HOUSE OF LORDS,
SW1A 0PW

30 May 1985

My dear Willie.

Family and Matrimonial (Miscellaneous Provisions) Bill

In his letter of 14th May Leon Brittan agreed in principle with the family legislation proposed in my letter of 23rd April, but he raised several points of detail in connection with the three Law Commission Reports concerned.

I agree with Leon Brittan's proposed consequential amendment to section 1 of the Child Abduction Act 1984 to bring the definition of "person connected" in this section into line with that in section 6 of the 1984 Act: Scottish custody orders would then have the same effect under section 1 as English orders.

The matters of detail on the Reports on Recognition of Foreign Nullity Decrees and on Declarations in Family Matters which were mentioned by Leon Brittan in paragraph 5 of his letter will be settled by our officials before legislation is introduced.

I share Leon Brittan's hope that the authorities in the Channel Islands and the Isle of Man will agree to the extension of the Bill to their Islands, so ensuring further harmonisation

The Right Honourable
The Viscount Whitelaw, CH., MC.,
Lord President of the Council,
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of the rules of child custody jurisdiction and the enforcement of custody orders.

I am copying this letter to the other members of H Committee, to the Lord Advocate and to Sir Robert Armstrong.

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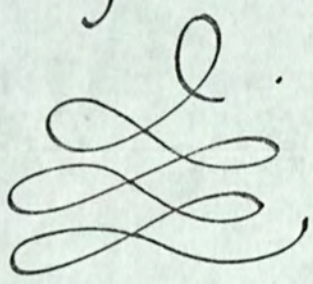

CONFIDENTIAL

Ref. No: C(84)2
Date: 7.6.84

Matrimonial and Family Proceedings Bill

Supplementary Brief for the Debate on 13th June 1984.

This should be used in conjunction with the Brief for the Second Reading (Ref No C(84)1R).

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INTRODUCTION

1. This Bill was considered by a Special Standing Committee. Witnesses selected by the Committee itself gave written and oral evidence. It is printed in the Hansard reports of the Second, Third and Fourth sittings. Attention is drawn in particular to the evidence of Sir John Arnold, (President of the Family Division of the High Court), Lord Scarman (a Law Lord), Mr Justice Gibson and Professor Cretney (Law Commissioners) and Mr Joseph Jackson, QC (Chairman of the Family Law Bar Association and Editor of 'Rayden on Divorce').

2. By far the greater part of the Committee's sittings was of taken up in considering Parts I and II. Part I amends the law relating to how soon proceedings for divorce may be begun after a marriage has taken place. Part II changes the emphasis of the guidelines given to the judges (by Section 25 of the Matrimonial Causes Act 1973) regarding their power to award "financial relief" after divorce.

3. The evidence of the witnesses related almost exclusively to these Parts. Consequently this Brief, which supplements the Brief supplied on Second Reading (C(84)1R), deals with Parts I and II of the Bill alone. (The Bill passed through committee without amendment, and without Government commitment to make any amendments of substance).

4. Part I implements the recommendations of the Law Commission in its Report No 116. It deals with the problem created by the present rule that a divorce petition cannot be presented within the first 3 years of marriage unless the court gives leave on grounds of "exceptional depravity" on the part of the respondent or "exceptional hardship" suffered by the petitioner. These criteria encourage allegations which greatly embitter the divorce proceedings, and also the negotiation and settlement of such matters as maintenance, custody, and access; and these consequences may be particularly harmful to children. There was no dispute as to this in the evidence given to the committee, which reflects the Law Commission's findings.

5. The present rule has obtained only since 1937. Before that there had been no time restriction at all ever since Parliament in 1857 transferred the divorce jurisdiction from the ecclesiastical to the civil courts. (In Scotland where the grounds of divorce are the same as in England and Wales, there is no time restriction and there never has been). The courts have long recognised that some of the most urgent circumstances giving rise to irrevocable breakdown of a marriage can arise at an early point in the marriage. In practice they give leave in about 1,900 cases a year - only about 5 per cent of applicants are refused.

