

Breakthrough
Britain

Every Family Matters

An in-depth review of family law in Britain

A Policy Report by the
Family Law Review

Chaired by David Hodson

SECOND EDITION

Reprinted August 2010

THE CENTRE FOR
SOCIAL
JUSTICE



Supported by the
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About the Centre for Social Justice

The Centre for Social Justice aims to put social justice at the heart of British politics.

Our policy development is rooted in the wisdom of those working to tackle Britain's deepest social problems and the experience of those whose lives have been affected by poverty. Our working groups are non-partisan, comprising prominent academics, practitioners and policy makers who have expertise in the relevant fields. We consult nationally and internationally, especially with charities and social enterprises, who are the champions of the welfare society.

In addition to policy development, the CSJ has built an alliance of poverty fighting organisations that reverse social breakdown and transform communities.

We believe that the surest way the Government can reverse social breakdown and poverty is to enable such individuals, communities and voluntary groups to help themselves.

The CSJ was founded by Iain Duncan Smith in 2004, as the fulfilment of a promise made to Janice Dobbie, whose son had recently died from a drug overdose just after he was released from prison.

Chairman: Mark Florman

Executive Director: Gavin Poole

Breakthrough Britain: Every Family Matters

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Preface

Iain Duncan Smith

The Centre for Social Justice came into being on a visit to a social housing estate. It was on the Easterhouse Estate in Glasgow where I began to appreciate the scale of social breakdown occurring in Great Britain. Since then we have published reports on the ‘pathways to poverty’ – educational failure, drug and alcohol addiction, economic dependency, serious personal debt and family breakdown (published together as *Breakthrough Britain*), and also the care system, early intervention for children, asylum, the criminal justice system and now family law.

This Family Law Review is directly connected to *Breakthrough Britain*. A critical part of that report was the section on family breakdown. It was this section that chartered the incredibly high level of family breakdown in Britain across a range of incomes and social backgrounds.

The United Kingdom has a peculiar track record in having some of the worst levels of family breakdown in Western Europe. At the heart of the problem lie the issues of divorce and the way in which society considers the vitally important institution of marriage.

It became abundantly clear during the *Breakthrough Britain* review that we needed to look again at the area of Family Law. Many of those who gave evidence told us that the existing system was no longer fit for purpose and was long overdue a full review. As a result I asked Dr Samantha Callan to chair this review and agreed with her that the following people should form a Working Group: David Hodson, Rebecca Bensted, Philippa Taylor, Professor Brenda Almond, Helen Grant, Benjamin Fry, Sheela Mackintosh, Richard Bruce and Rachel Gillman.

In line with all of our previous work, each of them is independent and selected solely on the basis that they bring a measure of expertise and understanding of the issues relevant to this report. Although some months ago Dr Callan had to step down from the chairmanship, we were fortunate in having David Hodson stand in as the chairman to complete the report. I am indebted to all of the above for their application and hard work and particularly to David Hodson for stepping up as he did.

As the paper makes clear, this review is necessary as part of a vital national effort to stabilise and support family relationships as a critical part of healthy society. The law plays a vital role in shaping the expectations and reality of

family life; yet sadly for at least the last 40 years Parliament has failed to enact the appropriate changes to Family Law in England and Wales. As a result statute law is openly acknowledged as being dated insofar as it fails to reflect the nature of family life and is often further confused by contradictory judge-made law.

Among the most fascinating areas of this report are the results of a poll conducted by YouGov. Two particular results stood out. The first was that 84 per cent agreed with the statement ‘that it is important for the law to support marriage’, with over 50 per cent saying that it was very important to do so. Furthermore nearly 60 per cent thought that the law should actually promote marriage in preference to other kinds of family structures such as cohabitation. Only a quarter actively disagree.

As a result, this review has set modern marriage in the context of the pressures falling on individuals here in the United Kingdom today. As with all previous CSJ work, the report does not pretend that marriage is some sort of magic bullet. Nonetheless, it makes it clear that it is vital to recognise its critical importance as a cornerstone to a stable society. Marriage remains the most common form of partnership for men and women with some six times as many couple families being married as cohabiting. It is however also necessary to recognise that family breakdown directly affects approximately a third of the United Kingdom population and many more indirectly. At the heart of this damaging experience lies the effect of family breakdown on children. I remember vividly the polling work carried out for *Breakthrough Britain* in which we were able to ask adults who had been children at the time of their parent’s divorce what they had hoped for as opposed to what actually happened. What was clear from their (often very emotional) responses was that they could recall hoping that their parents would stay together but that nobody ever seemed interested in hearing their views. Many spoke of the dreadful experience of losing contact with one parent and the majority admitted to a level of scarring in their lives as a result of their own experience of family break up.

The human cost of family break up is almost incalculable. However, we can estimate the financial cost. The cost to the taxpayer of family breakdown is running at around £20–24 billion a year or around £800 per taxpayer. It is this which shows that this whole issue even affects individuals who have nothing to do with the family who are experiencing family break up, as we all end up paying for it.

In that context this paper has done an excellent service for all in looking at this area. Included are sections on divorce law, cohabitation, pre-marriage information and marriage support. Also in the report is some excellent work on how we can help stabilise and rebuild family relationships as well as simplify the legal process. One area that is well worth looking at is the recommendation concerning the creation of Family Relationship Hubs, in part inspired by the system in Australia. Alongside that is the concept of relationship support, a

matter that is almost completely left out of the system at present. The report has also looked at Alternative Dispute Resolution as well as closely scrutinising child contact. In the case of the latter section I was struck by the large amount of evidence from many parents who were dissatisfied with the legal position of divorce and separation. Both parties are often dissatisfied; the parent with care of the children unhappy with the unreliability of maintenance payments from the non-resident parent, while those who were not resident parents were often unhappy with the lack of contact with their children. I was also struck by the report's recommendation that the *Children Act* needs to be amended to include clear and explicit principles for contact and residence, which nevertheless leave room for flexibility and judgment in specific cases.

I believe this to be an excellent report which is long overdue. It keeps at its heart the idea of the importance of stable relationships. I recommend that all those that are interested in this area, and even those who have up to now found the subject rather impenetrable, should read this report and act on its findings, particularly the Government and opposition.

Chairman's Foreword

Family life lies at the heart of our nation. It is where we grow up and receive many of our skills for life. It is where very many of us find the deepest and most satisfying relationships of life. It provides security and confidence for very many of us to go outside the family into our communities and places of work in order to make our chief contributions to our nation. It provides the continuity of life in parenting and in wider family relationships. For very many, this family life is found within the context of marriage. Family life is central to our personal life and to our corporate life as a country.

Moreover, despite the many strains and stresses on family life and the nuclear family over recent years, family life in general and marriage in particular remains crucially aspirational for very many people.

Yet Britain has experienced a dramatic family relationship breakdown culture over the past four decades or so. This crisis has directly and indirectly affected every single family across the country. It has been felt across the whole spectrum of society, from the wealthiest to the poorest, from the famous to the general public, young and old and across racial, religious and ethnic groups. It has affected children who are now in turn adults and struggling with their own family relationships. It has had an impact on issues of poverty, housing, crime, employment, health and wealth. While a happy family life has remained an aspiration for many, action to overcome the relationship breakdown culture has been sadly absent. In this, Parliament must take chief responsibility in not intervening in a timely, proportionate and effective manner. It has seemed that the perfectly understandable desire not to criticise any particular form of family relationship or parenting has nevertheless created a vacuum of support for primary family relationships, particularly marriage. This cannot continue. Not least, our country both generally and specifically in this present financial crisis, cannot afford the direct and indirect cost of family relationship breakdown.

It is in this context that the Centre for Social Justice established in the autumn of 2007 a review of family law. Our group has consulted widely, seeing 115 consultees and receiving written evidence from many others. We have visited Australia to look at the radical measures taken there to bring together services to help families. We have considered steps taken in other countries. The group is comprised of experts from family law, academia and social policy. Whilst the Law Commission has over the years made recommendations in specific areas of family law, this CSJ review may be the most comprehensive

review of family law for several decades. While there were certain areas we were unable to cover, nevertheless we are satisfied that we have put forward a holistic, joined up set of recommendations with specific guiding principles. We consider they will reverse the culture of family breakdown and recreate more satisfactory and intact family life. We commend our recommendations to Government, to Parliament, to the family law professions, to the media and other organisations, to the families in our country and for the children in our families who will be creating the families for the future.

I would like to thank all members of the group, whose details are set out on the following pages. They have worked incredibly hard over two years. It is always invidious to name individuals. Nevertheless fairness and justice demands particular gratitude to two members. Dr Samantha Callan set up the group in autumn 2007 and was its chair until February 2009 and oversaw the consultation process, the interim report and separate reports produced by the group as well as incredible work in the preparation of the final report. Philippa Taylor was invaluable in her work throughout the review including being a primary author of the report in respect of bioethical issues. Particularly this final report owes substantially to her contribution on matters of research and social policy. Creating the language and terminology to address the various recipients, i.e. politicians, policymakers, academics and lawyers as well as the public, has been a difficult task and required the particular input of Samantha and Philippa. I would also like to record my gratitude to Ann Thomas and my colleagues at The International Family Law Group for allowing me the very considerable time required for the review and then for this report.

It might be said that it is perverse for a divorce lawyer and family court judge to be espousing laws and policies which will reduce family breakdown, and with it the need for such services. Like most family lawyers, I have seen at first hand too many of the consequences of family breakdown and too many consequences of the impact on children. If one result of these proposed reforms is less need for divorce lawyers then most in society will rejoice!

David Hodson

Chairman of the Family Law Review

Members of the Family Law Review



David Hodson (Chairman)

David Hodson is an English family law solicitor, mediator, family arbitrator, Australian solicitor and mediator, and practises at The International Family Law Group, Covent Garden, London. He is a deputy District Judge at the Principal Registry of the Family Division, High Court, London. David has lectured extensively to other family lawyers in England and at conferences abroad, has commented frequently to the media and is a prolific writer on a variety of family law topics. He specialises in family law cases which involve complex finances and international elements. He is author of several books including *A Practical Guide to International Family Law* and *The Business of Family Law*.



Professor Brenda Almond

Brenda Almond is Emeritus Professor of Moral and Social Philosophy at the University of Hull. She has lectured widely in Europe, the USA and Australia and is the author of many scholarly articles on moral, social and applied philosophy, especially in relation to the family. Her most recent book was *The Fragmenting Family*. She also wrote *Exploring Ethics: a traveller's tale* and *Ethical Issues in the New Genetics* (ed. with Michael Parker). She has served on the HFEA (Human Fertilisation and Embryology Authority) and on the HGC (Human Genetics Commission) and was Joint Founding Editor of the *Journal of Applied Philosophy*.



Rebecca Bensted MA (Cantab)

Rebecca Bensted has an MA in Law from St Catharine's College, Cambridge. She was called to the Bar in 1993. She has worked for the last 7 years at BPP Law School teaching written skills on the Bar Vocational Course, where she is subject leader for Drafting. Rebecca is also a Door tenant in the Chambers of Tony Bawdry MP at 1, Essex Court.



Richard Bruce

Richard Bruce is a barrister. He graduated from Bristol University, where he gained both a Bachelor's and Master's degree in Law and was called to the Bar by Gray's Inn in 1974.

He is the author of a text book on the general principles of English law published by John Murray in 1978 and now in its fifth edition. He was elected a Fellow of the Chartered Institute of Arbitrators in 1992 and appointed as a Recorder in 2002.



Dr Samantha Callan

Samantha Callan is the Family and Society Policy Specialist in the Conservative Policy Unit. Prior to taking up this position she was a research and policy consultant to major UK voluntary sector organisations which aim to strengthen family life. She is also an honorary research fellow at Edinburgh University and is engaged in primary research into long term marriage and committed relationships, a subject about which she regularly presents at national and international conferences. Samantha chaired the Family Breakdown Working Group of the Social Justice Policy Commission and went on to chair the Early Years Commission at the Centre for Social Justice.



Benjamin Fry

Benjamin Fry developed an interest in psychotherapy and other areas of personal growth during a long and varied personal treatment starting in his twenties.

After a degree in physics and philosophy Benjamin studied psychotherapy at Regent's College in London. He wrote the book *What's Wrong With You* and the eponymous column in *The Saturday Times* Body&Soul section; he also recorded the follow-up audio book *How to be Happy* for Hachette Audio. He is perhaps best known to the nation as the co-presenter of the BBC's groundbreaking and long running *Spendaholics* series on BBC3, in which he helped over-spenders by getting to the root of their problems. Benjamin has a private practice in Harley Street and is founder of the Happy Hour network.



Rachel Gillman

Rachel Gillman has been a practising barrister since 1988, at 3 Dr Johnson's Buildings, Temple, specialising, specialising in all aspects of family law both relating to money matters and children. She has a particular commitment to representing less advantaged clients.



Helen Grant

Helen Grant qualified as a solicitor in 1988 and since 1996 has been the Senior Partner and owner of Grants Solicitors LLP.

Her firm employs a dozen lawyers and has a large legal aid contract operating across Central and South London, Surrey and West Kent, providing specialist legal help on all areas of family law, debt and welfare benefits. In 2008 Helen was selected as the Conservative Prospective Parliamentary Candidate for Maidstone and The Weald.



Sheela Mackintosh

Sheela Mackintosh is a family lawyer (she is a solicitor and started her career as a barrister of the Middle Temple) and matrimonial consultant, and founded and now runs the Divorce & Family Law

Information Service. She is also a Law Society mentor and coach for junior lawyers. Sheela is a governor of Beaconsfield High School, a trustee of the charity DrugFAM, vice-chairman of the London British Red Cross, chairman of the NSPCC Buckinghamshire and Deputy Chairman of the Beaconsfield Conservative Constituency Association. Sheela has also recently been selected as a Woman of Achievement by the 2009 Women of the Year Nominating Council.



Philippa Taylor

Philippa Taylor has worked as an independent consultant on family and bioethics issues for 15 years, predominantly for the charity CARE. She trained originally in market research and

has also been Associate Director at The Centre for Bioethics and Public Policy. She has written numerous papers, briefings and booklets, as well as doing some media work and presentations. Philippa is also studying for an MA in Bioethics, alongside her consultancy work.



Cheryl Dobson (Researcher)

Cheryl Dobson read Law at Edinburgh University where she took Honours courses in both Family Law and Human Rights. She was a researcher for the Family Law Review from September 2007 to

July 2008. She is studying to become a solicitor in England and Wales.



Becky Tuson (Researcher)

Becky Tuson read Drama at Loughborough University before joining the CSJ. Over the years Becky has been involved in many church-based community projects, working with children and

young people, homeless people and women who have been victims of trafficking.

CONSULTANTS

Dr Andrew Bainham

Dr Andrew Bainham is a Fellow of Christ's College Cambridge and Reader in Family Law and Policy at the University of Cambridge. For over a decade he was editor of the *International Survey of Family Law*. He was a founder of the Cambridge Socio-Legal Group and co-edited four of their books, two of which deal with parentage and contact between children and parents. He also authored the leading textbook, *Children: The Modern Law* (3rd edition, 2005).

District Judge Nicholas Crichton

District Judge Nicholas Crichton sits at the Inner London Family Proceedings Court at Wells Street where the Family Drug and Alcohol Court (FDAC) is running as a pilot covering Camden, Islington and Westminster. He is the serving member of the Family Justice Council who leads on 'hearing the voice of the child'. He also chairs and is a serving member of a number of committees and groups including the Association of Lawyers for Children and Young Persons subcommittee, Coram Family Advisory Groups and National Youth Advocacy Service Professional Advisory Group.

Professor Patrick Parkinson

Patrick Parkinson AM is a Professor of Law at the University of Sydney and Special Counsel at Watts McCray lawyers. He has authored many books including his latest *Australian Family Law in Context* (4th ed, 2009). Professor Parkinson served from 2004-2007 as Chairperson of the Family Law Council, an advisory body to the federal Attorney-General, chaired a review of the Child Support Scheme in 2004-05 and has been a member of the NSW Child Protection Council.

Dr Rebecca Probert

Rebecca Probert is an Associate Professor at the University of Warwick, teaching family law and child law. She has published widely on both modern family law and the historical development of the law, her most recent books being *Cretney and Probert's Family Law* (Sweet & Maxwell, 7th ed, 2009) and *Marriage Law and Practice in the Long Eighteenth Century: A Reassessment* (Cambridge University Press, 2009).

PATRONS OF THE FAMILY LAW REVIEW

Baroness Butler-Sloss of Marsh Green

Baroness Deech of Cumnor

Executive Summary

The general collapse of ordinary family life, because of the breakdown of families, in this country is on a scale, depth and breadth which few of us could have imagined even a decade ago. [Government] is allowing the whole family justice system to be starved to death. It fails to recognise the singular importance of the family justice system to the functioning of our society.

Mr Justice Coleridge¹

As long as solicitors and Society continue to view divorce and custody as adversarial, i.e. that there should be a 'winning' and a 'losing' side, then the issue of where the children from these relationships should spend their time will be a painful, expensive battleground for those involved.

