting that "fresh guidance" was necessary in the light of changes in attitudes and opinions since Wachtel,[38] "especially as there is, at present, little dialogue between Registrars and the higher courts regarding these matters." Others too suggested that the present guidelines might be altered. Those Family Division Judges who wanted guidelines suggested that they might include:

" (a) in every case a division (not necessarily equal) of property acquired and used during the marriage;

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36 They were not however unanimous on this and Dunn L.J. in particular said that the guidelines were very helpful and Ormrod L.J. implies this.

37 See also the Association of District and County Court Registrars' views at para. 16, below.

38 [1973] Fam. 72.

(b) support for a custodian of children in order to compensate for loss of earning power by reason of custodianship and to include in appropriate cases support after the termination of the custody where the custodian's financial power has been adversely affected because of it;

(c) support for relief of need where necessary;

(d) support for a short period for rehabilitation where reasonable and necessary;

(e) in the case of a long marriage, or where there are other special circumstances which justify it, support for life."[39]

Additionally, whilst joining with two other groups[40] in the suggestion that section 25's present overriding principle would better appear as a guideline, the Senate[41] also suggest that the present guidelines should be amended to give more prominence to the concepts of the "clean break" and "rehabilitation". The present emphasis (it was said) on the parties' earning capacity was insufficient.[42]

16. Against this policy it was forcefully argued by the Association of County Court and District Registrars that it is much easier to find a just solution if there is a guiding principle: "to remove the guiding light is to allow flexibility to go mad; the problems of inconsistency are bad enough as it

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39 These guidelines bear some resemblance to the "five principles" proposed by the Scots, with the exception that the Family Division judges do not expressely mention the Scots principle of "fair recognition of advantages and disadvantages."

40 C of E and NBCW. See para. 13 , above. See also the present s.25(1)(c).

41 Paras. 12 and 13.

42 See also the comments of the WNC, the NMGC (who suggested that future guidelines should offer positive guidance, but leave plenty of scope where their aim cannot be achieved), and the Bristol Courts Family Conciliation Service who also suggested that more emphasis should be given in the guidelines to rehabilitation and the "clean break." The Law Society are also expected to make recommendations along these lines. The Lay Observer suggests that more emphasis might be given to the "clean break" principle.

is."[43] Moreover, despite what might be called the "establishment" enthusiasm for a judicial discretion of some kind, the Scottish Law Commission's criticism of an untrammelled discretion with "no ascertainable objectives", provides an interesting contrast.[44] The arguments that they use for not retaining their present law are largely the same as those which we canvassed in paragraph 69 of the Issues Paper; but they conclude:[45]

" We accept that the courts must have a large measure of discretion to enable them to deal with the great variety of cases coming before them. We also accept that an inappropriate or too limited objective could be worse than none at all. We are convinced, however, that the disadvantages of the present system are such that an attempt must be made to provide some more specific guidance to the courts, the legal profession and to the public on the purpose or purposes of financial provision on divorce, and on the principles to be applied and the factors to be taken into consideration therewith."

For the same reasons they also specifically reject a "section 25 without its concluding direction" type of approach.[46] Nevertheless, whilst it is clear that there is a great deal of difference between, on the one hand, an unfettered judicial discretion (with no guidelines) and, on the other, the Scots' recommendations, it is less clear that there would be that much difference between section 25 less its concluding direction but plus, perhaps, revised guidelines, and the recommended approach in Scotland. Presumably much would depend upon the terms in which any revised guidelines were couched.

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43 See also the BOC'S comments. Parsdoxically however the Registrars seemed to welcome the court's decision in Sharpe v. Sharpe. The Times, 17 February 1981 (see n.35, above).

44 At paras. 3.36 to 3.39.

45 At para. 3.39.

46 At para. 3.48.

(4) A new guiding principle

17. For those who felt that the present law was unsatisfactory and that a judicial discretion would be too uncertain a solution the Issues Paper raised the possibility of a new "guiding principle" to replace that contained in the "tailpiece" of section 25. Those suggested were primarily the relief of need, rehabilitation of the economically weaker spouse, a "clean break", restoration of the parties to their pre-marital positions, or a combination of principles.[47] Not surprisingly there was little support for any single principle taken entirely on its own[48] and to a large extent commentators agreed with the various individual criticisms that were suggested in the Issues Paper.[49] Other particular criticisms were: in relation to the clean break, that it was not by itself a "model" - a principle was still necessary to regulate division, that it would work unfairly in relation to parties who were bad savers, and that it could cause injustice where the parties owned a business; in relation to the rehabilitation approach, that it did not cater sufficiently for the marriage where one party had gained economically from the efforts of the other during the marriage but the other had not actually "suffered"; and in relation to the "needs" approach that it could work unfairly where there was no "need", but where one party had nevertheless "lost out" economically through marriage. A number of commentators also mentioned the importance of giving due weight to a party's "contributions" to the economic

47 It was suggested in the Issues Paper that the other possibility canvassed, some sort of statutory formula, was not in itself a "principle": para. 83. Even however as a means of implementing a particular principle this approach attracted almost no support (see however the EOC); most of those who actually commented on it found it too complicated and inflexible an idea.