6. As to the harmful affects of the discretionary criteria the following passage from the evidence is relevant:

> "Solicitor General: It is said that in practice that has a bad effect on the relationship between the spouses and runs against the principle that a divorce should be effected with a minimum of bitterness, stress and humiliation. From your experience as a practitioner, what do you have to say about that? Does it extend to the negotiations on ancillary matters such as maintenance and access?

"Mr Jackson: I agree that such allegations are bound to embitter matters. I should go further. A practitioner sees allegations in ordinary behaviour petitions raising difficulties. It is difficult - I shall perhaps come back to this later - to get out of the recipient's mind his or her bitterness on finding such a petition on the breakfast table. So an allegation of exceptional depravity must be extremely difficult to eradicate. The sooner that one gets rid of that, the better. Judges have been trying to get rid of it by accepting a low threshold of "exceptional" and "depravity". In fact, it is said that if one presents one's application for leave to petition within three years, one automatically gets it in some parts of the country, although I do not know whether that it is true.

"The Solicitor General: Paragraph 2.5 of the Law Commission's report states:

> "It appears that the distasteful process of applying for leave, coupled with its unpredictable outcome, is such that practitioners sometimes advise clients against it, suggesting either that they seek some other less distressing form of relief or simply wait until the three years have expired, when the more neutral fact of separation can perhaps be relied upon." Does your experience bear that out?

"Mr Jackson: Yes. When I drafted applications for leave to present - I had a fair amount of experience of it - skill in drafting was an overriding factor. I found no difficulty in getting leave to present, and from what I have heard, I do not think that there is difficulty. The whole thing now has a lack of reality about it. Since Bowman, the courts have not been applying the law strictly and, in my respectful submission, nor should they be required to." (Fourth Sitting, Col. 282).

7. The Law Commission concluded that an absolute 1 year bar achieved the fairest possible balance between upholding the institution of marriage and relief for the unfortunate minority who find that their marriage has broken down irretrievably at a very early age.

They expressed their reasoning as follows:

"We believe that this would be a long enough period to assert the public interest in restricting precipitate divorce and also to have some influence in restraining impulsive or ill-considered proceedings prompted by initial problems or disappointment. Equally, we believe that one year would not be so a long period as to be unendurable for people in genuine situations of marital breakdown.

"We are, however, conscious that a considerable number of those who wrote to us favoured the total abolition of the restriction. We have sympathy with the logic of their arguments; yet we firmly believe in the public policy arguments recited above and the need to avoid the apparent scandal of divorce petitions being presented immediately after the marriage. We think that a one-year absolute bar is the least intrusive and most straightforward of restrictions which accords with many of the views which have been expressed to us and is, accordingly, likely to be the most generally acceptable."

8. The Government has adopted the Law Commission's recommendations and Clause I implements it. It is to be noted that there has never before been an absolute time bar, and that therefore the Bill provides a sterner rule, arguably more protective to the institution of marriage, in this respect than at present.

9. There are undeniably attractive arguments in favour of reverting to the Victorian arrangement of no time restriction at all, thereby coming into line with Scottish law. But the Government has on balance concluded that the scale of such a change might signal, however wrongly, that Parliament now valued marriage less as an institution.

10. The following passages from the evidence are relevant:

"The Chairman: I have listened with fascination to the discussions of Part I. May I be clear on one point? Am I right, Sir John, that you said that you regarded the bar as something of a deterrent to divorce?

"Sir John Arnold: I said that the bar was widely regarded as something of a deterrent to divorce, and that it was therefore to some extent a buttress to the institution of marriage. For that reason, I do not think that you would be justified in removing it altogether, because that would denigrate the institution.

"The Chairman: Would you agree with that, Lord Scarman?