Angela, daughter 11, son 10

Introduction

The importance of the family cannot be overstated. A child's physical, emotional and psychological development occurs within the family environment; it is where the vast majority of us learn the fundamental skills for



Family is where most of us learn the fundamental skills for life.

life. However family stability in Britain has been in continuous decline for four decades. Increasing numbers of adults and children have experience of family life which is dysfunctional, fractured, or fatherless, and their life chances are often adversely affected because of this. The personal cost, financially and emotionally, to individual family members and children is high; so too the costs to our nation. The direct financial cost of family breakdown to the country is estimated to be in excess of £20 billion per annum.² The indirect cost is substantially higher. This financial and human cost cannot be continued, nor can it

be afforded, and the current economic climate only increases the imperative for action. The trend of family breakdown must be reversed, and policies must be implemented to support and strengthen family life in Britain.

¹ Mr Justice Coleridge, speech to Resolution National Conference, April 2008

² Social Justice Policy Group, 2006, 'Fractured Families' Volume 2 of *Breakdown Britain*, Centre for Social Justice, p68, n12

The final report from the Social Justice Policy Group (SJPG),³ *Breakthrough Britain, Family Breakdown*, recommended that there be:

A review of family law conducted by a dedicated independent commission. *The relationship between the law and family breakdown and legal aspects of marriage, divorce, cohabitation, parental rights and the rights of the extended family (especially grandparents) are highly complex but require consideration. We recommend that this be carried out under the auspices of an independent body such as the Centre for Social Justice.*

The commission was duly established by the Centre for Social Justice in Autumn 2007 and comprises experts from the fields of family law and social policy. It met with and took evidence from a total of 115 consultees and represents one of the most comprehensive reviews of family law reform for 40 years.

The common thread running through this review is how the law, legal procedures and processes, and ancillary functions might better support and encourage stability and commitment in relationships. In keeping with the research findings and recommendations of *Breakthrough Britain* this review works from an underlying assumption that marriage should be supported both in government policy and in the law and that healthy, two-parent families represent the best environment for both children and adults.

“Data shows that only 8 per cent of married parents, compared to 43 per cent of unmarried parents, had separated before their child’s fifth birthday.”³

Section 1 The Need for Family Law Reform

THE ROLE OF THE LAW (SECTION 1.2)

A review of family law is considered to be necessary as part of a concerted effort to stabilise and support relationships within our society. The law plays an important role in shaping expectations surrounding family life, impacting relationships both directly and indirectly. However for the past four decades Parliament has not given sufficient attention to family life through failing to enact necessary and appropriate changes to family law in England and Wales. As a consequence, where family life needs and seeks the assistance of family law, some statute law is acknowledged now as being out-dated, failing to reflect changes in family life and parenting patterns. In addition, it is in places overlaid with confusing and sometimes contradictory judge-made law.

3 Kiernan, K., 1999, 'Childbearing outside marriage in Western Europe' *Population Trends*, Vol. 98, pp. 11-20. See also Social Justice Policy Group, 2006, 'Fractured Families' Volume 2 of *Breakdown Britain*, Centre for Social Justice, p30

PRINCIPLES OF FAMILY LAW REFORM (SECTION 1.3)

The following are underlying principles and elements of law considered very important, with some, naturally, being more crucial for certain areas of reform than for others. (The only recent attempt to state principles for family life in legislative reform was section 1 of the *Family Law Act 1996* which we strongly recommend should be brought back into primary legislation at the next convenient legislative opportunity.)

- **Support for marriage, married couples and the institution of marriage**
- **Support for family life;**
- **Every reasonable opportunity to save saveable marriages and other domestic relationships;**
- **Looking after the best interests of children;**
- **Protection of the vulnerable and potentially vulnerable, especially in matters of safety and personal protection;**
- **Fairness and justice, and being seen to be fair and just;**
- **Access to justice for all;**
- **Clarity, certainty and predictability of outcomes;**
- **Simplification and accessibility of procedure;**
- **Consistency of outcomes across the country and between similar cases;**
- **Impact on court resources, legal aid and other direct costs;**
- **Encouragement to private ordering** (with couples being strongly encouraged, after having obtained appropriate legal and practical advice and information, to reach agreements themselves if they are happy to do so);
- **Encouragement to settle out of court through Alternative Dispute Resolution and other means;**
- **Principle of ‘no fiction’ or artificiality in procedure, in court forms or in the law;**
- **No bargaining chips;**
- **Judicial continuity wherever possible;**
- **Sanctions against disproportionate legal costs;**
- **Greater court management;**
- **Overcoming delays in court procedures with greater case management;**
- **Taking account of international trends;**
- **Creating a law which respects national mores and values yet also respects international families from different backgrounds.**

The Working Group believes that the core tests for any reform proposal must be that it ensures the best interests of children, the safety and well-being of family members and fairness and justice within society. More specifically we test reform proposals on the anvil of support for marriage and the institution of marriage. Accordingly certain proposals, for example financial remedies on divorce, must be seen in their own right according to what is fair and just but also considered in light of the impact they will have on the respect for marriage and marriage commitment.

YOUNGOV POLLING (APRIL 2008 AND JANUARY 2009)

The Centre for Social Justice commissioned YouGov to conduct a poll of people's attitudes towards the law of marriage:

- 84 per cent agreed that it is important for the law to support marriage, with 52 per cent saying that it is very important;
- 57 per cent thought that the law should promote marriage in preference to other kinds of family structure such as cohabitation, compared to 27 per cent who did not;
- 58 per cent thought that giving cohabitants similar legal rights to marriage would undermine marriage and make people less likely to bother to get married;
- 85 per cent supported giving extra financial incentives to married couples through the tax systems as a way of promoting marriage;
- 60 per cent of respondents thought that prenuptial agreements are a good idea for some people and should be legally binding if a couple do divorce;
- Only 8 per cent of married couples took marriage preparation classes before they got married;
- 81 per cent support relationship counselling being made available to help people whose relationships are in trouble;
- 84 per cent thought that it would be a good idea if drugs courts were more widely available across the UK.

Section 2 Family Law and Family Relationships in the UK today

MARRIAGE IN THE UK (SECTION 2.1)

Rather than treating marriage as a 'magic bullet', previous CSJ reports have emphasised that attitudes and behaviours which tend to be more associated with marriage than cohabitation, for example future-orientation, willingness to sacrifice/invest, greater role specialisation (although not necessarily along traditional lines), are contributors to greater stability and better outcomes for adults and children. For example, married couples are far less likely to break up than couples who live together without getting married, even after adjusting for the influence of such factors as income, age and education. Data shows that only 8 per cent of married parents, compared to 43 per cent of unmarried parents, had separated before their child's fifth birthday.⁴ The empirical evidence in *Breakdown Britain* and *Breakthrough Britain* shows that intact marriages tend to provide more beneficial outcomes for adults and children than cohabitation and single parenthood. Children tend to do better in the areas of physical and emotional health, educational achievement, financial

⁴ Kiernan, K., 1999, 'Childbearing outside marriage in Western Europe' *Population Trends*, Vol. 98, pp. 11-20. See also Social Justice Policy Group, 2006, 'Fractured Families' Volume 2 of *Breakdown Britain*, Centre for Social Justice, p30

security and their ability to form their own future stable families.⁵ Despite this clear and overwhelming evidence there has been a lamentable lack of active government and parliamentary support for marriage.

A feature of modern British society and many other Western societies is cohabitation outside marriage. Often this is portrayed as having been a recurrent theme within British history, an inevitable progression within society and an aspect that must be accepted. This is refuted by this report. Important research shows instead that cohabitation has not been a significant feature throughout British social history.⁶ Periods of higher levels of illegitimacy are

explained by factors such as people's economic situation rather than cohabitation. Research commentators put the material increase in cohabitation only from the 1970s onwards. It is now at levels not previously seen and indeed the UK has one of the highest rates of cohabitation across the Western world.

Whilst undoubtedly there has been a dramatic increase in cohabitation, this must not obscure the fundamental fact that in twenty-first century Britain marriage is still the most common form of partnership for men and women. In 2001 there were more than 11.6 million married couple families

in the UK, compared with around 2.2 million cohabiting couple families.⁷ The Office for National Statistics states that: 'The traditional family structure of a married mother and father with a child or children remains the most common family type. More than 8 million (64 per cent of) dependent children lived with married parents in the UK in 2008.'⁸ This compares to 13 per cent living with cohabiting couples and 22 per cent with lone mothers.⁹

Furthermore, results from the British Household Panel Survey show that for those under 35 currently in cohabiting relationships, formalising a relationship through marriage is a widely held aspiration, and that 75 per cent want to marry.¹⁰

The rise of cohabitation does not mean there is a consequent disinterest in the formalised commitment of marriage. The conclusion that marriage remains a personal ideal in twenty-first century Britain accords with the demographer Andrew Cherlin's description of marriage as a 'Super-relationship' whereby 'its symbolic significance has remained high and may even have increased. It has become a marker of prestige and personal achievement'.¹¹



(Photo by Athena Vina)

- 5 See for example: Neyer, F. and Lehnart, J., 2006, 'Personality, Relationships and Health, a Dynamic Transactional Perspective,' *Handbook of Personality and Health*, Chichester, Wiley; Brewer, M., Goodman, A., Shaw J., & Sibietta L., 2006, *Poverty and Inequality in Britain: 2006*, IFS; Sarantakos, S., 1996, 'Children in three contexts: family education and social development,' *Children Australia*, Vol. 21, Cited in Social Justice Policy Group, 2006, 'Fractured Families', Volume 2 of *Breakdown Britain*, Centre for Social Justice, p46-57
- 6 See Probert R, 2008, 'Common law marriage: myths and misunderstandings' *Child and Family Law Quarterly*, 20, 1-226
- 7 ONS, 2008, Social Trends 38
- 8 ONS, 2009, Social Trends 39, p16
- 9 Ibid
- 10 *Marriage still the Ideal for many couples currently living together*, <http://www.lse.ac.uk/collections/pressAndInformationOffice/newsAndEvents/archives/2007/MarriageStillIdeal.htm>
- 11 Cherlin, A., 2004 'The Deinstitutionalization of American Marriage', *Journal of Marriage and Family* 66, pp. 848-861

Legal marriage has both private and public functions. Its private function is to help individuals to make credible commitments to each other. Through this, the institution of marriage gives them the confidence to invest time and resources in their relationship. Its public function is (at a minimum) to consolidate relationships that are considered beneficial to third parties, such as children, relatives and society at large.

FAMILY BREAKDOWN (SECTION 2.2)

This report confronts the major challenge of family breakdown in the UK today. It has become a fundamental and entrenched cultural experience directly affecting an estimated third of the UK population and indirectly affecting countless more across all ages and social backgrounds. Moreover this is not a purely private issue, affecting only the couple themselves. Children are often profoundly affected by parental separation, often carrying the scars into their adult lives and personal relationships. Nowadays we see many couples entering marriage with high expectations but much lower capacities to realise those expectations and little understanding of the long-term nature of the commitment.

The cost to our nation of relationship breakdown has been estimated at £20-£24 billion, between £680 and £820 for every taxpayer.¹² The cost to the nation of supporting a single-parent family is between £4,000 and £15,000 per annum. Other research puts the cost of family breakdown at a staggering £37 billion.¹³ The culture of relationship breakdown must change for economic as well as social reasons. Our nation simply cannot continue to afford the cost.

Mr Justice Coleridge highlighted the important role of the family in a key speech in April 2008 saying that ‘For as long as history has recorded these things, stable family life has been co-extensive and co-terminus with a stable and balanced society. Families are the cells which make up the body of society. If the cells are reasonably healthy, the body can function reasonably well and properly.’¹⁴

However he warned of the negative impact when family structure and family relationships across society consistently break down, concluding that ‘family breakdown and family justice needs to be at the top of the political and justice agenda. The maintenance of the family and family life in this country is the priority. It is nothing less than the business of the preservation of our society...It requires a full time minister devoting his or her energies to nothing else. It calls for a complete change of attitude by those who govern or would aspire to do so.’

12 This figure was a conservative estimate made by the SJPG, when taking into account the ONS data on the number of taxpayers, compared with IFS figures on child support and taxes and benefits relating to children and known figures on the cost of income support, as well as further costs to society from areas such as unemployment and crime which are the indirect result of family breakdown. For more details see Social Justice Policy Group, 2006, ‘Fractured Families’ Volume 2 of *Breakdown Britain*, Centre for Social Justice, p68

13 Relationships Foundation, 2009, *When Relationships go Wrong: Counting the Cost of Family Failure*

14 Speech by Mr Justice Coleridge to Resolution National Conference, April 2008. For full speech see Appendix 4. See also his speech to the Family Holiday Association, House of Commons, 16th June 2009

He goes on to ask, 'Is it fair that there should be two tiers of children, those who have received a reasonable and secure upbringing and those who have suffered the traumas of family breakdown for most of their minority?' He ended his call to government and to the public as follows: 'We are sleep walking to the edge of the precipice'.

This report brings together, in a holistic and joined-up way, many recommendations to help individual couples and their children at a micro-level and to change the deep-seated culture of relationship breakdown at a macro-level.

DIVORCE LAW IN THE UK (SECTION 2.3)

Divorce is the foundation of so much in family law: divorce law, procedure and practice inform the thinking of many on marriage, stability and commitment and what should happen on marriage breakdown. The evidence is compelling that the law and ancillary procedure are causally implicated in high rates of family breakdown. If the law is more powerful (although only as one factor among many) than has previously been acknowledged, then its potential role as a *stabilising* factor should be properly investigated.

We are concerned about the signal that no-fault divorce sends about marriage, marriage commitments and the ease of opportunity to leave a marriage. Although the grounds cited are often not the real reason why the marriage has ended, and references to blame and fault can provoke much discord and unhappiness, there are some cases in which the fault basis does indeed recognise the reality of the breakdown of the marriage. There are some petitioners who want this recognition. Whilst in most marriage breakdowns there is fault on both sides, there are also some where fault lies wholly or very substantially with one spouse alone and it would be wrong in these cases for there not to be any fault basis. However, other reform issues affecting families and family law have much greater priority. This is an area which has previously divided Parliament and the public and may do so again if no-fault divorce was proposed, distracting attention from more fundamental issues and very necessary reforms.

Parliament decided in the 1996 legislation that there were significant benefits in having a three month period of reflection and consideration at the outset of the divorce process. **This report concludes that such a period would be beneficial, commenced with a short, neutral notice.**

COHABITATION (SECTION 2.4)

Over the last ten years the proportion of cohabiting couple families in the UK has increased from nine per cent to 14 per cent.¹⁵ The UK has one of the

¹⁵ ONS, October 2007, Focus on Families: Overview of Families., <http://www.statistics.gov.uk/CCI/nugget.asp?ID=1865&Pos=1&ColRank=2&Rank=1000>

highest numbers of births occurring outside marriage. The continued ongoing rise in family breakdown in the UK (affecting many young children) has been driven by the dissolution of cohabiting partnerships, as divorce rates have remained high, but stable.

Unlike marriages or civil partnerships, when cohabitants separate the courts do not automatically have the power or discretion to adjust a couple's assets by way of property adjustment orders, lump sum orders, or periodical payments to meet maintenance needs. However, before there is any dramatic change of the law, especially to promote equivalence to marriage, we consider there should be a much more concerted and urgent attempt to highlight for cohabitants their lack of legal protection and available existing remedies.

Breakthrough Britain expressed:

...grave concern over the negative implications of imposing rights and responsibilities on cohabiting couples. Notwithstanding individual cases of apparent injustice, many cohabitantes have voluntarily chosen to reject marriage with the protection it provides. The liberal argument that people should not be penalised for this choice is flawed. Attaching legal provision would be illiberal (because it imposes a contractual obligation not freely entered into) and intrusive and would encourage inherently more unstable relationships.¹⁶

It concluded that if we want to encourage a high-commitment culture and break the relationship breakdown culture, it is counter-intuitive to make additional provisions within the law for lesser forms of commitment.

We have made significant proposals in the report for reform of ancillary relief financial provision on divorce, when a marriage is brought to an end and also on dissolution of civil partnership. These are the primary status-recognised relationships in society and are the priority areas for reform. There should be no statutory reform of cohabitation law until Parliament has had the opportunity to consider reform of ancillary relief financial provision on divorce.

There are many different categories of cohabitants. Some specifically do not want the obligations, commitments, legal burdens and other features of marriage and so reform should not be automatically imposed upon them, even with problematical opt out provisions. Moreover there are steps which can be taken by those in a cohabitation relationship to record their intentions regarding the financial aspects of the relationship and other existing remedies.

Finally, we have a major concern about the impact of cohabitation law reform on marriage. Within this area of social life, changes and trends occur

16 Social Justice Policy Group, 2007, 'Family Breakdown' Volume 1 of *Breakthrough Britain*, Centre for Social Justice, p10

often relatively slowly but then with a deep-seated effect. It may be years, even a generation, before the effect of cohabitation law reform would be known. **We recommend instead more education of couples to raise greater awareness of their rights and limitations in their relationships, and opportunities to provide certainty and planning in their financial affairs.**

CIVIL PARTNERSHIP (SECTION 2.5)

The legislation governing civil partnership is still very much in its infancy. It will take several years for reliable patterns of formation and dissolution of same-sex registered partnerships to become evident. As a consequence, in this report we are not making any recommendations or proposals in respect of civil partnerships.

Section 3 Family Law and Family Life Support

PRE-MARRIAGE INFORMATION AND PREPARATION (SECTION 3.1)

Our society has countless requirements for preliminary information, guidance, training, coaching and qualifications before certain steps or actions can be taken, not least because of the costs and implications. Yet marriage can be entered into easily, quickly and with little understanding of its implications, responsibilities and pressures. The lack of any widespread preparation for marriage within our society is stunning by its omission.