48 And there was absolutely no support for the idea of restoring as a general rule the parties to their pre-marital positions. In most cases this was viewed as unrealistic and impossible. In cases where it was possible, for instance in the case of a very short, childless marriage, the Association of District and County Court Registrars considered that it could already be achieved under the present law

49 The reason of course why the "models" were presented as separate principles was in order to highlight the problems that were involved in a change in the law.

well-being of the family.[50] Nevertheless there was considerable support for a law that reflected a combination of models, and it is of course this option, embodied in their "five principles" justifying financial relief that the Scots have adopted in their Report (see paras. 3.54 and 3.60 et seq.,). From the strictly analytical point of view this sort of preference does give rise to certain difficulties. This is because if the preferred combination of models or principles contains, as does the Scots', any room for manoevre for the courts it becomes to some extent subjective. Consequently, the difference between, on the one hand, a combination of principles tempered by discretion and, on the other, a discretion governed by specific guidelines is somewhat blurred.[51]

18. There were perhaps two main reasons why commentators thought that a law governed by a single principle would be unsatisfactory and would work injustice in individual cases: a) children, and b) to a lesser extent, the need to have a principle or principles regulating the distribution of property acquired during a marriage.

a) Children

The Issues Paper was often[52] criticised[53] for not devoting more attention to the inevitable inter-relationship of periodical payments for spouses and periodical payments for their children. Whilst many respected the Commission's intentions in trying to confine public discussion to the issues on which it thought that there was real controversy, a number of commentators felt

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50 This seems an important omission, although it is of course an element of the present law by virtue of s.25(1)(f). It was thought to be a significant consideration by a number of commentators (e.g. the Registrars, Bailey, Metcalf, and the Townswomen) and is given specific weight in the Scots second "principle" justifying financial provision, "fair recognition of contributions and disadvantages."(The Scots had rejected it however as a predominant approach feeling that the principle of equal sharing was a better starting point.)

51 See also para. 16 above.

52 See also para. 6(i) of the Issues Paper.

53 e.g. By One Parent Families, Gingerbread, O'Donovan, Perlman, Metcalf, etc.

that it was nevertheless essentially the presence of children that made marriage different from other relationships; and that therefore the financial consequences of divorce should depend primarily upon whether or not there were children of the marriage. The questions raised by the presence of such children, it was felt, cut across simplistic approaches based solely on one principle.[54]

b) Property

The Issues Paper did not in terms discuss whether or not debate should be confined solely to the question of the possibility of continuing support after divorce or whether the "models" discussed were equally applicable to the distribution of property acquired by the parties during their marriage,[55] although it was not intended to draw any distinction of this kind. A number of commentators[56] did however suggest that where there was property available for distribution different principles might be called for from those required in relation to income; and it is significant that this is also a consistent theme of the Scots' Report.[57]

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54 See e.g. the comments of M.U. A further group also questioned whether our assumption that the present law for children on the financial consequences of divorce was satisfactory was justified. Children (it was said e.g. by One Parent Families) are not being adequately provided for in practice. See further paras. 35 and 37, below.

55 See e.g. paras. 70-72. The "needs" approach might often work injustice in the case of property acquired by both parties during their marriage but held in the name of only one.

56 e.g. Clive and Bailey. The latter, for instance, suggested that maintenance should be "prospective" and should look at future needs, whereas property distribution should be "retrospective" and should look at the former economic partnership of the parties, cf. ss. 72 and 79 of the Australian Family Law Act 1975.

57 See paras. 3.41 et seq.

19. Despite the fact that most of those who favoured the idea of a law governed by a particular principle advocated a variety of "combinations of models", some more or less common themes can be extracted if one looks separately at the possible situations in which divorce might occur.

(i) Marriages with dependent children

20. There was no disagreement with the fundamental principle that after a divorce both parents should be equally responsible for supporting the children of their family until such children are no longer dependent; and that in the normal case, where only one parent[58] has the day-to-day care of the children, that parent too should be supported to the extent that the need to care for the children prevents him or her from providing for his or herself. To this extent a "needs" approach was generally approved. However opinions differed on certain key issues, particularly on whether this was the only type of continuing support that should be available, whether it should be seen primarily as the child's support, when dependency ceased and the role which should be undertaken by the State.[59]

21. As will be mentioned later, many commentators, not just those who advocated an approach to the financial consequences of divorce based on a particular "principle", strongly urged that the whole process of divorce should be more "child centred"; and, in keeping with this, a number[60] suggested that provision for the children and their custodian parent should be the primary type of continuing financial obligation on divorce.[61] As One Parent Families put it, it would be all and

58 A number of commentators emphasised that this should not necessarily be the wife: Perlman, National Council for the Divorced and Separated, CJD: see further para. 33, below.

59 See further para. 35, below for commentator's views on the role of the State.

60 See further para. 33, below. See esp. One Parent Families, NAPO, O'Donovan, CJD, Perlman, Metcalf.

61 The Scots rejected the possibility that provision for the children should be the only objective on divorce: para. 3.55.

and possibly more than most families could afford anyhow. It was also suggested by a few commentators that the custodian parent's claim for support should be treated as a part of the child's claim, rather than as an independent right.[62]

22. Two further matters on which the consultation was unresolved in relation to parents with dependent children were the date on which dependency "ceased" and the question of what should be done with any matrimonial property, in particular of course, the matrimonial home, during the period of the children's dependency. Some commentators suggested that children ceased to be dependent when they went to school[63], others when they left.[64] Others still opted for an age when the youngest child was midway between those two ages.[65] Little thought seems to have been given to the question of school holidays. As was noted above[66] there was not a great deal of discussion of the distribution of matrimonial property where there were children. A number of commentators favoured a Mesher[67] type order in respect of the matrimonial home, but the Campaign for Justice in Divorce[68] were anxious that this should be restricted only to situations where it was an absolute necessity, and even then hedged about by provisions for compensation of the "excluded" party when the house was eventually sold.

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62 See e.g. O'Donovan and CJD. There is of course some evidence to suggest that spouses are more ready to pay maintenance for their children than for the other spouse: see further below para. 37(c).

63 CJD for instance.

64 See e.g. the Scots Report, paras. 3.104 and 3.107.

65 E.g. Metcalf who suggested 11. The Mothers' Union suggested that all orders to spouses should cease after 5 years and that they should then have to be re-examined on the basis of "need".