"Lord Scarman: Yes, I agree. We are discussing something that is very difficult to assess - the effect of the bar on the minds of young people whose marriages get into difficulty. I think that its positive effect is slight, but it acts in favour of impressing upon them that marriage is not an ordinary contract, but a very important institution. That is the positive argument for the bar." (Third Sitting, Col. 91).

"Mr Fairbairn: In Scotland, we have never had a bar, and we have had divorce ever since the Reformation. But I have never come across anyone in practice who has entered marriage with a view to seeing how quickly they can leave it. Accordingly, do you not think that to make marriage terminable in England after one year invests the institution with a temporary characteristic, rather than make what Professor Cretney called a symbolic assertion of permanence?

"Sir John Arnold: If this were a rule being introduced into Scots law, that would be a decisive factor. We deal with the point on page 3 of our memorandum, which states:

> "In Scotland however there has never been such a bar and the psychological effects of removal of such a provision have no part to play in the making of a decision."

If the observer sees something that has been in operation from 1937 suddenly and completely removed, the likely psychological effect will be a feeling that that is running down marriage. But that would not be said by a public that was not used to a bar at all." (Third Sitting, Col. 84).

11. There has been criticism, in particular by some Churchmen, that Clause 1 does not in fact achieve a desirable balance, but is likely to damage the institution of marriage. The change to a 1 year absolute bar will, so the argument runs, further erode the concept of marriage as a life-long partnership and encourage people to give up too easily in the early, difficult years of marriage. It is said that if Clause 1 is enacted Parliament will seem to be encouraging divorce for marriages which run into difficulties in the first year, and that the institution of marriage will therefore suffer. But the evidence the Law Commission received in response to their consultations, and the findings of researchers, suggest that the institution of marriage is less vulnerable. The large majority of people embark upon marriage in the belief that it will last indefinitely, and that if divorce happens it will be an unlooked-for misfortune. When a couple divorce it is likely to be after a considerable period of separation.

12. It is suggested that a lengthy period before a petition may be presented gives the parties opportunity for reflection and reconciliation. But the views of lawyers experienced in matrimonial matters, and of marriage guidance counsellors, is in general that once one party has decided to petition for divorce the chances of reconciliation are in any event slight. As one commentator on the Law Commission's Working Paper said:

> "The law of divorce cannot truly attain the aspiration of making marriages either work or last."

The following passage from the evidence is relevant:

> "Mr Weetch: Does the present rule, under which in some cases you make people wait three years, ever do any good?
>
> Mr Jackson: I have grave doubts about it. People who want to be divorced within three years do so because they consider - and perhaps they are the most important poeple in the equation - that the marriage has totally terminated. If I may respectfully remind you, there is in the relevant section a provision about prospects of reconciliation. I would think - I do not go back so far, I am happy to say - that that was a dead letter from the start. Certainly in my practical experience it has always been a dead letter." (Fourth Sitting, Col. 283).

13. There is, of course, no time restriction on the presentation of a petition for judicial separation, and there never has been one. There has been a very large increase in recent years in the number of such petitions, and a high proportion are presented within the first 3 years of marriage. Research in 1981 suggested that the proportion was well over 60 per cent, and since then there has been a further significant increase in judicial separations (from 5423 in 1980 to 7480 in 1982). Since only just over half of these petitions end in a decree, it is reasonable to assume that a larger number are superseded by successful petitions for divorce. These facts confirm that the 3 year discretionary time-bar for divorce petitions may defer divorce but that it does not seem to deter time.

14. The evidence does not suggest that a 1 year absolute bar will result in couples, in particular those who are young and perhaps immature, having recourse to the divorce courts more readily. The statistics do not indicate that young

people at present divorce more quickly than those who are older at the time of marriage, and there is no reason to suppose this would change. Marriages in which the wife was aged between 20 and 24 are, it is true, approximately 20 per cent more likely to end in divorce that those in which the wife is aged from 30 to 34 at marriage. However, apart from marriages in which the wife married as a teenager, the younger the wife at marriage the longer the marriage tends to last before divorce, as measured by the median duration of marriage.