Marriage preparation can significantly reduce the possibility of marriage breakdown. The evidence is clear that good quality, focused and well delivered pre-relationship information and preparation significantly adds to the quality of the relationship, assists in parenting skills and awareness, alerts people to crisis points within relationships and provides information on where, when and how to seek help during relationship difficulties.¹⁷ It provides couples with the opportunity to take a step back to learn skills and begin to develop good habits, to understand choice and commitment, and to set in place the foundations for the years to come. There is already some pre-marriage preparation, some of very high quality. However, provision is currently very disjointed, with no consistent quality control or standardisation and it needs much greater support and encouragement.

This report concludes that there should now be **strong Government encouragement of couples getting married to take part in high-quality, standardised and accredited pre-marriage information and preparation, delivered in an accessible fashion.** This will also work in some instances alongside our recommendation that there should be binding marital agreements, including pre-marriage agreements, for those who want to enter into them, subject to certain preconditions and safeguards.

¹⁷ Carroll, J. & Doherty, W., 2003, 'Evaluating the effectiveness of pre-marital prevention programs: A meta-analytic review of research' *Family Relations*, 52, 112-113

MARRIAGE SUPPORT (SECTION 3.2)

Couple relationship education should not stop at the date of marriage. We have reviewed the different forms of couple relationship education presently available. Evaluations of effective relationship and parenting skills programmes show that they can improve relationship adjustment and parenting behaviour as well as reduce family conflict and divorce.¹⁸ Building upon the pre-relationship information, this report concludes that **there should be much stronger encouragement for couples to take part in relationship education whilst the relationship is healthy and intact, as evidence shows tangible benefits.**¹⁹

As part of reversing the culture of relationship breakdown, it will be important to create an awareness of the importance of relationship information and assistance and a willingness to seek that assistance rather than simply accept the inevitability of relationship difficulties or breakdown.

Although in this section reference is made to couple relationship education in the context of an ongoing relationship, we also recommend that the educational curriculum for **young people should include lessons about family relationships, including differences between marriage and cohabitation and the impact of separation on children.**

UK FAMILY RELATIONSHIP HUBS (SECTION 3.3)

Many excellent family support services exist across the country but provision is patchy and there are inconsistent standards of delivery. There is a need for some unifying and centralising resource for the services. The review conducted a study visit to Australia to look at their Family Relationship Centres and **recommends that a similar model in certain respects should be introduced.** We call them Family Relationship Hubs to concentrate on their focus of bringing together the various services available locally. The Family Relationship Hubs will not necessarily provide all of the services and resources, although they may do so in some instances. They will however coordinate what is available, identify what additional services and resources are needed and inform the public of the available resources and services. These should include pre-marriage information, couple relationship support and parenting skills programmes as well as certain information before the commencement of family court proceedings.



A Family Relationship Centre in Caringbah, Sydney, that the Family Law Review visited.

18 Benson, H., 2005, *What interventions strengthen family relationships: A review of the evidence*. Paper presented at 2nd National Conference on Relationships Education, London

19 Most available research has been done on the US. For example, Halford, K., Markman, H., Kline, G. & Stanley, S., 2003, 'Best practice in couple relationship education' *Journal of Marital and Family Therapy*, 29, 385 – 406; Stanley, S., 2001, 'Making a Case for Pre-marital Education' *Family Relations*, 50, 272-280; Carroll, J. & Doherty, W., 2003, 'Evaluating the effectiveness of pre-marital prevention programs: A meta-analytic review of research' *Family Relations*, 52, 105-118

They can build on existing infrastructure and services with potentially large costs savings advantages. In particular, **we want to explore use of existing Surestart Children's Centres. We recommend a similar situation in the UK, as in Australia, in terms of high visibility. By being distinctively and nationally branded with quality assurance, high profile and as a hub to the many local and national services, they will soon become the central core service for families at all stages.**

RELATIONSHIP SUPPORT: CONCLUSION

The UK has never before had such a consistent approach to marriage and family support, with provision of services across the spectrum of society and throughout the various stages of domestic relationships. We consider these combined services and recommendations will make a dramatic difference to the family breakdown culture in our country and hugely benefit the experience of family life:

- **Information to be provided at the beginning of a relationship to strengthen and prepare for the relationship;**
- **Marriage support in various forms of couple relationship education, including appropriate intervention at specific times in the relationship;**
- **Local centres to provide information and resources to help individuals and families;**
- **Mandatory referral to information before the commencement of court proceedings;**
- **Mandatory attempt at resolution in children matters before proceedings.**

Section 4 Family Law and the Family Law Process

INFORMATION BEFORE THE ISSUE OF PROCEEDINGS (SECTION 4.1)

The judiciary and many others across the family law professions with whom we consulted were clear that too many people were entering into family court proceedings without being fully aware of direct and indirect costs, wider implications and prospects of reconciliation. More information about the legal, practical and emotional impact of divorce on families and children and what it may involve might have changed the approach and the nature of the proceedings and timings, if not the outcome. Given the lack of success of the Family Advice and Information Service (FAInS) project and the difficulties of getting people to sources of information other than family lawyers, delivery of information is problematic.

Information prior to the issue of proceedings should best be seen in the overall context of the provision of relationship information (relationship education in schools, pre-marriage information, couple relationship education, parenting skills and resources available at times of relationship difficulties).

This reduces the sense that obtaining such information is an unwelcome hoop people need to go through and will assist in the process of removing the perception of family lawyers as always and inevitably the first port of call. **We recommend the use of new communication technologies to assist the dissemination of information.**

We recommend that **before any proceedings in family law can be commenced, with certain exceptions, the applicant must have had the opportunity to consider information** on reconciliation opportunities and resources, Alternative Dispute Resolution, impact on children, costs and court procedures and other relatively basic information. A certificate of attendance would be required before proceedings could be issued.

It is anticipated that the Family Relationships Hubs will play a crucial role in overcoming some of these problems, and in providing referrals to appropriate services and resources. The Hubs would work closely with HM Courts Service.

ALTERNATIVE DISPUTE RESOLUTION (ADR) (SECTION 4.2)

The vast majority of cases do not need to go to a final court hearing and the family law system must be directed more specifically and overtly to finding ways to encourage a settlement without a final court hearing through using Alternative Dispute Resolution methods (ADR).

Every opportunity should be given to the parties to explore appropriate ADR to save legal costs and avoid the polarisation and contention inherent in final hearings and generally to benefit the parties and any children.

There is an obligation on anyone seeking public funding, legal aid, to attend a meeting to consider whether mediation may be suitable; however it is inevitably very limited because it does not apply to private paying parties. We propose that it should be **mandatory to attend an information provision meeting, to include a full explanation of ADR, before commencing any form of family law proceedings and then to certify attendance before proceedings can be issued by the court.** This would be extended to respondents who counter-apply in any existing proceedings. This would then include information about ADR and an opportunity to take part in some form of ADR. It would include a mandatory attempt at ADR resolution in children cases. Moreover we recommend the family court should have the power to refer an ongoing case into mediation or other ADR where suitable.

Indeed, we strongly recommend that ADR should be properly regarded as primary dispute resolution and that there should be primary legislation to make family law arbitration binding in law.

LEGAL AID (SECTION 4.3)

Beyond doubt, the existing legal aid system is in the final throes of meltdown and change is urgently needed. Current government policy would only further

reduce the dwindling numbers of those willing to provide the service, depriving many families of access to the help they need. Access to legal advice is an integral part of family law and without it the courts will be cluttered in a way which will inevitably lead to significant delay and real risks of injustice. When people are forced to act as 'litigants in person' this slows down proceedings markedly, increases delays at court and often increases the costs.

Expenditure on this important public service is plainly low and especially in comparison with other similar services. We recommend that **budgets for family legal aid must immediately be ring-fenced, that banks should be encouraged to promote more finance for family law litigation and the courts should have power to grant interim lump sums to help with these costs.**

The taxpayer is entitled to know the true cost of public services. The real cost of legal aid in net expenditure should be made public so that income received through the operation of the statutory charge is transparent. Moreover **the statutory charge imposes an unacceptably high rate of interest upon litigants and should be reduced in line with market rates.**

We also urge a **return to the original principle of fair remuneration, so as to stem the exodus from this work.** Above all, we urge a belated recognition that access to justice, alongside health-care and education, is an essential facet of civilised society.

DOMESTIC VIOLENCE AND ABUSE (SECTION 4.4)²⁰

Breakdown Britain highlighted the scale of the problem of domestic violence, which accounts for 25 per cent of all recorded crime classified as violence against the person in England and Wales.²¹ The problem of domestic violence is closely correlated with the problem of family breakdown, and family breakdown dramatically raises the risk of domestic violence.

The Domestic Violence, Crime and Victims Act 2004 introduced reform both to the civil and criminal law dealing with domestic violence, and thus we have considered whether the objectives of the Act are being achieved. We have found that applications overall appear to have fallen by some 15 per cent since the implementation of the DVCV Act. The trend already in existence since 2000 was a general decline (a 16 per cent fall between 2000 and 2006) but was clearly not comparable to the current fall. The greatest concern among family law practitioners and the civil judges is that breaches are not routinely being prosecuted. In particular, there are concerns by judges of the civil family courts as to whether victims are not reporting incidents for fear of 'criminalising' the

²⁰ See also Appendix 7 for full report on Domestic Violence

²¹ Metropolitan Police, April 2006, *Violence against the person (VAP) – Summary of data and trends*, http://www.met.police.uk/foi/pdfs/priorities_and_how_we_are_doing/archive/2004/summary_performance_violence_against_the_person_2004-05.pdf

perpetrators and whether breaches of orders are being expeditiously prosecuted in the criminal courts by the Crown Prosecution Service (CPS). There are also concerns over the timescales and outcomes for those prosecutions and the effect of the change of venue on the victims.

What is **urgently needed is data as to the number of cases passed to the CPS, the number of those cases prosecuted, withdrawn or discontinuing for other reasons, the conviction/acquittal rates, and the timescales from arrest and charge to conviction/acquittal, in order to assess properly the impact of prosecution of breach in the criminal courts.** The concerns about the delay in the criminal system compared with the previous expeditious civil route are justified, as is concern about the effect of that delay on victims.

The difficulties with enforcement of domestic abuse orders must not be allowed to detract from the fundamental importance of the condemnation of domestic abuse of any form, whether between adults or to children and/or when witnessed by children. Abuse can take the form of actual physical violence, threats of violence and other forms of intimidation.

Section 5 Family Law and Children

CHILD CONTACT AND RESIDENCE (SECTION 5.1)

Breakthrough Britain attracted a large amount of evidence from many parents (especially fathers) who were dissatisfied with their legal position following divorce and separation. The parent with care of the child(ren) is often unhappy with the level and reliability of maintenance payments from the non-resident parent, whilst the latter often wishes to take issue with the level and reliability of contact with the child(ren). Breaches of contact orders made by the courts in favour of the parent without residence are not easy to remedy. The legal position of non-resident parents has been considered as well as the extent to which arrangements for 'sharing' care of the children should take account of the amount of social, educational and personal disruption a child or young person can reasonably be expected to bear: important issues around presumption of contact and presumption of the welfare of the child.

We are very aware that the Children Act was a highly respected piece of legislation, much copied across the world, with significant flexibility to adapt to changing circumstances and parenting patterns and with new and changing expectations regarding children. It was, however, drafted in an era when there was the assumption that the courts were faced with a stark choice between two alternative homes, the mother's and the father's. Increasingly the issue now concerns the amount of time the child will spend with each parent, which may sometimes have no legal description such as residence or contact or shared residence, but simply the need to work out a sensible parenting arrangement. In this respect there were consistent submissions to the review that there should be an improvement in the legislation.

We decided that there should not be any significant *wholesale* changes to the legislation. We did, however, decide that **the Children Act needs to be amended to include principles for contact and residence that are clearer and more explicit but nevertheless leave room for flexibility and judgement in particular cases.**

All those with parental responsibility should be considered to have an equal status in their children's lives following separation. Many consultees

wanted this statement recorded in the legislation to indicate that the starting point is a level playing field. One parent, of either gender or the parent with whom the child may, for perhaps historic, status quo or biological reasons, temporarily be living, should not automatically have an artificial 'head start' in resolving the future best interests of the child.

We also suggest **legislation should acknowledge that children are most likely to benefit from the 'substantial involvement' of both parents in their lives.** This will be found through contact being of a sufficient frequency and

duration so that each parent is able to have this substantial involvement in the child's day-to-day routine and activities.

Naturally the welfare of the child remains the paramount consideration. However **amendments to primary legislation of this form should significantly ensure that children have a continuous and good relationship with both parents despite parental separation (with appropriate caveats in place where domestic abuse is an issue).**

CONTACT CENTRES (SECTION 5.2)

We heard during the review of the excellent work undertaken by child contact centres, of which there are nearly 250 in the UK, facilitating 47,500 sessions of contact for 17,000 children a year. They are an invaluable resource for many children and parents. The simple reality is that in a good number of cases, one parent would not be able have contact with their child for weeks, perhaps months or longer, if it were not for these facilities and the staff who run them.

However we were concerned to hear that recent rearrangements in funding have meant that whilst start-up funding may be available, ongoing costs often cannot be met even with considerable volunteers and charitable support. Yet the costs of running many contact centres are relatively small, especially taking account of their considerable benefit in post-separation parenting and the costs saved elsewhere, such as in court proceedings.

There should be a **partnership of funding between central government, local government, CAFCASS and the centres themselves, whilst recognising that the centres for their part may continue to rely on volunteer work and charitable donations.** Whilst we understand that many attend these centres reluctantly and this has deterred many centres from charging, **payment by parents except for**



Legislation should acknowledge that children are most likely to benefit from the 'substantial involvement' of both parents in their lives.

exceptional services should become the norm, given the lack of available finance for this essential service and the fact of parental responsibility.

RELOCATION AND INTERNATIONAL CHILDREN (SECTION 5.3)

England is probably the world's most liberal jurisdiction in making relocation orders. Provided the primary carer is able to put forward good, practical, well-prepared and considered plans, and especially if they are able to demonstrate emotional and other unhappiness at having to remain, then permission to relocate will usually be given. English child relocation law has not significantly changed for over 30 years. However, as shown elsewhere in this report, patterns of parenting have changed dramatically in the past 10 years.

Changes to the *Children Act 1989*, proposed above, would be the starting point and provide guidance, where it is currently lacking, as to how the non-resident parent can be better factored into the decision-making process as regards relocation. Currently the resident parent has disproportionate 'rights' in this area, with their plans to move away being in reality the primary consideration. Instead, **there must be much greater consideration given to the wider implications for the child of a geographical relocation, and more than the simple alternative choice of with which parent to live.**

We strongly urge government to press this difficult issue forward whilst being aware that this may also require a Convention to create and bring together international consensus.

RIGHTS OF EXTENDED FAMILY (SECTION 5.4)

There has been a fresh realisation of the important roles played by other family members, especially grandparents, within the family framework. What little law there is on the subject of grandparents' rights is contested by a number of lobby groups, who perceive current injustices in the system. We have therefore been conscious of the need to enhance support for grandparents and other potential carers.

The term 'grandparents' in this section of our report includes adoptive as well as biological grandparents, although we recognise that in some situations, where biological grandparents have been closely involved with a grandchild, this could produce a conflict of interest between biological and adoptive grandparents. In such cases, the claims of the natural grandparents may also need to be considered.

There is evidence of a developing polarisation of situations: those where there is either no contact with grandchildren (something that can be painful and damaging for all parties), or those where a substantial burden of care is placed on grandparents who are themselves getting older and some of whom may be infirm or have limited financial resources.

Family law within the UK prioritises the welfare of the child and gives no automatic rights to grandparents. The current legal position is that a grandparent, prior to making any application for contact with a grandchild, needs to obtain leave of the court under Section 10(9) of the Children Act.

While lawyers working in this area report that leave generally tends to be given, making the grandparent free to apply for contact in the usual way, practitioners and grandparents also report that some contact applications are drawn-out, acrimonious and expensive for the individual or, (if the applicant is publicly funded) for the state. Given the level of support for curbing or removing the two-stage process, our recommendation is that **grandparents seeking contact should not be placed in the same legal position as other extended family members or stepparents to the family who need leave to apply to the court.**

Our evidence suggested that the parties who seem to manage contact issues more amicably are those who were directed towards compromise at an early stage. We concluded that **an approach that supports and encourages early mediation between the grandparent and the parent with residence (like that facilitated in Australian Family Relationship Centres) may have a real prospect of producing better outcomes for the family.** This might also relieve pressure and the financial burden upon HM Court Service.

Given many parents' preference for informal childcare, especially that provided by grandparents, we also reiterate the recommendation in *Breakthrough Britain* that there be a **change in the rules to allow the use of childcare tax credit to pay unregistered close relatives (albeit at a lower rate).**

LOCAL AUTHORITY CARE AND SPECIAL GUARDIANSHIP (SECTION 5.5)

Following on from the recent Centre for Social Justice report *Couldn't Care Less*,²² we have given attention to the role of the extended family when children are in the care of the Local Authority. The most common kinship placement is with grandparents, the next most common being with aunts and uncles. Research has concluded that **placement principles should be clearly enshrined in law and that kinship care should be treated as a distinct care type.**

We also reviewed how Special Guardianship Orders (SGOs) impact the rights of grandparents and extended family members and have found that these Orders can enhance the stability of these, often very vulnerable, children's lives. The implementation of SGOs could be helpful to the claims of grandparents and extended family members who would like to have more say in the daily affairs of the child that they are responsible for, whilst not becoming their adoptive parents.