66 e.g. Metcalf (but cf. One Parent Families) Deech.

67 (1973)[1980] 1 All E.R. 126. But cf. now Rushton v. Rushton (1978) 1 F.L.R. 195 and Carson v. Carson The Times 7 July 1981 which indicate the possible disadvantages of this type of approach (see further n. 131 below).

68 They were divided on this.

(ii) Marriages with no children

23. In the light of the general conclusion amongst the "professional and academic" commentators that the concluding direction of section 25 was no longer appropriate and further, in the light of most commentators' anxiety that children should be seen as the prime consideration on divorce, it is perhaps not surprising that there was little sympathy amongst those who wanted a "guiding principle" for the divorced spouse who had had no children. One[69] suggested that in such cases a division of the matrimonial property was the only appropriate way to resolve the parties' financial affairs on divorce. Others however suggested that even if there had been no children there could still be circumstances where it would be appropriate to order one spouse to make payments to the other for the relief of a marriage-related need,[70] or for a short period by way of rehabilitation.[71] This might particularly be the case where there was no matrimonial property to divide.

(iii) Marriages where the children are no longer dependent

24. Here again commentators who wanted a "guiding principle" were divided. There were four main approaches: a "clean break", rehabilitation, the relief of need, or a combination of a number of principles. Few thought that all cases could be covered by a division of property alone[72] and it was

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69 Metcalf and ? Bennion. See also Douglas, "The Clean Break on Divorce" (1981) Fam. Law 42.

70 The way in which many of the comments have been phrased has often made it difficult to extract a separate view towards the childless couple, particularly the childless couple who divorce after a long marriage. Nevertheless many commentators' general view of the "needs" and "rehabilitative" approaches seems equally applicable to childless couples as to the couples who have children who are no longer dependent on them, e.g. Mothers' Union.

71 e.g. O'Donovan, EOC (where she is young and childless).

72 But see Bennion's comment.

generally recognised that the spouse who had forgone paid employment in order to care for the children of the family should be "compensated" in some way. Some favoured a rehabilitative payment or allowance (or proof of need)[73] which would be strictly limited in terms of years, irrespective of the recipient's requirements after it expired.[74] Others thought that there should be an obligation to support a spouse who could establish "need",[75] but it was significant that on the who those who favoured this approach emphasised that the need should be marriage-related[76] and should be confined to cases of serious economic hardship.[77] To do otherwise, it was felt, would only effectively continue the present law because most women would be able to show that they had been "supported" to a greater or lesser extent during their marriages and that accordingly they were in "need" as a result of the breakdown. Throughout the comments of the professional and academic group there was a general appreciation of the economic difficulties faced by all women,[78] and it was partly for this reason that many felt that a clean break or a rehabilitative

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73 Deech

74 e.g. CJD suggested three years, the start of which could be postponed if the children were under school age. Deech suggested "a few years". The M.U. suggested five years but do seem to envisage that payment might continue beyond then if need is established. O'Donovan.

75 e.g. Perlman, EOC.

76 e.g. Bailey, Nat. Co. for Div. and Sep. MU (p.2), cf. Australian Family Law Act 1975, s.72 and New Zealand Family Proceedings Act 1980. Cf. the Scots' approach to grave economic hardship.

77 This might of course mean a severe drop in living standards for a spouse who had been caring for the children of the family if the children's maintenance had been calculated by reference to the family's former standard of living.

78 See e.g. paras. 47-57 of the Issues Paper. This was also shared by those who favoured giving the court a "discretion" accompanied by guidelines. It is interesting that one group of Registrars said that in the face of the economic recession they are less often able to take into account under s.25(1)(a) wives' income and earning capacity.

award alone would sometimes be inadequate. Nevertheless there was also a feeling amongst some commentators, expressed for instance by Mrs. Deech, that "The working woman's hardships are caused by all men and it is not fair to penalise the divorced man for the faults of male society as a whole".[79]

25. In the final analysis it would seem that most of the commentators who favoured an approach based on a "principle" felt that where there were no longer dependent children there would be too many disadvantages in a single approach and that the court should have a degree of freedom to select the right principle, or combination of principles, to suit the needs of the particular case.[80]

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79 See also Metcalf, "Divorce and the Right to Life-long Maintenance" (1981) N.L.J. 669, 671 and para. 3.31 of the Scottish Law Commission's Report on Aliment and Financial Provision, "In so far as employment difficulties of women or men flow from marriage or the need to care for children of a marriage they are relevant to financial provision on divorce, and we take them into account later in the appropriate contexts. In so far as they do not, they are in our view irrelevant to the policy on financial provision. The fact that a person belongs to a section of the population which is at a disadvantage in the labour market is not by itself a reason to impose a financial obligation on someone with whom he was formerly connected."

80 e.g. Deech (who emphasised the need to ensure that the order was fair to the payer. See also the New Zealand legislation of 1980) FWA, Nat. Assn. of Townswomen's Guilds, Justices' Clerks, Nat. Fed. of WIs, M.U., EOC, NCDC and recommendation 31(b) of the Scots Report ("the order is reasonable having regard to the resources of the parties").

(5) Conduct

26. To a certain extent the comments that we received on whether conduct should be an element in the financial consequences of divorce, and if so to what extent, cut across commentators' preferences for the present law or a discretion or a guiding principle. The predominant opinion seems to be that the balance struck by the present law is the correct one, although it was suggested by a number of people that Wachtel[81] has led to misunderstandings.[82] As anticipated in the Issues Paper, comment fell into three main categories.