15. Again, there is nothing to suggest that the substitution of a 1 year absolute time bar will result in more children with parents who are divorced. Of the couples who divorce during the first 3 years of marriage, 70 per cent have no children aged under 16 and, of couples who divorce during the fourth year of marriage, over 60 per cent have no children aged under 16. Thus, when a marriage breaks down irretrieviably after a comparatively short time it is more likely than not to be childless.

16. The available evidence, therefore, indicates:

(a) That people do not marry with a view to early divorce if the relationship does not work out;
(b) that young couples tend to stay married several years before resorting to divorce;
(c) that a period of years usually elapses between separation and divorce; and
(d) that the irretrievable breakdown of marriage culminating in divorce is not prevented by the 3 year time-bar.

17. The time bar, of course, has no effect upon what is the sole ground for divorce. This remains the irretrievable breakdown of marriage. It simply means that a person whose marriage breaks down irretrievably within the first 3 years cannot have the marriage dissolved, unless "exceptional hardship" or "exceptional depravity" can be shown. But in cases where these allegations are actually made, in support of a claim for the court's discretion, the court will only rarely decline to grant leave to petition. The trouble is that much harm to the parties and their family is done by the process of seeking leave.

18. It should be noted that the ability to re-marry is the only matrimonial relief that is uniquely derived from a decree of divorce. A decree of judicial separation, which can be petitioned for immediately after marriage, can where appropriate do everything else that may be sought in proceedings for divorce; but it cannot end the marriage. Yet preventing spouses who are separated (whether by judicial decree or de facto) from re-marrying cannot oblige them to live celibate and reflective lives until the three years are up. On the contrary, if they alrady wish to re-marry, as many do, it encourages adultery.

19. The Government believe firmly that marriage is the foundation of secure family life, which itself lies at the root of a stable society. Since 1857, however, Parliament has given to the Civil Courts jurisdiction in matters relating to the civil law of divorce, in recognition of the fact that some marrriages do regrettably break down and that when they do the consequences should be regulated by the courts. The institution of marriage will not be weakened by the steps proposed in Part I of the Bill to remedy the grave shortcomings in our civil divorce law which the Law Commission have identified.

PART II

"There is nothing in Part II which need cause apprehension to the middle-aged woman who has been deserted by her husband, and who has no reasonable prospect of supporting herself either by earning or from her own resources." (Lord Scarman, Lords Hansard, Vol 445, No. 36, Col. 64, on Second Reading).

"Mr Baldry: From your experience in the Family Division and in the Court of Appeal, is there anything in the Bill which can cause any apprehension to the deserted wife?

"Lord Scarman: Nothing." (Third Sitting, Col. 96).

"In case some attempt were made to argue that the new provision enlarged the extent to which conduct should be taken into account, I do not anticipate that this would be the subject of more than one appeal, in the judgement of which I would expect it to be firmly rejected." (Sir John Arnold, Second Sitting, Col. 78).

"It is entirely convenient that the matter of conduct, being eliminated through the repeal of the tail-piece [of Section 25 (1) of the Matrimonial Causes Act 1973], should be reintroduced with an equivalent effect of that which has gone before by a phrase which is designed and in my view effectively does give effect to the existing authorities." (Sir John Arnold, President of the Family Division of the High Court, Col. 77.

"Mr Baldry: So, in effect, the present definition in the Bill [of the significance of a party's conduct] is doing no more nor less than putting into statute where case law stands at the moment.

Sir John Arnold: That is what I believe." (Third Sitting, Col. 97).

These opinions expressed in evidence by judicial witnesses summoned by the Committee bear upon the two issues which dominated the discussion of Part II. These issues were whether its provisions will act unfairly and against the interests of women who are divorced after, for example, looking after their family for years; and secondly, whether its provisions will require the courts to attach greater significance than at present to the conduct of a party during the marriage when deciding such questions as maintenance payments.