Grandparents can be central in retaining family cohesion in difficult circumstances, lending support and being a source of advice and experience. Current research has revealed the extent to which this is often the case in the special circumstances of parents affected by drug abuse and its consequences.²³

We recommend that **positive steps be taken to enable regular contact with parents, grandparents, siblings, and other relatives, since this can have a positive influence as far as successful rehabilitation is concerned,** while lack of contact can affect crucial decisions such as whether or not to discharge a

²² Centre for Social Justice, September 2008, *Couldn't Care Less*

²³ ICS Working Paper 7, May 2004, *The Grandmother Project – towards a new partnership between family and state*

care order or to dispense with parental agreement to adoption. We believe that **an enhanced duty to promote contact with alternative family members for children in care should mean that close family members are seen as potential carers before a child is placed into Local Authority care.**

THE ROLE OF FAMILY, DRUG AND ALCOHOL COURTS (SECTION 5.6.1)

The safety and interests of the child are clearly paramount and often courts have to remove a child from drug-misusing parents. However, this may not always be the best option and we have considered alternatives to what can be a harsh and arbitrary mechanism, such as the Family, Drug and Alcohol Court being piloted at the Inner London Family Proceedings Court. Whilst it is still early days in this initiative, and evaluation is on-going, we were impressed by what we saw and heard on our visit to this Court. The project in California which inspired this initiative has seen an 80 per cent success rate in rehabilitating parents with addictions, so as to prevent them losing their children to the care system.

We strongly recommend the wider implementation of drugs courts. There is widespread public support for their introduction.

“84 per cent of the public, when questioned in our YouGov poll whether drugs courts should be more widely available across the UK, thought that it was a good idea.”

Section 6: Family Law and Finance

PRE-MARITAL AND MARITAL AGREEMENTS (SECTIONS 6.1.2 AND 6.1)

England and Wales is unusual across Westernised family law jurisdictions in not having binding pre-marriage agreements (also known as pre-nuptial agreements or pre-nups) or other marital agreements. However, in the past 18 months or so, perhaps accelerated by increasingly generous financial provision on divorce, there have been several reported higher court decisions in which the existence of marital agreements has been described as of ‘magnetic importance’ and ‘paramount’ importance.²⁴ The position in law must now be made clear by Parliament.

We have concluded that considering pre-marriage agreements is consistent with a very deliberative approach to getting married and fits into our proposals elsewhere in this report for obtaining information before marriage, which we hope and expect will become the cultural norm. We do not suggest that they should become mandatory or indeed that there should be an expectation that they become the norm for married life. They are an opportunity of binding legal status for those who want them.

In order to create safeguards, we have set out a number of pre-conditions, based on government recommendations in 1998. We concluded that **it would be unjust to have legislation for binding pre-marital agreements without**

²⁴ *Crossley* [2008] 1 FLR 1467 and *W v H* [2008] EWHC 2038

the courts having some discretionary opt-out to intervene for justice and fairness in exceptional circumstances and we recommend retaining the wording proposed by the Government in 1998 for the discretionary opportunity to open up an agreement, namely *significant injustice*.

We believe there is good reason to extend this provision to all marital agreements, civil partnership agreements, separation agreements (and cohabitation agreements), with the same preconditions and limited discretion to intervene.

FINANCIAL PROVISION ON DIVORCE (SECTION 6.2)

There have been consistent calls since the mid-1990s for Parliamentary reform of financial provision on divorce. The House of Lords decision in the landmark case of *White v White* in 2000 alleviated the need temporarily, as it set financial provision in a very different direction, concentrating on a starting point of equality of division of all assets. Nevertheless the calls for reform have returned, as strongly as before and at all levels, for example by the Court of Appeal in *Charman v Charman* in 2007.

However in considering this we have been very anxious that the issue should not be viewed narrowly and referable only to fairness and justice on marital breakdown. The way the law treats financial provision on marital breakdown has a fundamental impact on the way individuals and society treat marriage, including the respect for sacrifices made within marriage and in child raising. If the law gives very little respect to marital commitments and sacrifices, in the perception of the public of financial outcomes on divorce, then there is a very

real risk that fewer people will be prepared to make prejudicial commitments for marriage and their spouse. The converse is that if the law provides for very substantial financial outcomes, relative to the overall assets, then there will be a disincentive for some to get married, possibly leading to more cohabitation. The impact on the respect for marriage and marital commitments has been high in our consideration of reforms of financial provision on divorce.

Parliament's failure to engage in this area of law since 1973 has meant that the judges have had to fill the gap left

by Parliament and have created and adapted the law to fit changing social circumstances. On the dissolution of marriage, the courts have a wide discretion to adjust a couple's worldwide assets by way of property adjustment orders, lump sum orders, pension sharing orders and periodical payments. The requirement in the law is to produce a fair settlement. Fairness comprises needs, sharing and compensation. Thus the principle of English financial provision on divorce is equal sharing of all assets unless there is a 'good reason to depart from equality'.²⁵



The way the law treats financial provision on marital breakdown has a fundamental impact on the way individuals and society treat marriage.

²⁵ Para 65 of Charman Judgement. See *Charman v Charman* [2007] EWCA Civ 503

One of the greatest features of the English system is the discretionary element. However this advantageous discretionary system has an equally substantial disadvantage in that it is very difficult to predict with any reliability and certainty what will be the outcome of a particular case if it were to go before a court for adjudication. This decreases prospects of out-of-court settlements and increases costs. England is also a good jurisdiction in recognising and allowing compensation for marital commitment and sacrifice, which must continue and be strengthened. However, in a series of cases in the past 12 months the higher judiciary have seemed to reduce the opportunity for compensation provision rather than strengthen it.

Whilst the present law and system has many disadvantages, we have been conscious that we must not lose the many good elements of the present system. We have reviewed models of divorce financial provision abroad – such as the European community of property model, the automatic division of assets in New Zealand, and the short-term maintenance situation in Scotland and Scandinavia – but we have been convinced that we need to build on the benefits of the present discretionary model, whilst at the same time create more certainty and predictability to lead to more settlements out of court, preferably earlier and more cheaply.

We propose greater usage of web-based electronic calculations, similar to the tables used after the Budget, produced by HM Treasury, which set out the impact of the Budget on a wide variety of families. They are illustrative only and many families do not fit any of the tables. Nevertheless, they offer an informative guide to the Budget outcome for a wide variety of families. We consider that it should be possible to create something similar to the Budget tables for divorce and thereby help very many families. We emphasise this would not be determinative and that assistance from lawyers may (or would) still be required. Nevertheless, we believe that this should be actively explored and we suspect many members of the public would welcome this opportunity as an aid towards predicting a fair divorce financial settlement. **We recommend further options available using the internet for dealing with ancillary relief, ways to overcome the problem of layers of conflicting judicial decisions and suggest more powers for the court to obtain more reliable disclosure.**

Our proposal on financial provision is that all assets of the couple on divorce should be categorised into marital assets and non-marital assets and divided differently. Marital assets should be divided equally subject to overriding calls on those assets, and non-marital assets should stay with the relevant spouse again subject to overriding calls on those assets and unless there is any good reason to make any distributive orders. Non-marital assets would be pre-marital assets, inheritances or gifts and certain post-separation assets with provision that some non-marital assets would become marital assets in particular circumstances and over time.

The court would have power to make different orders if there was significant injustice but otherwise the present very wide discretion would be fettered. The overriding calls would be first to provide accommodation, and other capital

needs, of the children with each parent during the minority of the children and secondly to provide for any prejudice arising to one spouse because of commitments to or sacrifices for the relationship, the other spouse or child raising. In this regard we have borrowed from the Law Commission's recommendations in respect of cohabitation (but applied them to divorce) namely 'unjust enrichment and retained benefit'. The third overriding call would be reasonable needs, although more narrowly construed than present law.

We believe this proposed legislative model could be converted into a web-based computer programme to help more couples make better progress towards a settlement.

We have deliberately not proposed dramatic and radical reform because we consider that **some of the essential elements of the existing law are of fundamental and valuable importance, accord with English national mores and values, and should be retained. It is fettered discretion, whilst acknowledging that marriage creates obligations and commitments which should be rightly recognised.**

TAXATION (SECTION 6.3)

Over the past decade fiscal policy has moved away from any support or endorsement of any particular form of domestic relationship, so that there is now no fiscal benefit within income tax in being married. Conversely, in the vast majority of European countries, the income tax system explicitly recognises marriage and takes into account family responsibilities towards both children and dependent spouses.

Breakthrough Britain proposed that transferable tax allowances be available for married couples, acknowledging the reality that if one spouse is not working outside the home a family requires more, not less, support from the tax system. As part of a joined up message and endorsement by Government of the importance of marriage to children, families and the country, **we recommend that there should be some benefit from the fiscal provision to those who are married.**

Section 7 Family Law and Alternative Family Structures

THE HUMAN FERTILISATION AND EMBRYOLOGY ACT AND 'FATHERS NOT INCLUDED' (SECTIONS 7.1 AND 7.2)

Reproductive technology has facilitated the trend towards legal and social rather than biological parenthood. However children still need to know where both parts of their genetic material have come from if their identity is not to be compromised, and to benefit greatly from the engagement of parents of both sexes in their upbringing.

The Human Fertilisation and Embryology Act 2008 was of central concern to the Family Law Review. Therefore we compiled an earlier report, *Fathers Not Included*,²⁶ published during the passage of the legislation through Parliament

²⁶ Centre for Social Justice, 2008, *Fathers Not Included: A Response to the Human Fertilisation and Embryology Bill*

to address some the issues it raises on family and parenting, as well as to highlight other related issues to which we have given ongoing consideration.

This report opened up a necessary debate on how best to safeguard the interests of children born with the help of donor-assisted reproduction. It concluded that the needs of childless adults are disproportionately represented in the HFE Act. We remain concerned to ensure that the interests of adults are not elevated over those of children in a way that is sharply at odds with other aspects of government policy and that has profound implications for society. In particular, then, as a group especially concerned with family law, we **object to the falsification of the birth certificate, which has always been intended to be a true record of a person's birth origins and genetic parentage as far as that is known. We therefore recommend greater transparency in the birth registration system and moving birth certificates to the General Register Office. We further recommend introducing an adapted 'special guardianship' status and over the longer term, we recommend continuing and starting new, qualitative research to compare outcomes for children born in alternative household structures, both in their early years and later in life.** Whilst the law has to take cognizance of the implications of new assisted reproduction technology, nothing should be codified which will diminish or discount the importance of biological parenthood.

Section 8 International families

The international dimension to family life and family law is now fundamental. We are in Britain living in an international community. Moreover, the UK is a member of the European Union which has a vigorous programme of family law reform. Whilst we have endeavoured to draw upon experience and practice from other jurisdictions, we have been conscious that there is little harmony across the world on some of these issues and, moreover, not much harmony on how to solve them. Family law is culture and society specific, so that what may work well in one country at its stage of development and family background and ethos may not be appropriate elsewhere. Thus, whilst we do draw upon working examples from other jurisdictions, our focus and final recommendations are specifically intended for UK family law.

In April 2009, we produced a report, *European Family Law: Faster Divorce and Foreign Law*,²⁷ looking at the challenges to English family law for EU reforms. **We condemned the rush to the divorce court created by the European Union legislation known as *Brussels II*, which gives priority to the spouse who first issues proceedings** when two countries have the opportunity to deal with the divorce case. We strongly advocated that England should only ever apply English law in family law cases and **oppose the attempted introduction by the European Union of applicable law, whereby the family courts of England and Wales would**

27 Centre for Social Justice, April 2009, *European Family Law: Faster Divorce and Foreign Law*

be required to apply the law of a foreign country. We urged slower EU reforms to take account of the considerable impact from national family life.²⁸

Conclusion

The Family Law Review has sought to build on and develop the work of the Family Breakdown working group in *Breakdown Britain* and *Breakthrough Britain*. These reports revealed the true and increasing scale of family breakdown in Britain and the devastating impact it is having both on individuals and wider society. They showed that, at the most fundamental level, family structure and family process matters: evidence shows that outcomes for both children and adults are *not* equal regardless of family background, and public policy should reflect this. Children growing up in healthy, married, two-parent families are

more likely to lead happy, healthy and successful lives than those who have not experienced the same level of family security and stability. As such, *Breakthrough Britain* made a series of recommendations aimed at supporting and strengthening families, a number of which are reiterated in this report.

The focus of this report was to establish the role the judiciary plays in strengthening or weakening family relationships, and how best family law can be reformed to reflect the importance of healthy, stable families for both adults and children and minimise the potential for

conflict. Very little has been done by Parliament either to acknowledge the damaging trend of family breakdown or, crucially, to do anything meaningful about it. This report seeks to rectify this unacceptable situation.

We are proud of our English family law and the English family law system. It has incredible benefits and advantages, many of which have been adopted by other countries. We are, however, equally aware of some its fundamental failings. Parliamentary neglect of family law for so long has weakened a once superb system. Excellent attempts to patch it up by judges, legal practitioners and others working with families, and even create completely new extensions as the family life of our country has grown and changed, can only go so far. It is now time for Parliament to take action on the areas recommended in this report.

We offer this report to government, Parliament, the family law professions and to society. Most importantly, we offer it to those who are married, considering marriage and to families and children whose health and stability is reflective of that of our nation. If implemented, the recommendations contained in this report will support and strengthen family relationships, making society stronger for this and future generations.



Action must now be taken by Parliament to reverse this culture of relationship breakdown.

²⁸ Throughout this report, reference to research and institutions is primarily UK but the law referred to is primarily England and Wales. (References to England in this regard includes Wales.) We are conscious that Scottish family law is very different. We propose a similar report applied for Scotland and Northern Ireland.

ONE

The need for family law reform

The final report from the Social Justice Policy Group, *Breakthrough Britain* included a recommendation that there be:

A review of family law conducted by a dedicated independent commission. The relationship between the law and family breakdown and legal aspects of marriage, divorce, cohabitation, parental rights and the rights of the extended family (especially grandparents) are highly complex but require consideration. We recommend that this be carried out under the auspices of an independent body such as the Centre for Social Justice.¹



Members of the Family Law Review Working Group

1.1 The role of the law

A review of family law is considered to be necessary as family law has an important role to play in stabilising and supporting relationships within society. The law impacts relationships directly and indirectly, as the following quotes highlight. It has an explicit role in defining the family as an institution:

Governments set the parameters that define the family as a legal institution. These parameters define who is to be granted marriages, divorces, and parental rights, and articulate subsequent obligations. The law also provides a set of default property rights in case of separation or death, and a definition of the family for the purposes of taxation and government programs.²

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- 1 Social Justice Policy Group, 2007, 'Family Breakdown' Volume 1 of *Breakthrough Britain*, Centre for Social Justice, p10
 - 2 Stevenson, B. and Wolfers, J., 2007, 'Marriage and Divorce: Changes and their Driving Forces,' *Journal of Economic Perspectives* – Volume 21, Number 2: 27–52

It also plays a more implicit and disputed role in shaping expectations surrounding family life:

The premise of many family law scholars - that legal change is only a response to underlying cultural shifts and never an independent cause - is difficult to reconcile with either economic theory or existing empirical research. Changing divorce law can affect the divorce rate, and likely the rate of unmarried childbearing and cohabitation as well. Family scholars, policymakers, legislators, and media need to consider and take seriously the complex ways in which family law affects real families and real children.³

We have been keenly aware of both roles as we have sought to use the law, legal procedures and processes and ancillary functions, and recommend changing

“We believe that our Parliamentary family law fails to support family life in general, and marriage in particular.”

them if and where necessary, so that they better support, and encourage, various beneficial institutions or pro-social norms which are in danger of being washed away. Increasing stability and encouraging commitment are key aims and the criteria chosen to establish if some aspect of family law fell within the remit of this review. The role of the law in respect of the family life of our nation has always been vital and central.⁴

Family law must take cognizance of social and cultural changes, reforming to take account of the expectations for example of different patterns of parenting and different roles within relationships. It must not remain moribund, looking back to a pattern of family life of previous generations. Nevertheless it must equally hold up, support and encourage certain values, foundational within society, which make the strong and valuable constituent elements of marriage and family life. Separating out these foundational values from what may have been regarded simply as important in a previous generation and culture is not easy. The nature of family law reform is that changes and consequences in family life, relationships and behaviours can sometimes only show themselves many years, perhaps decades or even generations later. Therefore there should be a tendency to err towards caution and great care.

However, we have been concerned that for the past four decades Parliament has neglected family life through failing to enact necessary and appropriate changes to family law in England and Wales. As a consequence, where family

³ Allen, D. & Gallagher, M., July 2007, Does Divorce Law Affect the Divorce Rate? *A Review of the Empirical Research 1995-2006*, iMAPP, Vol. 1, No. 1, p7

⁴ In 1841, Henry Brougham, Lord Chancellor said: ‘There is no one branch of the law more important, in any point of view, to the great interests of society, and to the personal comforts of its members, than that which regulates the formation and the dissolution of the nuptial contract. No institution indeed more nearly concerns the very foundations, or more distinctly marks by its existence the transition from a rude to a civilised state, than that of marriage’, *Philadelphia* (1841), Vol. 2, p. 289

life needs and seeks the assistance of family law, some statute law is acknowledged now as being out dated, failing to reflect changes in family life and parenting patterns and in places is overlaid with confusing and sometimes contradictory judge-made law. Moreover we now have European laws imposed on English family life and English family law from different cultural mores. In short we believe that our Parliamentary family law fails to support family life in general, and marriage in particular.