(i) Conduct should be irrelevant

27. In addition to the obvious argument that if conduct is irrelevant in the divorce it should also be irrelevant to the consequences of the divorce,[83] a small number of commentators suggested that if, as they thought, financial provision was to be entirely based on the needs of the children of the family, questions of the parents' conduct should be ignored.[84]

(ii) Conduct should be an essential element in determining elligibility for financial provision

28. For a variety of reasons a number of commentators wanted to see conduct play an essential role in financial proceedings.[85] The most common justifications were that it

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81 [1973] Fam. 72.

82 This would seem to accord with the Lord Chancellor's suggestion made in his speech to the Family Bar Association, that the Wachtel principle should be reviewed: p.10.

83 e.g. Bennion. The Nat. Co. for the Divorced and Separated pointed out that conduct was still relevant to divorce and that the concept of irretrievabie breakdown was undermined by the fact that a petitioner could not offer his own conduct.

84 e.g. CJD, FWA, Metcalf and O'Donovan.

85 viz. Soc. of Conserv. Lawyers, Deech, Bailey, Perlman, Nat. Co. for the Divorced and Separated and the Nat. Union of Townswomen's Guilds.

was most people's expectation that bad conduct should not be "rewarded"[86] and that an inquest into past conduct had a "cathartic" effect on the parties and prevented future bitterness.[87] Restoring "conduct" was also seen by two commentators as a necessary part of "tightening up" the divorce laws and of generally making sure that divorce was not available on flimsy or contrived evidence.[88] The various objections to holding an inquest into the parties' conduct in every single case were not really tackled, although the Society of Conservative Lawyers did say that they thought that whilst it should be a consideration in all cases, it should only be in exceptional cases that the quantum should be affected by conduct.

(iii) Conduct should only be a factor in exceptional circumstances

29. The majority of those who commented on conduct seemed to agree that the balance at present struck in section 25 was the right one.[89] It was widely felt, as paragraph 89 of the

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86 e.g. Perlman and Soc. of Conserv. Lawyers.

87 Deech and Nat. Co. for Divorced and Separated.

88 Nat. Co. for Divorced and Separated and Soc. of Conserv. Lawyers, p.7.

89 e.g. FD Judges, Dunn L.J., Ormrod, L.J., Senate, Bristol Courts Fam. Concil. Service, EOC, WHC, Lay Observer, Bristol Registrars, NMGC, M.U. The approach adopted by the Scottish Law Commission in their Report on Aliment and Financial Provision is more refined than that adopted at present in this country, but it too would (unless the conduct has affected the economic basis of the claim) result in conduct being relevant only in very exceptional circumstances ("where it would be manifestly inequitable to ignore it") and only in relation to two of the "principles" which can be relied on for continuing support (viz. in relation to the principle of "fair provision for adjustment to independence", and in relation to that "for the relief of grave financial hardship"). In these two cases the court would be looking to the "future" and therefore might be justified in taking account of exceptional past conduct. Under the other principles the court would be concerned solely with ascertaining an "accrued entitlement" (or providing for the children of the family) and accordingly conduct should be irrelevant.

Issues Paper had suggested, that any other solution would be either impracticable or unjust. Nevertheless it was felt by a number of commentators[90] that although the principle behind the present law was the right one, Wachtel and many of the cases since Wachtel had "deprived the law of its meaning". It was in their opinion therefore desirable to "reformulate" the present law to make it quite clear that conduct should be a factor where it can be quite clearly shown to be the the cause of the breakdown. The judges of the Family Division[91] observed that "if sensibly applied" Wachtel should cause no difficulty, but acknowledged that there is at present "a misunderstanding of Wachtel by the lawyers, who advise their clients that Wachtel virtually rules out any of issue of conduct in financial proceedings". They suggest that "if one could get away from the words "obvious and gross" and stress the aspect of repugnancy to justice to disregard conduct in a particular case, some of the dissatisfaction might be removed".[92]

30. Before leaving the question of conduct, special mention should perhaps be made of the Registrars' views, because they were divided on this issue.[93] They point to the continuing

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90 e.g. MU., NCW, Nat. Bd. of Cath. W.

91 Whose remarks are made on the assumption that the law will continue to provide for "life-long support": para.5. They particularly approved the court's decision in Robinson v. Robinson (19 December 1973, unreported) where Scarman LJ (as he then was) observed "The statute tells the court that conduct is relevant. The Court of Appeal in Wachtel has given guidance as to the weight, relevance and value to be attached to the conduct that the statute has said is relevant".

92 Ormrod LJ also suggested that there was "a place for bad conduct after separation". See also New Zealand Family Proceedings Act 1980 which mentions the concept of "repugnancy to justice". The NMGC felt that if the court was encouraged by guidelines in the direction of a "clean break" or rehabilitation, conduct would less important anyhow.

93 See pages 6 and 10 of their comments.

use of the "fault based" grounds for divorce[94] and suggest that in the majority of cases there is no difficulty in ascertaining blame. A majority of registrars, the Association says, feel that "it would be unjust, and be felt by the litigants to be unfair to confine the cases where conduct has any bearing on financial provision to those where the misconduct is "gross and obvious", since those words impose a harder test than the facts seem to call for ... There is a general feeling that conduct is relevant and a large number of our members admit to taking it into account; some are convinced that it can be very unjust to ignore it".

c) Further points raised by the professional and academic commentators

31. In the Issues Paper we set out to "focus attention on what we believe to be the fundamental problems at issue".[95] Some of our commentators, notably One Parent Families and Jenny Levin, felt that we failed entirely in this objective. Others thought that there were also other problems, some fundamental some not so, that we had failed to deal with or that we had given inadequate attention to. Before attempting to draw any conclusions on the problems that we did raise, it is therefore necessary to look at the other issues that were drawn to our attention. They fall into three main categories:

a) The need for comprehensive reform of the divorce process.

b) The need for improved State support.

and c) Specific difficulties and detailed improvements.