The answer to both these questions is No.

1. The policy to which this part of the Bill seeks to give effect is contained in four of the recommendations made in paragraph 46 of the Law Commission's Report No. 112. They are that:-

(1) Section 25 of the Matrimonial Causes Act 1973 should be amended in the following respects:

(i) to seek to replace the parties in the financial position in which they would have been had the marriage not broken down should no longer be the statutory objective;

(ii) the guidelines contained in that Section should be revised, to give greater emphasis to the following matters:

(a) the provision of adequate financial support for children should be an over-riding priority;

(b) the importance of each party doing everything possible to become self-sufficient should be formulated in terms of a positive principle; and weight should be given to the view that, in appropriate cases, periodical financial provision should be primarily concerned to secure a smooth transition from the status of marriage to the status of independence.

(2) The court should be given power in appropriate cases to dismiss a wife's claim for periodical payments without her consent.

These are important changes which will cause the statute to reflect and affirm the principles which have been worked out in the courts over the last 13 years for providing the best approach to doing justice between the parties, while safeguarding the interests of children. They will not cause a major shift in the position of women, though they will undoubtedly help to promote the welfare of children.

2. There was a nearly unanimous response to the suggestion made by the Law Commission that the court should no longer be required to restore the parties to the financial position in which they would have been if the marriage had not broken down "so far as it is practicable and, having regard to their conduct, just to do so". The case for removing that requirement has been overwhelmingly made out: it is simply impracticable in the large majority of cases to put the egg of martrimonial finances back into its broken shell when the marriage has irretrievably broken down. It is damaging to impose upon the court this objective, which is generally unobtainable and not always desirable. It is unnecessary to put in its place any further express objective. The court will remain under the inherent duty to do justice between the parties, but to do so having regard to all the circumstances of the case including a number of matters which continue to be particularly specified. Always, the welfare of any child will have to be first considered.

3. It has been suggested that the Government should adopt the recommendations of the Scottish Law Commission Report "Aliment and Financial Provision", and include in the Bill a series of general principles about the way in which matrimonial property should be divided between the parties. But unlike the English courts, the courts in Scotland have at present no statutory guidance about the considerations which they should have in mind when they make financial provision orders in matrimonial proceedings and they lack the extensive body of case law which in England complements the statutory guidelines in Section 25. It would in the Government's view be unwise to substitute a new series of statutory principles for those carefully applied and developed by the English judges.

4. There has been considerable public interest in the provisions of the Bill relating to self-sufficiency and the "clean-break". These reflect the unequivocal recommendations of the Law Commission. The recommendations were themselves the result of the widespead feeling, amongst the many people and organisations who commented on the Law Commission's discussion paper, that greater weight should be given to the importance of each party doing what is reasonably practicable to become self-sufficient, in so far as this is consistent with the interests of the children of the family.

5. It is a mistake to suppose that there is any principle of life-long maintenance enshrined in the 1973 Act. Section 28 of the 1973 Act in fact provides that:

> (1) The term to be specified in a periodical payments [i.e. maintenance] or secured periodical payments in order in favour of a party to the marriage shall be such terms as the court thinks fit ...".

This provision is used from time to time by the courts to make an order for a limited period. Indeed, since the first Matrimonial Causes Act in 1857 the court has always had a discretion as to whether or not to order maintenance to be paid to a former wife on divorce. The existing law, however, does not permit the court without the applicant's consent, to dismiss with permanent effect an application for maintenance. Following the Law Commission's recommendation it has been thought right for the Bill to remove this bar.

6. The Bill also tells the court that it must consider, after granting a divorce decree, whether it would be appropriate for there to be a clean break (so far as financial obligations are concerned), and if so to consider at what time it would be just and reasonable for those obligations to be terminated. This does not lay down that a clean break is to be the norm, or anything like it. It merely requires the court to give its mind in each case to the question whether it would be appropriate.