Yet family life is the heart and soul of our community. It is where we are born, nurtured and raised, where we find the deepest fulfilment in personal relationships and where we gather the mental, physical and other strengths, creativities and encouragements to go out and create better communities and a better country. As we later show, marriage remains the bedrock of our family life, of our inter-generational families, of our communities and our nation and remains the aspiration for most individuals for family life. Many find marriage the best form of family life for themselves and their children.

Neglect of family life disadvantages our community life and leads ultimately to a neglect of our community, with many other disadvantages and negative elements.

A fundamental review of the aims and objectives of family life and relationship breakdown will often result in those aims being channelled through legal systems. These legal systems must not determine the aims and objectives, but there must be an awareness of how to achieve those objectives. Moreover some objectives may be impossible to create or change through law alone. These are the legal systems that need the intervention of Parliament.

Over the last four decades there has been little Parliamentary intervention in family law, despite the need. *The Matrimonial Causes Act 1973* was in good part a re-enactment of the *Divorce Reform Act 1969*. *The Matrimonial and Family Proceedings Act 1984* had some beneficial effects by providing rightful and necessary imperative to clean breaks but these have been diminished by judicial case law. The child support legislation and agencies have been unsuccessful and expensive. The *Family Law Act 1996*, despite good intentions,⁵ failed to provide the reform needed and the new divorce process and procedure was never implemented, save the legislation relating to domestic abuse. *Brussels II* in 2001,⁶ indirectly sanctioned by the UK Parliament, is in our opinion, the worst piece of family life and family law



Family life is where we find the deepest fulfilment in personal relationships and marriage is the bedrock of family life.

⁵ It was in a good form when it entered Parliament as a Bill but had been dramatically altered on the conclusion of its Parliamentary passage.

⁶ Now Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility. It created identical divorce jurisdiction across Europe and automatic recognition of some family court orders. It created a priority to proceedings between countries based simply on who issued first in which country, known as 'lis pendens'.

legislation on the statute book (see section 8 later). Civil partnership legislation was not initially government-sponsored and in any event relates to a very small number of those in domestic relationships of any form. *The Children Act 1989* is an exception, and is a very successful piece of legislation, much copied around the globe, with radical new concepts and much flexibility of approach and outcome, which in our opinion is still working very well.

Whilst we believe it is imperative that Parliament takes a pro-active role in reforming family law, we also have to note concerns with the Parliamentary process in itself where it affects family law. Often the informed, well-considered and consensual reforms and ways forward following consultation of all those involved in family life and family law can flounder in the Parliamentary and political process. For example, elements of fault and conduct have attempted to hijack the 1996 Act on family law reform. Accordingly, we record that we would be unhappy about the Parliamentary reform of our proposals in this report if the consequence was any significant risk that strong elements of conduct and longer periods of delay became prevalent across family law provisions.

1.2 Principles of family law reform

We set out at the beginning some principles and elements which we consider are crucial to proposals for family law reform. Some will be more relevant, some more important and some more fundamental than others. Some pervade areas of professional practice whereas others are directly referable to family life. Within these issues of reform, there is inevitably a reference to the different forms of family relationships. This is referred to below. In these remarks about different family relationships two fundamental aspects, those concerning children and safety, must take priority over the form of family relationship.

Whatever the nature of the domestic relationship between the couple, there should be no distinction in the remedies, facilities and opportunities for protection from domestic abuse, domestic violence and other forms of similar behaviour. Naturally the same applies about safety for children.

Similarly, whatever the nature of the domestic relationship between the parents, there should be no distinction in the remedies, facilities and opportunities for the consideration of the child's best interests or in any other way regarding the child.

English law has created civil partnerships to answer the call of those in same-sex relationships for public formality, status, rights, duties, obligations and similar. It is still very early days since the *Civil Partnership Act 2004* was introduced and any early trends may be misleading. Whilst civil partnership is not marriage, and whilst civil partnership ends in dissolution rather than divorce, there is some equivalence with marriage in law and in status. Accordingly, and until there can be much better knowledge and understanding of the patterns of relationships, lengths of relationships, commitments to

relationships and similar, the approach taken throughout this report is that reference to reforms in respect of marriage, divorce, marital agreements and similar should, if and where appropriate, incorporate the equivalence in civil partnership.

However marriage and, following the above, civil partnership is not cohabitation. We specifically refer below in the separate section to cohabitation law reform (section 2.4).

In keeping with the research findings and recommendations of its progenitor, the Social Justice Policy Group (SJPG), this Family Law Review has worked from an underlying assumption that marriage should be supported both in government policy and in the law and that, related to this, fatherlessness or motherlessness (single parenthood), far more likely when relationships are informal, should be avoided. There may be many personal, ideological, experiential, faith-based or other reasons for supporting marriage, which are important and deserve respect; nevertheless we do not need to rely on these alone for our justification for the support of marriage. As set out elsewhere in this report, marriage works. It benefits the individuals who are married and the couples together, it benefits those living with the married couple, the wider family, employers and fellow employees, and it benefits local communities, wider communities and our nation. These alone justify central government, local government and all other support. These justify special treatment because of the benefits which arise both narrowly and widely.

However, as the SJPG report *Breakdown Britain* also showed, there is a culture of relationship breakdown, including marriage breakdown, in our country which must be a top priority to change and reverse. Anything less will fail our country and specifically our children and generations to come. It is creating poverty, both for those directly involved and for the wider community, as the country has so many resources committed to dealing with the direct and indirect effects of this relationship breakdown culture. They inform elements of social policy far more broadly than family law alone, necessitating consideration of many aspects of social life. Within family law, these also inform elements beyond matters affecting the marriage itself, as aspects of divorce law affect marriage. We refer to this specifically in relation to divorce law and financial provision on divorce (Sections 2.3 and 6.2).

Subject to this overriding policy of support for marriage, we nevertheless also endorse generally policies which support the family. Family life is wider than marriage alone. There are family members such as grandparents, uncles and aunts, step-siblings and others who have a distinctive role to play and a

“Our policy is specifically informed by support for married couples and the institution of marriage.”



Family life is wider than marriage alone, there are many members who have a distinctive role to play.

(Photo by: aalbinger.)

special interest in family life. They cannot be disregarded. Family law reform cannot focus narrowly on just the couple and their children. Post separation, new families and new relationships are sometimes created, which can have a particular brittleness with pre-existing tensions and responsibilities. They too need support, for the benefit of the children and the new families they are creating. Therefore without in any way diminishing or detracting from the priority of support for marriage, we also recognise that people require and deserve support for all family life.

Following are underlying principles and elements of law which we believe are very important. Some will, of course, be more crucial in certain areas of reform than in others. They are many and varied and each is fundamental and important in their own right. We set them out to inform our thinking.

- **Support for marriage, married couples and the institution of marriage.** This is set out above;
- **Support for family life.** This is set out above;
- **Every reasonable opportunity to save saveable marriages and other domestic relationships.** It is our perception that there are saveable relationships which are presently ending. Much more can and should be done to allow opportunities for reconciliation through the law as well as social policy;
- **Looking after the best interests of the children;**
- **Protection of the vulnerable and potentially vulnerable.** This goes to matters of safety and personal protection. It also informs court procedure. Importantly, it highlights an awareness of the inherent dynamics of many domestic relationships;
- **Fairness and justice,** and being seen to be fair and just;
- **Access to justice for all,** irrespective of wealth, gender, race, age, disability, cultural background, faith and similar;
- **Clarity, certainty and predictability of outcomes.** When there is a relationship dispute, and subject to any necessary ascertaining of the relevant facts, the couple should within broad parameters be entitled to be able to predict with a reasonable degree of certainty, with legal advice, what will be the outcome, and that there should be clarity and certainty in how this outcome is reached;
- **Simplification and accessibility of procedure.** Court processes, proceedings and other elements relating to families should be made as simple as possible, with simplified forms, explanations and terminology. This must nevertheless be consistent with the precision and comprehensiveness required for important legal issues of status, children and finance;
- **Consistency of outcomes across the country and between similar cases.** There should be no regional variations in outcomes and procedures, as has occurred. Equally, two identical cases should lead to similar outcomes and

- thereby produce consistency and confidence. Different outcomes will produce significant public dissatisfaction with the law;
- **Impact on court resources, legal aid and other direct costs.** Any reform proposals must take account of the impact on the family court system, on the requirement for and availability of legal aid and of other direct costs;
 - **Encouragement to private ordering.** This has been a strong theme for many years. Couples should be strongly encouraged, after knowing the relevant facts and having obtained appropriate legal and practical advice and information, to reach agreements themselves if they are happy to do so and feel comfortable and be encouraged in doing so, especially in relation to matters affecting children;
 - **Encouragement to out of court settlements through Alternative Dispute Resolution and other means.** Very few cases need to have a final court hearing and indeed very few couples can afford to have a final court hearing. Settling cases without a final court hearing is a top priority, and often one of necessity. There are many significant benefits from reaching a settlement rather than having one imposed;
 - **Principle of ‘no fiction’ or artificiality in procedure, in court forms or in the law.** Unfortunately there are elements in existing family law requirements which are simply fictitious or artificial and have no meaning or purpose whatsoever and should be abolished. Reforms should not be introduced unless they will have meaning, purpose and significance in practice;
 - **No bargaining chips.** Too often well-meaning reforms have done little save to shift the bargaining and negotiating position of the spouses on other issues. They have simply created bargaining chips, in which one party has been able to negotiate a better outcome. This is wrong in principle and requires great care in analysing consequences of any proposed reform;
 - **Judicial continuity wherever possible.** Judicial approaches do differ, including even within one court building. Time and costs are increased when judges have to get to grips with the particular case, previously handled by another judge. Judicial continuity has benefits;
 - **Sanctions against disproportionate legal costs.** Legal costs in family law are high and sometimes can be disproportionately high and crippling. Often this is only seen in hindsight. Often court requirements, professional requirements e.g. for indemnity insurance, duties to investigate disclosure and other matters contribute to the high costs. Judicial condemnation is not enough unless there are appropriate sanctions in excessive cases;
 - **Greater court management.** England and Wales have moved from a classic adversarial system in family law to an increasingly inquisitorial approach whereby the court takes a significant role in the investigation of the facts and the management of what steps will be taken in litigation.

More case management is essential;

- **Overcoming delays in court procedures and case management;**
- **Taking account of international trends.** Family law in any country should not ignore trends in other countries. With some very significant cultural differences, family life has many similarities across the world. It is right and beneficial to look at what is happening in other countries and consider if and how that could usefully be incorporated into English law and practice;
- **Creating a law which respects national mores and values yet also respects international families from different backgrounds.** Britain has historic and ongoing distinctive perceptions of fairness and justice in the context of marriage and family life including treatment of men and women. This should not change. However international families in Britain often have expectations e.g. as to marital agreements or property regimes, which they presume will be adhered to here, but which may be contrary to the English perceptions of fairness and justice. Finding a balance between the national values and mores and international expectations is a challenge for the future of UK family law.

1.3 1996 Family Law Act

Prior to entering Parliament in 1995, the proposed family law reforms were based on many principles that we endorse and support today. In good part this was because of the principles enunciated and promoted by the then Lord Chancellor, Lord Mackay of Clashfern, the primary sponsor of the 1996 legislation. In the foreword to the Government's paper on divorce reform in April 1995, he said:

Divorce is an issue of great concern to many, in which moral and religious views are vitally important. Personally I strongly adhere to the view that marriage should be for life. I believe that a husband and wife with such an ideal should provide the most stable and secure background for the birth and development of children. However I recognise that the civil law must accommodate many situations which although less than ideal, do occur in practice and I think the reference I gave in my forward to the Consultation Paper to the teaching of Jesus (Mark's Gospel, chapter 10 at verses 4 and 5) supports this responsibility for the legislator.

In the light of these considerations the framework proposed in the White Paper is, in my opinion, the best that can be devised. It gives the Court an ultimate discretion to refuse a divorce when to grant it would cause grave financial or other hardship. It gives the parties a period of reflection and consideration of their future and the future for their children before allowing them to be divorced. I believe it gives the best opportunity of saving saveable marriages and of minimising the bitterness

and damage which the breakdown of such an intimate relationship causes. It gives to the children of broken homes the best chance of a good continuing relationship with both parents which a divorce process can afford.

I consider we have a heavy responsibility to ensure that our law recognises the importance of the institution of marriage and also to ensure that it does not impose unnecessary damage on the personal relationships with which it deals, particularly those of parents with their children.

We are also keenly conscious that the only recent attempt to state principles for family life in legislative reform was Section 1 of the *Family Law Act 1996* namely:

- (a) that the institution of marriage is to be supported;*
- (b) that the parties to a marriage which may have broken down are to be encouraged to take all practical steps to save it;*
- (c) that a marriage which has irretrievably broken down should be brought to an end with minimum distress to the parties and to the children, with questions dealt with in a manner designed to promote as good a continuing relationship between the parties and any children as is possible and without costs being unreasonably incurred; and*
- (d) that any risk to any party or children of violence from the other party should so far as reasonably practical be removed or diminished.*

We strongly urge that these principles should be brought back into primary legislation at the next convenient legislative opportunity.

1.3.1 SUMMARY OF PROPOSAL

Section 1 of the *Family Law Act 1996* should be reinstated in primary legislation for family law matters.

TWO

Family law and family relationships in the UK today

This section of the report will cover the nature of marriage, a brief overview of marriage law and history, the religious and contractual nature of marriage, the benefits of marriage, marriage and divorce trends and statistics, divorce law, cohabitation and civil partnerships.

2.1 Marriage in the UK

Under English law, marriage is a public and legal relationship between a man and a woman.¹ It involves certain obligations between the parties concerned with regard to property, mutual care and financial support, sexual fidelity and children. It is voluntary in that both parties must agree to it. It is public in a dual sense:

- (1) Marriages are registered in official archives that are available for public inspection; and
- (2) A marriage takes place in a ceremony that is conducted by a person licensed for this purpose, in which the couple make formal promises to each other before witnesses.



It has a clearly defined and public start and end: the public ceremony of marriage and the public end of divorce or death. It is a criminal offence for an already married person to enter into a second marriage before the first one is dissolved. The dissolution of a marriage is subject to certain legal conditions.

Marriage is an important creator of status; it creates issues of citizenship and nationality, legitimacy, inheritance, tax and public welfare benefits, and much more. It is a status acknowledged in the laws of all countries, with reciprocal recognition of each other's marriages and divorces.

¹ The Notice of Marriage by Certificate, signed by couples getting married in a Register Office.

2.1.1 MARRIAGE LAW IN THE UK

Since the 1970s, historians have painted a picture of past marriage practices that earlier generations would not have recognised.² Their key claim is that until the *Marriage Act of 1753* all that was necessary to establish a valid marriage was a private exchange of vows and that many if not most marriages were celebrated in this way.

Actual marriage practices in the eighteenth century were very different from this portrayal;³ in fact, the evidence from parish records shows that most marriages were celebrated in church even before the 1753 Act.⁴ Canon law had long required that marriages be celebrated with due formality, i.e. the calling of banns or the obtaining of a licence, followed by celebration in church.⁵ While the validity of a marriage did not depend on strict compliance with *all* of these formalities, only a ceremony presided over by an Anglican clergyman was sufficient to confer the legal rights of marriage on the parties.⁶ A private exchange of vows, while legally binding (assuming it could be proved), did not entitle the parties to such rights: the only right it conferred was that of compelling a reluctant lover to celebrate the marriage in church.

In London, however, clergymen resident in debtors' prisons – including the Fleet – earned a living solemnising marriages without asking too many questions. Such ceremonies, however degraded, gave the parties the same legal rights as if they had married in church and proved extremely popular. The 1753 Act was explicitly intended to stamp out this practice. It gave increased force to the Church's requirements by stipulating that a marriage would be void if it was not preceded by banns or licence, or if it was not celebrated in church. Only Jews, Quakers, and members of the Royal Family were exempt from the need to comply.

Compliance with these statutory requirements was almost universal, if not always enthusiastic.⁷ But the huge increase in the number of dissenters and Catholics over the subsequent decades led to pressure for change. This coalesced with the perceived need for a new system of civil registration to meet the needs of a modern nation. The *Marriage Act of 1836* responded by introducing the option of civil marriage, as well as marriage according to non-Anglican religious rites.

Yet marriage still remained indissoluble, save for the few who could afford a private Act of Parliament to free themselves from adulterous spouses. It was



2 See in particular Gillis, J., 1985, *For Better, For Worse: British Marriages 1600 to the Present Day*, Oxford: Oxford University Press, whose work is the mainstay of many subsequent accounts

3 For a full account see Probert, R., 2009, *Marriage Law and Practice in the Long Eighteenth Century: A Reassessment*, Cambridge: Cambridge University Press

4 Probert, R. and D'Arcy Brown, L., 2008, 'The Impact of the Clandestine Marriages Act: Three Case-studies in Conformity', *Continuity and Change*, 23, 309-330

5 Stevenson, K., 1982, *Nuptial Blessing: A Study of Christian Marriage Rites*, London: SPCK provides evidence of rituals dating back to Anglo-Saxon England

6 Probert, R., 2009, *Marriage Law and Practice in the Long Eighteenth Century: A Reassessment*, Cambridge: Cambridge University Press

7 Probert, R. and D'Arcy Brown, L., 2008, 'The Impact of the Clandestine Marriages Act: Three Case-studies in Conformity' *Continuity and Change*, 23, 309-330

not until the *Divorce Act of 1857* that provision was made for a new court to grant divorces. This undercut the ecclesiastical ideal of the indissolubility of marriage and institutionalised the idea that marriage was a matter of contract rather than status – an idea that has important implications for us today.