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94 In 1979 of 162,867 petitions for divorce 37% were based on "behaviour", and 27% on adultery. This compares with 24% based on two years separation: Judicial Statistics 1979, Cmnd.7677, Table D8(b); Maidment, "Matrimonial Statistics 1979" (1980) N.L.J. 1168.

95 Para. 5.

(1) The need for comprehensive reform of the divorce process

32. Although the idea of a Royal Commission only appeared in two submissions,[96] the suggestion that the whole law of divorce was in need of reform was a common one, either expressly, or implicitly in the observation made by a number of commentators that the present law had been allowed to develop haphazardly and without regard to any particular principle.[97]

33. Another aspect of the call for comprehensive reform was the priority, already mentioned,[98] that many of our commentators[99] thought should be given in all matters to the welfare of any children of a divorcing couple. This concern cut right across commentators' views on the question of financial support between former spouses. It emerged in two particular areas - custody[100] and financial support. In relation to the former, alarm was expressed from a number of quarters that the courts too often assumed that it was in a child's best interests to be in his mother's custody.[101] In relation to the latter, groups as diverse as the Society of Conservative Lawyers on the one hand and One Parent Families on the other suggested that, although in principle the law treats children generously in financial affairs, in practice too much attention is focussed on the needs of their parents. One Parent Families pointed out that in questions of maintenance, the children's interests were not, even in

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96 See para. 4, above. In effect this is also the primary requirement of Abse's Motion. See also M.U.

97 See in particular CJD's comments on "no fault divorce". See also the M.U.

98 See paras. 18 and 21 above.

99 e.g. NCW, MU, Nat. Bd. of Cath. W., OPF, Gingerbread.

100 See the terms of Abse's motion which calls for a review of existing practice and procedures relating to the custody of the children of the parties, with a view to ensuring that greater emphasis is in future placed upon their interests and welfare.

101 E.g. NAPO, CJD, Perlman. The Lord Chancellor's views on this question appear at pp. 15-16 of his address.

principle, "paramount"[102], and that in practice the courts usually consider a wife's maintenance before considering the child's.[103] The guidelines in section 25(2) were "vague" and orders for children were often wholly unrelated to the real cost of providing for a child.[104]

34. A further aspect of the call for comprehensive reform which has, perhaps, a particular bearing on the financial settlement on divorce, was the widely held view that the present divorce process was too "antagonistic". There was considerable support for conciliation schemes[105] and a number of comments stressed the need for better information and education about divorce and its financial consequences.[106] Family courts were also mentioned. Additionally the Bristol Registrars felt that one of the main reasons for the current pressure for reform was that "the great majority of decisions are made behind closed doors", leaving the parties often disgruntled. Something, they suggest, could be gained if reports could be permitted preserving anonymity but disclosing the facts, the decision and the reasons why it had been reached.[107]

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102 Cf. para. 6(i) of the Issues Paper.

103 Being given the house either outright, or by deferred trust, could also be a "disadvantage": One Parent Families.

104 The Bristol Registrars suggested index-linking.

105 e.g. From NCW, Nat. Bd. of Cath. W., Lay Obs., Dunn LJ, Assoc. of Cty. Ct. and District Registrars, FWA and NMGC. See also item (b) of Abse's Motion. It should perhaps be borne in mind though that the chief success of conciliation schemes seems to have been in relation to custody and access rather than in relation to finance: see e.g. Gwynn Davis, Research to Monitor the Bristol Courts Family Conciliation Service (1980) pp.9 et seq. and 124 et seq.

106 e.g. MU, Assoc. of Cty. Ct. and Dist. Registrers, NBCW. The NCW and NBCW also wanted a review of the "special procedure".

107 They also question the principle of "rehearings" - para. 7.

(2) The need for improved State support

35. One of the main reasons expressed in the Issues Paper[108] for our declining to undertake a major review of the financial consequences of divorce was the possible impact on public expenditure of any shift away from private support. The general tenor of our consultation however made it essential for commentators to advert to this question. On one level, as one might have expected, the whole question of private support was seen as something of a "middle class" irrelevance. One Parent Families, for instance, pointed out that over 60% of one parent families headed by a woman were already dependent on state benefits as their main source of income.[109] (In only 6%, apparently, was maintenance the main source). Court awards of maintenance moreover bore little relation to reality and tended to decrease with time. What was needed, it was argued, was a comprehensive One Parent Family Allowance[110] which would be non contributory, non means tested and which would remove one parent families altogether from the supplementary benefits register. Such action would ensure the children of broken marriages an adequate standard of living and would relieve the custodial parent of the need to constantly seek the variation of an inadequate order (The DHSS would instead recover contributions from the liable relative). Only a small number of commentators went this far. Many however, simply by making the recommendations which they did for limiting the

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108 At para. 3.

109 Hansard (HC) 29 Oct. 1980, vol. 991, cols. 171-2. See also the EOC's evidence to us, para. 2.4 et seq. For this reason Douglas ("The Clean Break on Divorce" (1981) Fam. Law 42) argues that more use should be made of the "clean break" in low income divorces.

110 See also NAPO, Gingerbread. The EOC note that "it is perhaps unrealistic in the present economic climate to expect to see the Finer proposals fully implemented, but it would appear to be equally unrealistic to see the state as having no part in the broad implications of the financial consequences of divorce", para. 5.8.6.

circumstances in which a continuing obligation to support a spouse after divorce should exist, assumed that the State would have to bear the extra burden of supporting these whose "needs", for instance, were not strictly attributable to their marriage[111] (or who were unprepared to "rehabilitate" themselves). A number[112] argued that any increased public expenditure would in all probability be offset by the savings in legal aid arising out of a smaller number of disputed financial proceedings.[113] It was also argued[114] that because of the generally low level of maintenance orders and the frequency of default, many of those who have an order in their favour are still forced to depend on supplementary benefits in any case.[115] Consequently it would make little difference if such orders were never made at all.[116]

36. A number of commentators[117] also suggested that the ultimate success of a new approach to the financial consequences of divorce would depend on improving women's prospects of employment, guaranteeing their equal treatment in relation to tax and welfare benefits and in greatly expanding child care facilities. It goes without saying also that many of the means by which commentators thought that the general divorce and financial relief procedures might be

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111 e.g. EOC, CJD, Harper, FWA, but cf. the Townswomen who thought that extra cost should not fall on the State.