7. This provides the difference in emphasis from the existing guidelines that the Law Commission recommends. To take an extreme example, a marriage of short duration which is dissolved when the wife is young, childless and well able to earn her living is not likely to call nearly so insistently, if at all, for the continuance of a financial obligation to the wife on the part of the former husband. On the other hand one does not have to go to an example at the opposite extreme in order to envisage circumstances in which it would be quite unjust for a husband to be relieved of responsibility to maintain his wife's former standard of living or something like it.

8. Concern has been expressed about the use of the "clean break" provision where there are children of the family. It must be borne in mind that 4 out of every 10 divorcing couples have no children aged under 16. Of these divorcing couples without children - which numbered just under 60,000 in 1982 - just over half the wives (31,000) were aged under 35 at divorce and 16 per cent (9,500) were aged under 25. Many of these women will be in full-time work and in a position to support themselves. Where there are children the court will of course always be required to put their interest first, and this will no doubt often lead to the conclusion that it would be wrong to make a "clean break" order.

9. The proposed removal of the requirement that the courts should attempt to

restore the parties to the financial position in which they would have been had the marriage continued, has necessarily involved a reformulation of the circumstances in which conduct should be taken into account in a financial provision order. At present when making an order Section 25(1) of the Matrimonial Causes Act 1973 obliges the court to "have regard" to the conduct of the parties. A series of judicial decisions, since the well-known Wachtel case in 1974, has resulted in the courts now disregarding conduct unless it would be inequitable to do so. The Government agrees with the Law Commission that this policy should be maintained. The amended Section 25(1) of the 1973 Act is designed to achieve just that effect and the Government is advised and confident that it succeeds. This was wholly confirmed in evidence to the Committee by Lord Scarman, Sir John Arnold, Mr Justice Gibson, Professor Cretney and Mr Joseph Jackson QC.

10. It has been argued that the Bill should state that conduct should only be taken into account if it is "gross and obvious". The Bill provides that the conduct of each of the parties shall only be taken into account if in the opinion of the court it would be inequitable to disregard it. This is the test the courts apply at present; and it is to this that the statements of Lord Scarman and Sir John Arnold set out at the head this section above relates. It means that the conduct of either party shall not be taken into account unless it would offend an ordinary person's sense of justice to disregard it.

> "Mr Jackson: I am totally against putting epithets into matrimonial statutes. For example, I would not put "gross and obvious" into a statute. That view is contrary to my trade union instincts, if I have any, because if such words were included they would keep me and my colleagues going for the rest of our practising days discussing what they meant." (Fourth Sitting, Col. 285).
>
> "Lord Scarman: We must remember that the adjectives "gross and obvious" were used in judgement. They are not to be found in statute. They are far too emotive, vituprative, abusive and unreal. We are not concerned with "gross". I do not know what gross means, although if it were applied to myself I would look at my waistline." (Third Sitting, Col. 96).

To write the words "gross and obvious" into the legislation would signal an intention to change the law without giving any clear indication of what the effect is intended to be.

11. It would be no less unsatisfactory to change the existing law by requiring that conduct shall only be taken into account "in exceptional circumstances", as has also been suggested.

> "The Solicitor General: When the matter was discussed in another place, Lord Elwyn-Jones suggested an alternative formulation of the conduct provision. He said that the concept of exceptional circumstances should be implied. Would you see the substitution of circumstances, rather than the concept of what was inequitable adding to the certainty of the formulation, or would it give rise to a whole new raft of case law, which would keep your trade union happy?
>
> Mr Jackson: I should really encourage you to put in such things, but I fear that I cannot." (Fourth Sitting, Col. 287).

Reform of the Family

CONCLUSION

Although the scope of the Law Commission's recommendations to which Parts I and II give effect, is modest, the provisions of the Bill will achieve reforms in our divorce law which are important and urgently needed.

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