2.1.2 A BRIEF HISTORY OF MARRIAGE TRENDS IN THE UK

Until the later part of the twentieth century it was taken for granted that couples who wished to make a life together would marry. But what of the

“Marriage is much more than a lifestyle choice. It is recognised by anthropologists as being a universal institution that has existed for thousands of years.”⁸

claims by many modern commentators that the popularity of marriage has waxed and waned and that the trend for couples to live together is no more than a revival of older forms of ‘informal’ or ‘consensual’ marriage popular in earlier centuries? Such claims are, as more recent research has shown, utterly misconceived.

First, supposed marriage ceremonies such as ‘handfasting’ and ‘jumping the broomstick’ owe more to Victorian misunderstandings and imagination than to eighteenth-century practice.⁹ The terminology of ‘handfasting’ did exist in earlier centuries, but it simply denoted an exchange of vows, a formal betrothal after which the couple would proceed to solemnise their marriage in church.¹⁰ The term ‘broomstick wedding’, by contrast, was used to indicate a sham or hasty marriage, rather than one in which the bride and groom jumped over a stick.¹¹ This explains the complete dearth of evidence of such marriage practices in contemporary sources; had such ceremonies taken place – especially on the scale that is sometimes claimed – one would have expected them to leave *some* trace in the records;¹² in fact, there is none.

Secondly, detailed studies of eighteenth-century communities establish that couples who were living together had almost invariably gone through a ceremony of marriage in church. In a study of over a thousand couples, only two were known to have cohabited, and in one community it was possible to trace church marriages for 98 per cent of the couples.¹³

8 ‘Marriage exists in virtually every known human society. At least since the beginning of recorded history, in all the flourishing varieties of human cultures documented by anthropologists, marriage has been a universal human institution. As a virtually universal human idea, marriage is about the reproduction of children, families and society... [M]arriage across societies is a publicly acknowledged and supported sexual union which creates kinship obligations and sharing or resources between men, women, and the children that their sexual union may produce.’ Doherty, W. J., Galston, W. A., Glenn, N., Gottman, J. et al, 2002, *Why Marriage Matters: 21 Conclusions from the Social Sciences*, NY: Institute for American Values, p7

9 Probert, R., 2009, *Marriage Law and Practice in the Long Eighteenth Century: A Reassessment*, Cambridge: Cambridge University Press

10 Ibid

11 Ibid

12 It has been claimed that in one Welsh village 60 per cent of couples married by jumping a broomstick in the late eighteenth century, and various scholars have assumed that the same was true in other communities and eras. However, an inspection of the parish register for that village established that (a) there was no mention of such a practice and that (b) the differences in the recording of baptisms that had given rise to such speculation were due to the curate’s idiosyncratic record-keeping. See Probert, R., 2005, ‘Chinese Whispers and Welsh Weddings’ *Continuity and Change*, 20, 211-228

13 Probert, R. and D’Arcy Brown, L., 2008, ‘The Impact of the Clandestine Marriages Act: Three Case-studies in Conformity’ *Continuity and Change*, 23, 309-330

The popularity of formal marriage in previous centuries can be explained by the undesirability of the alternatives. Cohabiting couples were never treated in law as if they were married; the concept of ‘common-law marriage’ was unknown in the eighteenth century.¹⁴ Indeed, the modern use of the term to denote cohabiting relationships dates back only as far as the 1960s. Nor were the rights that marriage conferred of relevance only to those with property at stake: under the poor law, individuals were entitled to relief only from the parish where they had their ‘settlement’. A wife took her husband’s settlement, and legitimate children took their father’s. If a family fell on hard times they would be entitled to relief together. Unmarried families, by contrast, could be split up, with father, mother and children each being sent to their own place of settlement.¹⁵ In addition, the fact that babies born outside marriage had their settlement where they were born meant that it behoved neighbours and parish officials to make inquiries into the marital status of newcomers rather than be financially responsible for their illegitimate children. Those discovered to be living together unmarried ran a real risk of being punished by the ecclesiastical courts for, as one court put it, ‘living and cohabiting scandalously and suspiciously as man and wife without lawful marriage.’¹⁶

The legal and social disapproval meted out to such couples explains why cohabitation was so vanishingly rare in earlier centuries. But as the control of the ecclesiastical courts waned, and as urbanisation and industrialisation increased, it appears that at least some couples chose to live together unwed. Some cohabited because they could not marry, either because one spouse was already married or because they were related within the prohibited degrees. In the most recent study of Victorian cohabitation it is striking just how many such couples preferred the apparent respectability of a bigamous or otherwise invalid marriage to overt cohabitation.¹⁷

The warnings and fulminations of social commentators such as Colquhoun and Mearns, and even the more measured appraisals of Mayhew, all of whom commented on cohabitation in London,¹⁸ do need to be set in the context of the available demographic trends. While we do not have national-level statistics as to the prevalence of extra-marital cohabitation before the 1970s, inferences can be drawn from the percentage of children born outside marriage. After all, at a time when contraception was at best rudimentary and in any case little-used, an ongoing sexual relationship was likely to result in pregnancy. Yet apart from a bulge in the latter part of the nineteenth century and small spikes during the

14 On the invention of the concept, see Probert R, 2008, ‘Common law marriage: myths and misunderstandings’ *Child and Family Law Quarterly*, 20, 1-22

15 Snell, K. D. M., 1985, *Annals of the Labouring Poor: Social Change and Agrarian England, 1660-1900*, Cambridge: Cambridge University Press

16 Kinnear, M., 1990, ‘The Correction Court in the Diocese of Carlisle, 1704-1756,’ *Church History*, 59, 191-206

17 Frost, G. S., 2008, *Living in Sin: Cohabiting as Husband and Wife in Nineteenth Century England*, Manchester: Manchester University Press

18 Colquhoun, P., 1796, *A treatise on the police of the metropolis*; Mearns A, 1883, *The Bitter Cry of Outcast London*; Mayhew H, 1861, *London Labour and the London Poor*

two world wars, the illegitimacy rate barely rose above five per cent until the 1960s, and certainly never exceeded 10 per cent. Moreover, studies of illegitimacy from the seventeenth, eighteenth, and nineteenth centuries indicate that such births were rarely the product of cohabiting relationships.¹⁹ Even as late as the mid-twentieth century less than half of illegitimate births occurred in the context of cohabiting unions.²⁰

From the 1960s, however, the position began to change, at first slowly and then more rapidly. Most commentators concur in dating the emergence of cohabitation

“Between 1956 and 1960 only around 1 per cent of women who married, reported that they had previously cohabited with their husband to be. In the twenty first century this figure is now at around 80 per cent.”

as a statistically significant family form to the 1970s.²¹ One early study found that only one per cent of women who had married between 1956 and 1960 reported that they had cohabited with their husbands-to-be; among those who had married between 1970 and 1975 the figure was nine per cent.²² The percentage of couples who had lived together before marriage rose from 10 per cent in the late 1970s to around 80 per cent in the twenty-first century.²³ By the turn of the century both men and women were more likely to cohabit than to marry in their first relationship, and those who had been divorced were also more likely to cohabit with a new partner rather than re-embark on marriage.²⁴ The

number choosing to marry in the UK correspondingly fell from a peak of 480,285 marriages in 1972 to just 270,000 in 2007.²⁵

2.1.3 MARRIAGE IN THE UK TODAY

Such changes should not obscure the fundamental fact that in twenty-first century Britain marriage is still the most common form of partnership for men and women. In 2001 there were more than 11.6 million married couple families in the UK, compared with around 2.2 million cohabiting couple families.²⁶ The Office for National Statistics states that: ‘The traditional family structure of a married mother and father with a child or children remains the most common family type. More than eight million (64 per cent of) dependent children lived with married parents in the UK in 2008.’ This compares to 13 per

- 19 Probert, R., 2009, *Marriage Law and Practice in the Long Eighteenth Century: A Reassessment*, Cambridge: Cambridge University Press; Gandy, G. N., 1978, ‘Illegitimacy in a Handloom Weaving Community: Fertility Patterns in Culcheth, Lancashire, 1781-1860’, unpublished DPhil dissertation, University of Oxford; Robin, J., 1987, ‘Illegitimacy in Colyton, 1851-1881’, *Continuity and Change* 2, 307-342; Frost, G., 2003, ‘The Black Lamb of the Black Sheep: Illegitimacy in the English Working Class, 1850-1939’, *Journal of Social History*, 37, 293-322
- 20 Spence J et al, 1954, *A Thousand Families in Newcastle upon Tyne*, Oxford: Oxford University Press; MacDonald E K, 1956, ‘Follow-up of Illegitimate Children’ *The Medical Officer* 361-65
- 21 See Kiernan, K., Land, H., and Lewis, J., 1998, *Lone Motherhood in Twentieth Century Britain*, Oxford: Clarendon Press; Murphy M, 2000, ‘The evolution of cohabitation in Britain, 1960-95’, *Population Studies*, 54, 43-56
- 22 Dunnell, K., 1979, *Family Formation 1976*, London, HMSO, para 2.4
- 23 Office for National Statistics (ONS), 2008, Marriage, divorce and adoption statistics, table 3.38
- 24 Ermisch, J. and Francesconi, M., 2000, ‘Patterns of household and family formation’ in Berthoud R and Gershuny, J. (eds), *Seven Years in the Lives of British Families*, The Policy Press
- 25 ONS, 2009, *Marriages*, <http://www.statistics.gov.uk/CCI/nugget.asp?ID=322&Pos=1&ColRank=2&Rank=1000>
- 26 ONS, 2008, *Social Trends* 38

cent living with cohabiting couples and 22 per cent with lone mothers.²⁷

It should also be noted that the available figures on the number of marriages solemnised each year do not include those who travel abroad to be married: the popularity of marrying in sunnier climes may account in large part for the fall in the numbers actually marrying in this jurisdiction.²⁸

Furthermore, results from the British Household Panel Survey on the marriage expectations of those under 35 currently in cohabiting relationships show that formalising a relationship through marriage is a widely held aspiration and that 75 per cent want to marry.²⁹

It would seem that the rise of cohabitation does not mean there is a consequent disinterest in the formalised commitment of marriage. A recent MORI survey revealed that:

Less pressure to marry has unambiguously affected marriage rates, but notably it has not led to the end of marriage as a widespread ideal. It might even be argued that marriage is more idealised today than ever before, both in light of its popularity without the coercion of normative pressure and because...for many marriage appears to require preconditions which people do not always feel can be fulfilled... With by far the most popular reason for wanting to marry in the survey being to commit to one's partner, it is clear that marriage is perceived to be distinctive.³⁰

The conclusion that marriage appears to be very much a personal ideal in twenty-first century Britain accords with the demographer Andrew Cherlin's discussion of marriage as a 'Super-relationship' whereby 'its symbolic significance has remained high and may even have increased. It has become a marker of prestige and personal achievement.'³¹



(Photograph by: Athena Vina)

“The British Household Panel Survey found that 75 per cent of couples under 35 currently cohabiting want to marry.”

2.1.4 DIVORCE TRENDS IN THE UK

In 1929 there were only 3,400 divorces throughout all of England and Wales. The number of divorces in Great Britain more than doubled between 1958 and 1969, from around 24,000 to around 56,000. After 1969 divorce became legal in Northern

27 ONS 2009, *Social Trends* 39.

28 It has been estimated that 16 per cent of UK marriages now take place overseas: Mintel, 2008, *Weddings and Honeymoons Abroad*, available at <http://reports.mintel.com/sinatra/reports/display/id=280360#about>

29 *Marriage still the Ideal for many couples currently living together*, <http://www.lse.ac.uk/collections/pressAndInformationOffice/newsAndEvents/archives/2007/MarriageStillIdeal.htm>

30 Civitas/Ipsos MORI survey of 1560 young people, reported in de Waal A, 2008, *Second Thoughts on the Family*, Civitas, p147

31 Cherlin, A., 2004 'The Deinstitutionalization of American Marriage', *Journal of Marriage and Family* 66, pp. 848–861

Ireland and between 1970 and 1972, the number of divorces in the UK rose from 63,000 to 125,000. This increase was also partly a result of the *Divorce Reform Act 1969* in England and Wales, which came into effect in 1971. In England and Wales there were around 129,000 divorces in 2007, a fall of three per cent from 2006 and the lowest number since 1979 (when there were around 127,000 divorces).³² Currently approximately four in ten marriages of all marriages end in divorce. Many of these divorces involve one or both spouses who had been previously married. It should be remembered that most marriages last a lifetime, and that the marriages of those marrying for the first time are more likely to last longer than of those re-marrying: two thirds of first marriages last until one partner dies.³³

Similar trends in both marriage and marital breakdown to the UK can be seen across Europe, with rising divorce rates over the last few decades. For the EU as a whole, the average was 2.1 per thousand population in 2005, compared to 2.6 in the UK.³⁴ These high divorce rates are a key reason for looking at how to support and strengthen marriages. Although it is clear that supporting marriages today cannot involve harking back to an earlier era, the Government can focus policy on stemming the tide of relationship breakdown.

2.1.5 MARRIAGE AS A RELIGIOUS INSTITUTION

Although the institution of marriage is considered by some to have religious connotations, it should be stated that since 1992, there have been more civil marriage ceremonies in England and Wales than religious ceremonies. In 2007, 67 per cent of marriages were solemnised by civil ceremonies.³⁵ *The Marriage Act 1994* permitted civil marriages to take place in approved premises from 1 April 1995. In 2006, 40 per cent of all marriages in England and Wales took place in approved premises, compared with 5 per cent in 1996.³⁶

There do, however, appear to be some differences between those marrying in religious and civil ceremonies, for example, in the number of couples marrying ‘directly’ (i.e. without first cohabiting) in both types of ceremonies. If giving identical addresses prior to their marriage is used as a reasonable proxy for cohabitation rates prior to marriage, in 2006 88 per cent (140,000) of all couples who married in a civil celebration cohabited with each other first. In contrast, 65 per cent (52,000) of all couples who married in a religious celebration gave identical addresses prior to their marriage.³⁷

2.1.6 MARRIAGE AS A CONTRACT

In the law and economics literature, marriage is sometimes regarded as a form of ‘relational contracting’, a term used to describe contracts that are based on tacit or

32 ONS 2009, *Social Trends* 39, p20.

33 ONS 2004, *Social Trends* 34, p4

34 ONS, 2008, *Social Trends* 38, chapter 2, p7., http://www.statistics.gov.uk/downloads/theme_social/Social_Trends38/ST38_Ch02.pdf

35 ONS, February 2009, *Marriages*, <http://www.statistics.gov.uk/cci/nugget.asp?id=322>

36 ONS, News Release, 26 March 2008, *Marriage rates fall to lowest on record*, <http://www.statistics.gov.uk/pdfr/marr0308.pdf>

37 ONS, 2009, *Marriage, Divorce and Adoption Statistics*, Series FM2, no34, p102

partially expressed agreements that presume a high degree of future goodwill amongst the parties concerned. In commercial life, such contracting is widespread in long-term economic relationships (e.g. business partnerships) that require continuing renegotiation as circumstances change. The behaviour of the parties in such a relationship is governed by personal morality shaped by accepted social norms of fairness. In the last analysis there is also the possibility of legal intervention, but this is the 'nuclear' option. In the normal course of events disagreements are resolved by negotiation with give and take on both sides. However, this does not mean that the law is irrelevant. Although legal intervention into an ongoing economic relationship is rare, the legal framework may be of great importance if the relationship breaks down. Indeed, in the case of long-term relationships, the regulations covering dissolution are the main channel through which the law exerts its influence. These regulations influence the expectations with which individuals enter a long-term economic relationship and they also influence their behaviour during this relationship.

The main factor that limits the influence of law in the case of relational contracting is evidential. If one party deliberately and avoidably breaches the terms of a commercial contract, this party is said to be 'at fault'. If the breach is clearly established the standard remedies are to compel the relevant party either to fulfil the contract ('specific performance') or to pay damages. In the case of relational contracting, it may be very difficult to identify who, if any one at all, is responsible for the breakdown, or if both are responsible to varying degrees. It may be simply a matter of one person's word against another's with little hard evidence to go on. Thus, although standard contract remedies theoretically apply, they may be difficult to implement in practice.

From the above description it is clear that marriage is a relational contract that has many similarities with its commercial equivalent. In particular, it is difficult to monitor from the outside, and when it breaks down it is often difficult to assign responsibility. However, there are certain differences. Marriage is a contract that is explicitly for life and it involves an explicit commitment to the welfare of the other party. These aspects are encapsulated in the promise 'To love and to cherish until death us do part'. Also, it is usually more difficult to obtain reliable evidence about behaviour within marriage than in commercial life.