112 e.g. One Parent Families, p.7 and CJD who in their preliminary evidence to the Commission made some attempt at costing.

113 And enforcement proceedings: Registrars.

114 e.g. by EOC.

115 NAPO in particular criticise cases in their experience of divorced husbands on SB being ordered to make payments to their wives, also on SB, largely because of DHSS pressure on the wife to bring proceedings.

116 The latter arguments figure prominently in the Scottish Law Commission's estimate that their recommendations will have a fairly minimal impact on public expenditure: See para. 1.14 of their Report.

117 e.g. EOC, OPF, O'Donovan, Levin, Groves.

improved would also involve a commitment to increased public expenditure.[118]

(3) Specific difficulties and detailed improvements

37. In addition to the views expressed on "fundamental issues" a number of commentators raised specific difficulties which would obviously be looked at in the context of a major review, but which also might possibly be dealt with on a more ad hoc basis. The chief of these were:

a) The relevance of the second wife's income

This was recognised as a particular problem in the Issues Paper[119] and a number of consultees[120] felt that the law should be clarified to ensure that a second wife or mistress's income was not used to support a first wife. Since publication two recent cases, Brown v. Brown and Macey v. Macey,[121] might have gone some way towards doing this, the court holding in the second case that it was improper to make orders that effectively have to be paid out of the second wife's or mistress's income or capital. However the court went on to hold that "the presence of a mistress or a second wife might be relevant in two ways. The husband might be under a legal or moral obligation to support her, which would have some relevance on his ability to support his first wife and children, or the husband might derive some benefit from his mistress's income, which meant that a greater part of his income was available to pay maintenance to his first wife and children". A similar compromise is reflected in the Scots

118 One of the tasks envisaged for a Royal Commission by the Society of Conservative Lawyers was to consider how the State should take a more active part in fostering family life and providing a network of family support.

119 See para. 26.

120 e.g. MU., Assn. of Dist. and Cty. Ct. Registrars (p.3.) CJD and Perlman.

121 Reported in The Times on 14 July 1981.

report[122] and it is perhaps difficult to see how far their proposals would, if implemented in this country differ from the present law.

b) The effect of the payee's cohabitation[123]

A number of commentators[124] found it repugnant that the payee's cohabitation, particularly where it was in the former matrimonial home, was not more regularly taken into account in varying maintenance payments or even in bringing into operation a deferred trust for sale on the home. The Association of County Court and District Registrars[125] suggested that some of their members would in any case take account of such cohabitation under the guise of "conduct". They also wonder whether more use might not be made of "conditional property adjustment orders" to deal with unforeseen consequences, including a wife's remarriage,[126] but they admit that this possibility might be unattractive to lenders. It is perhaps interesting that the Scots specifically recommend that the payee's cohabitation should not automatically affect a periodical allowance.[127]

c) Technical difficulties in making orders in favour of children

A number of bodies commented that a man was more likely to comply with an order made in favour of his children than he was if it was expressed to be for his ex-wife.[128] The

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122 At para. 3.189. They do specifically take account of "moral" obligations in determining the payer's ability to pay however.

123 See para. 25 and n. 78 of the Issues Paper.

124 e.g. C of E Bd. of Soc. Resp., Arnold M.P., Perlman, NCDS.

125 At pp. 2 and 11.

126 Cf. Wales v. Wadham [1977] 1 W.L.R. 199. It has also been suggested recently in the Gazette that where property adjustment is part of a "package", it should be conditional on the receipt of any maintenance payments ordered.

127 para. 3.127.

128 e.g. Senate, Registrars.

Association of County Court and District Registrars suggested therefore that it would be a good thing if more use could be made of the court's powers to provide for children by way of lump sum, property adjustment or settlement. However the present authorities tend to disapprove of this approach.[129]

d) The Law Society's Charge

The present exemption limit on the Law Society's charge is £2,500. Ormrod LJ suggested that this was far to low[130] and operated unfairly against recipients of lump sum orders (as against property adjustment orders where it would usually be postponed). He suggested that it should be increased tenfold.[131]

e) Dismissal of periodical payments claims without the claimant's consent

The difficulties occasioned by the conflicting decisions

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129 Chamberlain v. Chamberlain [1974] 1 All E.R33: Alonso v. Alonso [1974] 118 S.J. 660; Lilford v. Glynn [1979] 1 All E.R. 441; Draskovic v. Draskovic, The Times 18 Dec. 1980.