Many judges look upon marriage as a domestic partnership, using partnership principles of commitment, sacrifice and compensation etc., which are similar to contractual principles but perhaps more refined. On this basis, recent judicial reforms of ancillary relief law on divorce have been created e.g. by the House of Lords in *Miller*.³⁸

38 (2006) UKHL 24 para 16: 'This 'equal sharing' principle derives from the basic concept of equality permeating a marriage as understood today. Marriage, it is often said, is a partnership of equals. In 1992 Lord Keith of Kinkel approved Lord Emslie's observation that 'husband and wife are now for all practical purposes equal partners in marriage': *R v R* [1992] 1 A.C. 599, 617. This is now recognised widely, if not universally. The parties commit themselves to sharing their lives. They live and work together. When their partnership ends each is entitled to an equal share of the assets of the partnership, unless there is a good reason to the contrary. Fairness requires no less.'

Given the contractual character of marriage, this review has considered, below, the benefits of making legally binding ‘pre-nuptial’ and other marital written agreements (section 6.1) about the distribution of money and property. This is for those who wish to use them, because of the ongoing public interest in this subject³⁹ and the possibility that these would foster a greater awareness about the obligations, responsibilities and indeed the contractual nature of marriage. The absence of enforceable pre-nuptial agreements in English law may be discouraging certain (particularly wealthier) sections of the population from marrying.

2.1.7 MARRIAGE AS A COVENANT

Marriage is sometimes described as a ‘covenant’ in preference to ‘contract’. In this context, the term ‘covenant’ has a number of different meanings of which the following are the most important:

- A solemn agreement which has a social purpose wider than the objectives of the signatories;
- An agreement that can be terminated with difficulty, if at all, and only with the permission of some legal or religious or other body.

Thus, the term ‘covenant’ is intended to convey the fact that marriage serves a wider social purpose and requires external permission to dissolve. These features are visible in the US state of Louisiana’s ‘Covenant Marriage.’ This was a form of marriage introduced a few years ago as an alternative to the existing no-fault, perceived to be easy-to-dissolve marriage. Covenant marriage is very similar to marriage in this country before the 1969 divorce reform and is unlikely to be implemented widely.

2.1.8 THE FUNCTIONS OF MARRIAGE

Legal marriage has both **private and public functions**. Its private function is to help individuals to make **credible commitments** to each other. Its public function is (as a minimum) to **consolidate relationships** that are considered beneficial to third parties, such as children, relatives and society at large. By helping individuals to make credible commitments to each other, the institution of marriage gives them the confidence to invest time and resources in their relationship. This is of benefit to the individuals concerned. It also helps to stabilise relationships and is therefore of wider social benefit. Children are usually best raised by both of their natural parents, and anything that strengthens couple relationships is therefore beneficial. Couples that stay together support each other in sickness, hardship and old age, thereby saving the taxpayer money. They also have stronger kinship networks.⁴⁰ For instance,

39 For example, The Times, 10 September 2008, *Divorce is still big news but collaboration is the latest story*, and The Times, February 13, 2008, *The path to an amicable divorce*,

40 Social Justice Policy Group, 2006, ‘Fractured Families’ Volume 2 of *Breakdown Britain*, p62-64; also Social Justice Policy Group, 2007, ‘Family Breakdown’ Volume 1 of *Breakthrough Britain*, both published by The Centre for Social Justice, p43

a Department of Work and Pensions report on understanding older people's experience of poverty and deprivation noted that 'family plays a pivotal role in many older peoples' lives.'⁴¹

The prevalence of isolation and exclusion amongst the elderly is influenced by separation, bereavement and the wider breakdown of family and community networks...The consequence of reduced family or community support is the need for earlier or increased state provision.⁴²

Marriage also acts as a **stabiliser and a signal**. Married couples are far less likely to break up than couples who live together without getting married. This is true even when allowance is made for the influence of such factors as income, age and education. The correlation between stability and marriage is strong and widely acknowledged amongst experts. As reported in *Fractured Families*, studies of family breakdown in the UK are remarkably rare. However, using data from the British Household Panel Survey, Kiernan found that 8 per cent of married parents and 43 per cent of unmarried parents had split before their child's fifth birthday.⁴³ Data from Europe and the US consistently suggests that cohabiting parents throughout the West are several times more likely to split up compared to married parents.

“8 per cent of married parents and 43 per cent of unmarried parents had split up before their child's fifth birthday.”

The fact that a person offers or agrees to get married is a signal of commitment to the other person. The fact that a couple are married indicates to the rest of society that their relationship is likely to be more durable than the average cohabitation. It is not an infallible signal, because sometimes married couples break up and sometimes cohabiting couples stay together. However, in statistical terms, as already stated, married couples are more stable than unmarried couples.

We recognise that marriage today has evolved and changed, and an overly simplistic or idealised view of marriage which ignores the presence of diversity, is not to be recommended. At the same time however, although some people may have partially rejected the institutional view of marriage, they do still want to marry and the symbolic and distinctive significance of the **commitment** of marriage remains high. It is still a major aspiration for the young, perhaps as much or more than the previous generation who gave more priorities to careers.

41 Domoni, N. and Kempson, E., 2006, *Understanding older peoples experience of poverty and deprivation*, Department of Work and Pensions research report No 363, Corporate Document Services, p3

42 Social Justice Policy Group, 2006, 'Fractured Families': Volume 2 of *Breakdown Britain*, the Centre for Social Justice, p63

43 Kiernan K, 1999, 'Childbearing outside marriage in Western Europe', *Population Trends*, Vol.98, pp.11-20

Our challenge therefore is not so much to defend institutional marriage; rather it is to protect people and society from the damage caused by weakening the structural value of marriage. Our aim is to create a legal and social context that supports people's aspirations to make long-term, committed relationships, ideally 'healthy marriages.' We want to see couples fully supported in their aspirations and in continuing those relationships for their benefit, for their children's benefit and for the wider family and community. Therefore, as just one example, we have explored the issue of marriage preparation and/or information 'classes' and the role that churches and other voluntary organisations can play in providing them for those getting married in civil as well as religious ceremonies, and have questioned to what extent government should seek to support people's efforts to 'pre-qualify' themselves for entrance into marriage.

2.1.9 THE BENEFITS OF MARRIAGE

The benefits of marriage are becoming increasingly publicly acknowledged and are backed up by social science research, as cited in *Breakdown* and *Breakthrough Britain*.

“A MORI poll found that by far the most preferable lifestyle for adults was being married with children; chosen by 68 per cent of respondents.”

Marriage benefits couples.

Dismissing the importance of family *structure* (whether couples are married or resolutely committed to each other or not) in order to emphasise instead family *process* (the quality of relationships) ignores the compelling statistical evidence that the durability of a family unit is bound up with the quality of commitment and relationships between the adults, as the British Household Panel Survey data, noted earlier (section 2.1.8), shows. Similarly, a more

recent study of Millennium Cohort Study data on 15,000 mothers with young children found that cohabiting couples are more than twice as likely as married couples to split up.⁴⁴

The fact is that very many first marriages still last for joint lives, at a time in our nation when life expectancy now is long and joint lives can be many decades. Very many second marriages, often after a short, unsatisfactory first marriage, are fulfilling and then lifelong. Moreover, marriage is still an aspiration of a very considerable number of people, throughout the social spectrums and across the wealth spectrums and the cultural and ethnic backgrounds within our country. When MORI asked 805 adults which lifestyle they would most prefer the sample showed overwhelmingly that they would choose marriage over cohabitation (only 4 per cent chose being unmarried with a partner and children, while 68 per cent chose being married and with

⁴⁴ Benson, H., 2006, *The conflation of marriage and cohabitation in government statistics – a denial of difference rendered untenable by an analysis of outcomes*. Bristol Community Family Trust, p8

children). Other British surveys consistently report high scores (nearly 90 per cent) for young people who wish to get married at some time in the future.⁴⁵

We are of course aware that there are complex interactions between cause and effect, nonetheless family structure is a driver in its own right. Analysis of the Millennium Cohort Study showed substantial differences in family stability between married and unmarried couples in the early years of parenthood, crucially even after discounting socio-economic factors such as age, income, education and race.

Marriage benefits children.

Clearly there can be good parenting in any family type – married couple, cohabiting couple, single parent etc. But we cannot ignore the fact that good parenting is more likely, and far easier to achieve, in some family types than others.

Evidence indicates that children have a better educational and health upbringing when in a married family. They have a better chance of developing into competent and successful adults.⁴⁶ Studies also show that children brought up by married parents have a lower chance of getting involved in crime, drugs and other problems later in life. Since marriage relationships last longer than cohabitation relationships, crucially when there are children, children are more likely to have a stable and settled family background when the parents are married. We recognise that there are many reasons for this, of which marriage in itself is just one. Nevertheless it is a factor which goes directly to the benefit of the upbringing of children. Elizabeth Marquardt's research indicates that children of divorce, even those whose parents have a 'best-case' scenario separation (i.e. where there is regular and conflict free contact or residence with both parents) often experience significant levels of inner conflict which dominate their childhood and adulthood.⁴⁷



Children have a better chance of developing into competent, successful adults when brought up in a married family.

Marriage benefits individuals who are married.

Statistically the chances of staying together in a relationship without marriage are lower. Those who are married are more likely to enjoy better physical and mental health and well-being, longer life, financial prosperity and other personal advantages than those who are not married, whether single or cohabiting.⁴⁸

45 Opinion Research Business Poll, 2000, 'Young People's Lives in Britain Today', Cited in Social Justice Policy Group, 2006, 'Fractured Families' Volume 2 of *Breakdown Britain*, Centre for Social Justice, pp17-8

46 'One widely replicated finding tilts the argument in favour of pro-marriage policies. That is, studies consistently indicate that children raised by two happily and continuously married parents have the best chance of developing into competent and successful adults' (Amato, P, November 2004, 'Tension Between Institutional and Individual Views of Marriage', *Journal of Marriage and the Family*, 66, 959-965.)

47 Marquardt E., 2005, *Between Two Worlds: the inner lives of children of divorce*, New York, Crown Publishers

48 For supporting research see: Smock, P.J. et al., 1999, 'The Effect of Marriage and Divorce on Women's Economic Well-Being', *American Sociological Review* 64, pp. 794-812; McLanahan, S., 2000, 'Family, State, and Child Well-Being', *Annual Review of Sociology* 26(1), pp. 703-706; Lupton, J. and Smith, J.P., 2002, 'Marriage, Assets and Savings', *Marriage and the Economy*, Cambridge: Cambridge University Press; Horwitz, A.V. et al., 1996 'Becoming Married and Mental Health: A Longitudinal Study of a Cohort of Young Adults', *Journal of Marriage and the Family* 58, pp. 895-907; Hirschl, T. 2003, 'Does Marriage Increase the Odds of Allience', *Journal of Marriage and the Family*, 65; Waite, L.J. and Gallagher, M., 2000, *The Case for Marriage: Why Married People are Happier, Healthier, and Better-Off Financially*, New York: Doubleday; Oswald, A. and Blanchflower, D., 1999, *Wellbeing in Britain and the US*

Conversely, relationship breakdown dramatically raises the risk of domestic violence; indeed, the single biggest predictor of domestic violence is being a separated woman.⁴⁹ Fragmentation of the nuclear family increases the risk of people becoming socially isolated in old age because the main source of care in old age is from a spouse. This has important implications for social care.⁵⁰ Those living with a spouse are least likely to go into an institution after age 60.⁵¹

Marriage benefits the wider family.

The post war years have seen the breakup of the nuclear family; formerly children, parents and grandparents living and working in a locality with very close intergenerational support. Very often now family members are geographically separated, perhaps even across national borders. Very often as well, family members are from other countries including sometimes very different cultural, ethnic and religious backgrounds. Nevertheless in a very structured way marriage brings together families across generations, across distances, and across divides within society which are often otherwise uncrossable. At times of personal crisis, the members of the wider family often (but not always) draw close and are the most supportive. In contrast, as noted earlier (section 2.1.8), the wider breakdown of family and community networks is increasing the prevalence of isolation and exclusion amongst the elderly, who no longer have the close family networks to help care and provide for them.

Marriage benefits the workplace.

Although the reasons are still not always wholly clear, those who are married often make good employees and good work colleagues, stable in employment contracts, committed and hard-working and reliable. For example, it has been found that married men earn more than those who are single,⁵² perhaps because of the incentive to support a spouse and/or children. This is of course a generalisation inevitably. Nevertheless it is comparatively often the case.

Marriage benefits the community.

Marriage provides a longer-term stability and continuity within a community. Married couples tend to be more likely to get involved in community affairs, to stay longer in a community and to raise children in the community and in other ways put down roots. This includes schools, civic authorities, religious communities and the vast range of societies, clubs and groups which make up a community. General Household Survey data shows that two-parent families

49 Mirrlees-Black, C., 1999, *Domestic violence: Findings from a new British crime survey self-completion questionnaire*. London, Home Office, p39

50 ONS, 2000, 'Looking back to look forward: Lessons from four birth cohorts for aging in the 21st Century', *Population Trends* 99, p31

51 ONS, 2001, 'The dynamics of living arrangements in later life: evidence from the British Household Panel Survey', *Population Trends* 105, p40

52 For example, Wilson C. & Oswald A., 2005, *How Does Marriage Affect Physical and Psychological Health? A Survey of the Longitudinal Evidence*, Economics Department Working Paper, University of Warwick, p4

are more likely to be involved with their local communities than lone-parent families.⁵³ Whilst this is not in any way to criticise those who do not have this lifestyle, nevertheless community life invariably depends upon the stability, continuity and commitment which is more often found in marriage. In contrast, *Fractured Families* stressed the strength of the correlations between family breakdown and its impact on community crime levels, youth delinquency, educational failure, economic dependency, debt and housing shortages.⁵⁴

Marriage benefits the nation.

Those who are married are statistically more likely to be law-abiding and in other ways engage in activities which are supportive of a nation rather than contrary to the best interests of a cohesive, constructive, positive and forward-looking country. This is a generalisation. Government policy of many countries has been to encourage the formation of families especially through marriage, as it works to the benefit of the nation and for the benefit of its citizens. Indeed, as we note later, the breakdown of marriage and other, less stable, relationships generates real financial costs to society. These costs include not only the direct costs of supporting lone parents, but also indirect impacts on employment, education, health, crime, police and prisons etc.⁵⁵

“Marriage is of paramount importance to individuals, children, communities and our nation.”

Despite these findings, and as noted above, there is still the question of causality. The correlation between marriage and stability is partly a ‘selection effect’ due to the fact that the intrinsically most stable couples are the ones who are most likely to get married. Yet marriage has ‘causal effects’ that help to stabilise the couple relationship and reduce the chance of breakdown. When a couple get married they make public commitments to each other and they enter into a set of socially-defined relationships with kin and society at large. They take on new social roles which are conventionally regarded as permanent. The resulting ties and expectations alter the behaviour and perceptions of the couple and help to strengthen and stabilise their relationship. Thus, the correlation between marriage and stability is partly causal and partly a selection effect.⁵⁶ Demographers such as Professor John Ermisch have found that it is not possible to explain all the effects of marriage through selection. We will never be able to ‘lose’ selection completely because that would require randomised control trials.

53 O'Neill R., 2002, *Experiments in Living: The fatherless family*, Civitas

54 Social Justice Policy Group, 2006, ‘Fractured Families’ Volume 2 of *Breakdown Britain*, Centre for Social Justice, p45-68

55 Social Justice Policy Group, 2006, ‘Fractured Families’ Volume 2 of *Breakdown Britain*, Centre for Social Justice, p67

56 Wilson C. & Oswald A., 2005, *How Does Marriage Affect Physical and Psychological Health? A Survey of the Longitudinal Evidence*, Economics Department Working Paper, University of Warwick

The underlying assumption in academia, policy and many sections of the media is that we should not pay too much attention to the demise of marriage and that lending it more support will not affect social regeneration. This approach was what was challenged in previous reports from the SJPG on the basis of evidence cited. However the SJPG reports did emphasise that simply encouraging more people to get married was not the solution, as indicated by our divorce rates. At the same time however, these divorce rates are the reason why we need to strengthen marriages and make the intentionality required for a 'successful' marriage more obvious.

We emphasise here that nowhere in our recommendations do we suggest that people should be coerced into staying together if profoundly unhappy. However, a government that wants to prevent family breakdown and benefit society cannot ignore these statistical differences and research evidence any longer, but must do all it can to deal with this issue. It is clear that marriage is good for society and yet research indicates that whilst aspirations are high for marriage, and married couples prize their relationships, there is a sense that sections of society do not place a high enough value on or truly recognise the benefits of marriage.⁵⁷

Much more could be said about the benefits of marriage; a public relationship commenced by a public ceremony intended to be faithful and lifelong, with the anticipation of mutual sharing of benefits and difficulties throughout life along with the expectation of the making of commitments and sacrifices for the benefit of the other and the children of the relationship. Marriage is of paramount importance to individuals, children, communities and our nation. It has been neglected by Parliament over many years. An inappropriate anxiety not to exclude or to appear to cast judgement on other lifestyle relationships has resulted in marriage being devalued. It has suffered in terms of central government and local government funding, fiscal opportunities, welfare benefit opportunities, legal reforms and other appropriate encouragements and incentives.

A significant improvement in our married life and respect for marriage would have significant improvements in many other areas of personal, community and national life. This is why this review of family law is so fundamental to other improvements for our country.

We state yet again for the avoidance of any doubt that there should be no judgement on those who choose other forms of relationship. They can do so and should have opportunities for safety and protection from violence irrespective of the status of their domestic relationship. Children of these relationships should be treated in no different way than any other children. Nevertheless, subject to these elements, there should be encouragements and positive incentives given to marriage because of the overall benefit to individuals, children and our nation.