130 See also NCW.

131 He also raised the question of how capital might be found for the departing spouse. This was a problem that taxed a number of others (e.g. CJD) but is arguably one for the court in the individual circumstances. The traditional method of providing for the departing spouse by means of a deferred trust has of course recently been discussed in Carson v. Carson The Times, 7 July 1981. In that case the court refused to vary a Mesher type settlement of the matrimonial home on the grounds that s.31 of the MCA prevented this. Ormrod LJ held that "he had great sympathy with the wife who had suffered and would suffer. The case was a good example of the chickens unleashed by the Mesher orders that were so fashionable in the mid 1970s, coming home to roost. It was not for some time that the dangers of that type of order came to be apparent. In 8 or 9 years' time the wife would be obliged to sell the matrimonial home, and with only half the proceeds of sale she would be in a most unfavourable position to rehouse herself."

in Minton[132] and Dunford[133] on the one hand and Carpenter[134] and Carter[135] on the other, and arising now out of Dipper[136] are well documented.[137] The President commented when sending the views of the Family Division Judges that "the general view of the Judges is that there should be a power to dismiss a periodical payments application by a spouse without any consent of that spouse and I should be most grateful if consideration could be given to that matter in a suitable context".

f) Delays in obtaining a final order and in enforcement

A number of groups[138] thought that it was unsatisfactory that financial matters were not finally disposed of until sometimes many years after the divorce itself, and they suggested that no decree absolute should be granted until all ancillary matters had been settled. Questions were also raised about the practical difficulties and delays encountered by women trying to enforce orders.

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132 [1979] A.C. 593.

133 [1980] 1 W.L.R.5.

134 [1976] Fam. Law 110.

135 [1980] 1 W.L.R. 390.

136 [1980] 2 All E.R. 722.

137 See also para. 78 of the Issues Paper. See also Douglas, "The Clean Break on Divorce" (1981) Fam. Law 42, which argues that the court does have a power to dismiss an application for periodical payments without the applicant's consent. For the Scots' solution to this problem, see para. 3.124 of their Report.

138 e.g. M.U., MWA, CJD, Nat. Assn. of Div. and Sep.

g) Enforcement

A number of interesting points were made on enforcement generally. Two commentators[139] remarked on the waste of public money spent on trying to enforce orders against those who simply couldn't pay. Imprisonment was also seen by some as a pointless exercise.[140] On the other hand however difficulties could be experienced if the parties did make a financial settlement on the basis that the wife would remain on supplementary benefit,[141] and the Registrars felt that some of these might be overcome if the DHSS or the local authority were represented at the financial hearing.

Conclusions to be drawn from professional and academic comments

38. Obviously there is no absolute consensus amongst the commentators in this group on whether the law governing the financial consequences of divorce should be reformed, and if it should in which direction such reform should go. However

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139 NAPO and the Association of County Court and District Registrars who commented that "Our members are constantly appalled at the waste of public money in pursuing defaulting husbands who cannot pay enough more to make any real difference to the wife's situation or to the State."

140 NAPO. Cf. however the Government's attitude in Hansard (H.C.) 30 June 1980 Vol. 987, col. 395 to the effect that they were not satisfied that "there is an adequate alternative to the courts having the power in the last resort to use the threat of imprisonment as a means of enforcing the payment of maintenance."

141 See e.g. Hulley v. Thompson [1981] 1 W.L.R. 159.

it would seem that there was a fair measure of agreement amongst them on the following major issues ;

a) That the present law is unsatisfactory. Whatever a couple intend of their marriage, the law should no longer automatically entitle the economically weaker spouse on divorce to expect to be put in the position in which he or she would have been had the marriage not broken down. This was undesirable in principle and impossible in most cases in practice.[142]

b) Except in a number of clearly defined cases it is desirable that the financial relationship of ex-spouses should terminate at the time of, or shortly after, their divorce. The exceptions to this principle, which do of course form the majority of cases, are:

i. where one spouse is caring for the dependent children of the family

and ii. where one spouse has some special need, (arising, according to many, directly out of the marriage itself), for continuing support. It would depend on the nature of the need as to whether it would best be provided for by a single payment, by a limited period of support (rehabilitation) or whether it could only be dealt with by imposing a continuing obligation on the paying spouse.

c) The law should be expressed in sufficiently wide terms as to cater for all possibilities. This would not be achieved if only a single "principle" were adopted or if the court had no discretion.

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142 It was the latter reason that weighed most heavily with commentators.

d) Orders that are made should be fair to the payer.[136]

However commentators were divided on how these results would best be achieved. Some favoured a wide judicial discretion. Some favoured a discretion governed by specific guidelines such as those presently contained in section 25 or guidelines reformulated to emphasise more clearly the above principles. Others favoured a law governed by the principles themselves. The latter is, in theory, the approach being advocated in Scotland but the subjective and discretionary elements built into the principles suggested bring it nearer to the "discretionary approach governed by guidelines" than might at first sight appear.

41. Again there was no absolute consensus on the question of whether conduct should affect the financial consequences of divorce. The largest single group of commentators favoured the principle of the present law whereby conduct is only a factor in exceptional circumstances. There was however some feeling that since Wachtel this had been misunderstood and that some clarification was now necessary.

42. A number of commentators suggested that it would be unrealistic to confine a review of the financial consequences of divorce to the question of orders between spouses. Other factors that would have to be taken into account were the relationship of orders between spouses to orders in favour of children, public expenditure and welfare benefits, procedure and the development of a coherent theory of marriage breakdown. Some suggested that what was now needed was a comprehensive review of the whole divorce process.

August 1981

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136 This is implicit in the Registrar's comments: see n.132, above. See also Deech, OPF (p.8), NMGC, the Scots' Report - principle 31(b) and the New Zealand Family Proceedings Act 1980.

10 DOWNING STREET

From the Private Secretary

4 February 1982

Financial Provision After Divorce

I mentioned to you yesterday the Prime Minister's concern that the views of former wives might not have received sufficient weight in the preparation of the Law Commission's proposals on this subject.

I have drawn the Prime Minister's attention to those who were consulted on the Law Commission's discussion paper, but she has commented that, although former wives may well have been consulted, their views might still have been given too little weight. Perhaps you could let me have a brief note summarising the representations that were made by the organisations representing divorced women on the Law Commission's discussion paper. It would be helpful if this could reach us by Thursday 11 February.

J.W.F.S. RICKETT

Michael Collon, Esq.,
Lord Chancellor's Office.

Note: I have asked the Lord Chancellor's Office to let us know who was consulted over these proposals, and whether representatives

PRIME MINISTER

You asked about Divorce law reform. I attach the paper which went to H, together with the minutes.

I am putting in the box separately some material for Questions tomorrow. This includes a report from the Lord Chancellor's Office which shows that the Times Correspondent spoke to the Lord Chancellor on Sunday evening, and seems to have got an inaccurate reply from the Lord Chancellor, perhaps because of an unclear question.

MTF

We do not seem to have received any advice from the former which would make a lot work. MTF

1 February 1982

10 DOWNING STREET

Prime Minister 2

You expressed some concern that we might not have consulted former wives over the proposals on divorce law reform.

The attached is a list of those consulted on the Law Commission's discussion paper on the financial consequences of divorce. It includes a number of organisations representing women, and also divorced women.

MR 3/2 [illegible] may not have those expressed in the Report and

APPENDIX 2

Organisations and professional persons who commented on the Discussion Paper

The Association of County Court and District Registrars
T. Arnold, M.P.
Ms. R. Bailey
F. Bennion, Esq.
Bristol Courts Family Conciliation Service
Bristol County Court Registrars
Campaign for Justice in Divorce
Church of England Board for Social Responsibility
Dr. Eric Clive
Mrs. R. Deech
Divorce Counselling and Advisory Service
Dr. J. Dominian (United Kingdom Marriage Research Centre)
The Rt. Hon. Lord Justice Dunn
Equal Opportunities Commission
Fair Family Division
Family Division Judges
Family Welfare Association
Ms. A. Finlay
Gingerbread
Ms. D. Groves
W. Harper, Esq.
Association of Justices' Clerks
The Law Society, Family Law Sub-Committee
The Lay Observer
Married Women's Association
Methodist Division of Social Responsibility
The Mothers' Union
National Association of Probation Officers
National Association of Townswomen's Guilds
National Board of Catholic Women
National Council for the Divorced and Separated
The National Council of Women of Great Britain
National Federation of Women's Institutes
The National Marriage Guidance Council
Ms. K. O'Donovan
One Parent Families
The Rt. Hon. Lord Justice Ormrod
A. Perlman, Esq.
Mr. Registrar Price
Rights of Women
The Rt. Hon. Lord Scarman
The Senate of the Inns of Court and the Bar
The Society of Conservative Lawyers
The Society of Labour Lawyers
Women's National Commission

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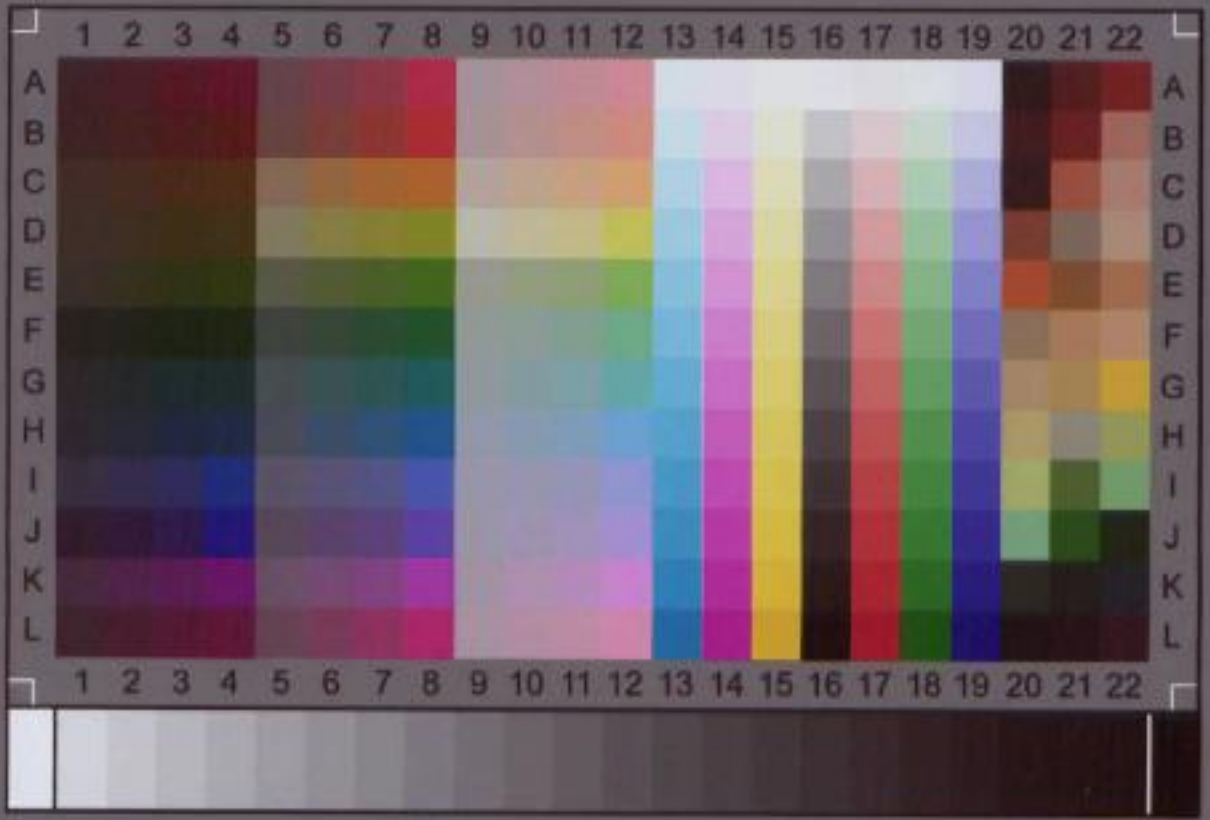

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