⁵⁷ Detailed further in Social Justice Policy Group, 2006, 'Fractured Families' Volume 2 of *Breakdown Britain*, Centre for Social Justice, p80-81

Moreover this is no suggestion of any return to artificial or outmoded models of marriage or gender roles. To the contrary, modern healthy marriage is often the springboard for working out individual patterns of work, life and family responsibilities.^{58, 59}

2.1.10 CONCLUSION ON MARRIAGE

This report is focused on family law reform. It looks at several key areas of family law incorporating aspects of family life. The Working Group believes that the core tests for any reform proposal must be that it ensures the best interests of children, the safety and well-being of family members and fairness and justice within society. We also test reform proposals on the anvil of support for marriage and the institution of marriage. Accordingly certain proposals e.g. financial remedies on divorce, must be seen in their own right according to what is fair and just, but also seen from the impact they will have on the respect for marriage and marriage commitment.

2.2 Family breakdown

2.2.1 A CULTURE OF MARRIAGE AND FAMILY BREAKDOWN

Many of the factors causing marriage breakdown today did not exist 100 years ago. At the turn of the last century, people had little expectation of getting divorced due to the social stigma attached to the process. People with assets did not require contractual protection if a divorce occurred because the law did not provide for capital transfer upon divorce. The status of marriage itself was deemed to provide all of the necessary terms of the relationship between spouses. The law and society's obligations and expectations were clear. The roles of the husband and wife were clearly defined.

None of this is true any longer because of revolutionary changes in the role, status and fundamental understanding of the nature of marriage and gender and of lifestyle expectations. The legal, moral, economic and social constraints of this earlier era no longer operate as a protective fence around marriage. Gender roles are much less important. Couples must choose for themselves the kind of marriage they want to have. Societal pressures are



The Working Group discusses marital breakdown

58 'Some critics of pro-marriage policies suspect that these interventions imply a return to a patriarchal authority structure and a traditional gender division of labour. With the exception of individuals in ultraconservative religious groups, however, few promoters of marriage wish to return to the patriarchal, hierarchical marriages of the past. Attitude surveys reveal that the majority of Americans support gender equality in the home. In contrast to the fears of some critics, there is a growing recognition amongst policy makers and the general public that healthy marriages should be based on the norm of egalitarianism, and that couples should be free to choose a division of home-making, breadwinning and child-care responsibilities (irrespective of traditional gendered family roles) that best meet their particular needs.' Amato, P., November 2004, 'Tension Between Institutional and Individual Views of Marriage', *Journal of Marriage and the Family*, 66, 959-965, p963

59 See as an example the honest account of early married life and parenthood described by Barack Obama in *The Audacity of Hope*, 2007, Canongate, pp 325-352

generally far less clearly defined and less influential on couples (for example, marriage is no longer deemed socially 'necessary'). Increasing numbers of marriages are a second or third union. More people already have children when they marry, whether from a relationship with their new spouse, a former spouse or a previous relationship that did not include marriage. The age range of people entering marriage is far wider today than it was 100 years ago (when marriage was seen as an important rite of passage into adulthood and typically took place when people were in their early twenties). Likewise, the assets that people have upon entering marriage vary much more widely nowadays than before, as do the responsibilities they bear and the expectations held. The fact that we live in a consumerist society with the expectation of instant fulfilment has contributed to a 'throw-away mentality' and subsequent marital breakdown when satisfaction is not quickly achieved.

Speaking in the television documentary, 'Geldof on Marriage', Bob Geldof blames the 'because I'm worth it' society for leading people to abandon marriages for what he regards as self-indulgent reasons:

We hop from product to product, channel to channel, station to station and, most damagingly, lover to lover, trading each one in for a new model as soon as passion fades...Perhaps a lot of it is down to an overblown sense of self. We imagine ourselves to be free people, but we should not be free to destroy others, especially children. We have confused freedom with the idea of choice; we have become voracious consumers, not just of stuff, but of the soul.⁶⁰

Sociological theorists have written about the growing individualisation of personal and married life. Giddens in particular popularised the concept of 'pure relationships,' which are self-sustaining, needing no support, regulation and constraints by external standards, laws or conventions. These 'pure relationships' (married or not) will continue for as long as the relationship is thought by each individual to deliver enough personal satisfaction. As Cherlin notes, this is the logical extension of the increasing individualism and the 'deinstitutionalisation' of marriage that occurred in the late 20th century.⁶¹ In other words, marriage has undergone 'a weakening of the social norms that define partners' behaviour over the past few decades,' as evidenced by both the increasing number and complexity of cohabiting unions and the emergence of same-sex marriage.⁶² Thus nowadays we see many couples entering marriage with high expectations but much lower capacities to realise those expectations, and little understanding of the long-term nature of the commitment.

⁶⁰ First broadcast on UK, Channel 4, 11 October 2004

⁶¹ Cherlin, A., 'The Deinstitutionalization of American Marriage,' *Journal of Marriage and Family*, 66: 848–861, p853

⁶² Ibid, p1

2.2.2 THE COST OF RELATIONSHIP BREAKDOWN

Family breakdown represents a significant economic burden to society. Although it is impossible to quantify with any accuracy the cost of family breakdown to the Exchequer, we do know that the total figure is very large.

Fractured Families attempted to quantify some of the financial costs (although clearly the costs are more than just financial) of relationship breakdown. It estimated that the financial burden to the country is currently around £20-£24 billion, or £680-820 for every taxpayer.⁶³ The costs include not only the direct costs of supporting lone parents of £4,000 – £15,000 per family, but also the indirect impacts on employment, education, health, crime, police, prisons etc.

A recent pamphlet from the Relationships Foundation estimates the direct costs of family breakdown at a staggering £37 billion. This research reviewed in some detail the costs to the public purse in relation to tax and benefits, housing, health and social care, criminal justice and education. It claimed that if investing in preventative measures could save even a small proportion of these costs over a 5-10 year period, this would allow considerably increased expenditure on a range of measures to support couple relationships and families, going well beyond even the modest £46m that the Department of Children, Schools and Families (DCSF) currently plans to invest in the whole range of Children and Family Support Services over two years.⁶⁴

Jill Kirby has also documented the cost to the taxpayer of the effects of family breakdown. She found that Mr and Mrs Average pay over £5,000 a year more in tax than they receive in benefits. If they break up, however, the two households can receive £7,000 more in benefits than they pay in tax.⁶⁵ Given the large, and increasing, number of lone parents, these sums quickly become substantial.

Clearly, if there were less family breakdown and lone parenthood, there would be fewer children taken into care, less homelessness, less drug addiction, less crime, less demand on the health services, less need for remedial teaching in schools, better average educational performance and less unemployment. All of these would save the taxpayer money and some would contribute to better economic performance of the country as a whole.

“The Relationships Foundation estimated the direct costs of family breakdown to be around a staggering £37 billion.”

2.2.3 JUDICIAL CONDEMNATION OF THE RELATIONSHIP BREAKDOWN CULTURE

In the past couple of years there has been no clearer and no starker warning of the relationship breakdown culture than that provided by Mr Justice Coleridge

63 Social Justice Policy Group, 2006, 'Fractured Families', Volume 2 of *Breakdown Britain*, Centre for Social Justice, p68

64 Relationships Foundation, February 2009, *When Relationships Go Wrong: counting the cost of family failure*

65 Kirby, J., 2005, *The Price of Parenthood*, Centre for Policy Studies, p9

of the High Court in a speech in April 2008, as set out in full in appendix 5. He started by referring to the fundamental importance of family life:

For as long as history has recorded these things, stable family life has been co-extensive and co-terminus with a stable and balanced society. Families are the cells which make up the body of society. If the cells are reasonably healthy, the body can function reasonably well and properly.

However he highlighted the impact when the family structure and family relationships across society consistently breakdown:

But if the cells are unhealthy and undernourished, or at worse cancerous and growing haphazard and out of control, in the end the body succumbs. The disease may be hidden from view until very late in its progress. And this may make the situation when it is discovered that much more difficult to control and treat. But it is there even if invisible. Put it another way, if the house is riddled with dry rot, the effects may not become apparent for a long time but in time the whole, interior, walls and wood will crumble to dust and one is left with a useless shell. And if the rot affects the bulk of houses in the town in the end the town is destroyed.

These may sound like dramatic images... But I suggest they are apt for the situation large tracts of society now find itself in. The disease and the rot are spreading and are out of control ... The increasing incidence of family breakdown is at all levels of society. Every level of society from the Royal family downwards is now affected.

So I suggest the general collapse of ordinary family life, because of the breakdown of families, in this country is on a scale, depth and breadth which few of us could have imagined even a decade ago.

I am talking about the wholesale breakdown of ordinary family life in households of our land. Parents (whether married or not) providing no consistent parental influence or authority over their children's daily lives and separating as a matter of course and as part of the ordinary experience of children as they grow up. It is a depressing but, I suggest, accurate picture.

In his speech he analysed a number of fundamental areas where there had to be dramatic changes, expressing deep concern that the Government has done very little to halt the decline of relationship breakdown, or even reverse it. He accused the Government of allowing the whole family justice system to be starved to death through lack of resources and funds. He called upon the Government as follows:

Family breakdown and family justice needs to be at the top of the political and justice agenda. The maintenance of the family and family life in this

country is the priority. It is nothing less than the business of the preservation of our society. It is not just a rather irritating and increasingly expensive political sub issue. It is as important as the management of the economy or the war on terror. And rather more important than the abolition of the plastic carrier bag or the taking of oaths of allegiance. It is as important as the preservation of the NHS. Indeed it is part and parcel of our national health. It requires a full time minister devoting his or her energies to nothing else. It calls for a complete change of attitude by those who govern or would aspire to do so.

Is it fair that there should be two tiers of children, those who have received a reasonable and secure upbringing and those who have suffered the traumas of family breakdown for most of their minority?

He ended his call to government and to the public as follows: ‘We are sleep walking to the edge of the precipice whilst the rot and disease rages out of control.’

We endorse his remarks as timely and vital. They must be heeded.⁶⁶

2.2.4 CONCLUSION ON RELATIONSHIP BREAKDOWN

Undoubtedly and sadly, the social theme of the past couple of decades has been the high level of relationship breakdown. The reasons are many and diverse, as highlighted in *Fractured Families*. For some couples of course, the opportunity of marriage termination is beneficial for themselves and/or their children and, as set out below, we do not seek to limit access to divorce.

Instead, this review seeks ways to end this culture of marriage breakdown. It will need full support across society: political, legal, media, financial and others. It will be a long-term task. The evidence of the change in the culture will take some time to be seen and then even longer to have significant and obvious beneficial effect. Nevertheless until material steps are taken to change this culture of marriage and family breakdown, it will continue and become even more deep-seated, established, costly and destructive.

Pulling back from this culture is a crucial step and one which must be taken by government in partnership with other agencies, professions and institutions. Our plea is that there should be a variety of measures and initiatives to end the culture of marriage breakdown and that instead marriage, married couples and family life should be encouraged and supported.

2.3 Divorce law in the UK

Divorce is the foundation of so much in family law. The divorce law itself and divorce procedure and practice informs the thinking of many in our

⁶⁶ We also endorse the remarks made by Mr Justice Coleridge in his most recent speech on 16 June 2009, to the Family Holiday Association at the House of Commons. Some of these remarks are referred to in this article: The Times, 17 June 2009, *Judge calls for action to stop British ‘epidemic’ of family breakdown*, <http://business.timesonline.co.uk/tol/business/law/article6516159.ece>

community about marriage, marriage stability and commitment within marriage and what should happen when a marriage breaks down.

The balance of evidence is that changes in the law do have an effect on family behaviour as stated at the outset by Allen and Gallagher, and it would appear that family law affects the likelihood that couples and children will enjoy the benefits of stable marriage.⁶⁷

Unduly easy divorce with a low cost of exit, or even financial benefit on ending the marriage, gives the message that marriage can be treated lightly, commitments given to marriage will not be highly regarded, that there are no significant incentives to work at the marriage and that marriage can be easily set aside. Unrealistically restricted opportunities for divorce discourages some from marriage and may not necessarily encourage reconciliation. It may also encourage cohabitation and new relationships before the divorce is finalised.

Equally as fundamental, financial provision on divorce which gives no credit or recognition to sacrifices and commitments made to the marriage, the other spouse or children and gives the message that society places little worth on

such commitments and on the institution and relationship to which the commitments have been made, consequently discourages either such commitments or marriage at all. The converse is that very high levels of financial settlement especially after short marriages encourage marriage to be seen as a short-term opportunity to seek quick financial rewards.

The messages about marriage and marital commitment by our divorce law and ancillary financial provision law are at times complex and mixed yet are frequently stark and obvious to the public. The way we treat divorce reflects the way we regard marriage and marital commitment.

The evidence available before us makes it very hard to argue that the law and ancillary procedure are not themselves causally implicated in certain unwelcome social trends, such as high rates of family breakdown. If the law is more powerful (although only as one factor among many) than has previously been acknowledged,

then its potential role as a stabilising factor should be properly investigated. Without according it any degree of inappropriate omnipotence, this review examines what reforms might be necessary to achieve such an end.

As we have set out elsewhere in this report, we are convinced that there is an urgent need to counter the relationship breakdown culture within our society, both because of the impact on those whom it affects and because of the significant direct and indirect costs to our nation. Tinkering with parts of the

“The way we treat divorce reflects the way we regard marriage and marital commitment.”



Divorce law is a fundamental starting point for stemming the tide of relationship breakdown.

⁶⁷ Allen, D. and Gallagher, M., July 2007, *Does Divorce Law Affect the Divorce Rate? A Review of the Empirical Research 1995-2006*, iMAPP

law is no longer sufficient. There is a need for radical thinking about the multitude of different ways and means to bring about this culture change. This paper can only address some of them.

Policy can and should be focussed on stemming the tide of relationship breakdown. The promotion of stability and commitment is what guides our work and the policies we recommend. Divorce law is a fundamental starting point.

2.3.1 INTRODUCTION TO THE LAW OF DIVORCE

The Divorce Reform Act 1969 came into effect in England and Wales on 1 January 1971. The Act introduced a solitary ground for divorce: the irretrievable breakdown of marriage. The Act, subsequently consolidated in the *Matrimonial Causes Act 1973*, made it possible for the first time for divorce to be petitioned on the couple's separation.⁶⁸

The Act attempted to remove the concepts of the 'guilty party' and the 'matrimonial offence' by introducing a single ground for divorce: that the marriage has broken down irretrievably. This is shown only by giving evidence of one of five facts.

The five facts are: the adultery of the other spouse, the unreasonable behaviour of the other spouse, two years' desertion, the couple has lived apart for two years and the other spouse consents to divorce, and the couple has lived apart for five years (no consent needed). Any proceedings concerning the children are invariably separate and freestanding.

The first three (adultery, unreasonable behaviour and desertion) are the former matrimonial offences and are known as 'fault' grounds. The two separation criteria were introduced for the first time by the 1969 Act. Despite Parliamentary hopes during passage of the 1969 Act that most would use the non-fault-based 'two year separation by consent,' the reality is that approximately 75 per cent petition on the fault grounds to provide immediate access to the divorce courts, often to obtain its ancillary powers to deal with the financial consequences of separation and divorce. See also the changes to the procedure of divorce, known as 'special procedure,' referred to below.

The Matrimonial and Family Proceedings Act 1984 came into effect in England and Wales on 12 October 1984. It made three main changes. The first concerned the time bar for divorce – the minimum interval of time which has to elapse between the date of marriage and that of being able to file a petition for divorce. Under the former law the time bar was three years, with discretion to shorten it. This was reduced to 12 months with no discretion. No petition can now be filed under any circumstances within the first year of marriage.

The second change was that the Act no longer required the courts to try to place the divorced spouses in the financial position they would have enjoyed had the marriage not broken down. However, crucially in retrospect, no other objective of financial provision in law was provided by Parliament: it was left

68 ONS, 2008, *Marriage, Divorce and Adoption Statistics*, Series FM2, no.33, p29

to judges' discretion. The third change is that when considering orders for financial relief, courts are required to place greater emphasis on the desirability of the parties becoming self-sufficient, with the court making so-called clean break orders.⁶⁹

The procedure for a divorce itself is generally straightforward, uncontentious, undefended and quick.

It is also worth noting that the *Family Law (Scotland) Act 2006* came into effect on 4 May 2006. The Act reduced the separation periods for divorce with consent to one year (previously two years) and without consent to two years (previously five years). It also removed 'desertion' as a ground; this was rarely used in England and Wales.

2.3.2 NO-FAULT DIVORCE

England is one of the few advanced jurisdictions which still retains fault as a basis for divorce. It was condemned by the Law Commission in the early 1990s. After both Parliament and society were riven apart by the surrounding debate, legislation was eventually passed in 1996 to produce no-fault divorce which was then (a few years later) dropped by secondary legislation. This was probably due to reasons unconnected with non-fault divorce itself. We have considered whether the time is right to revive divorce law reform, whether Parliament will be willing to engage again on this topic, what would be the impact on marriage and what reform there should be.

The first question is whether we do indeed want to, or need to, move again towards a divorce law based purely on non-fault? In practice a fault divorce makes negligible difference on finance or children issues. Divorce is a short and uncontentious procedure. We do not see this as a reform which is law driven.

Reform is often driven by an awareness of the impact on those going through the divorce process of having to create fault and raise blame. Fault grounds are used by at least 75 per cent of petitioners because of the wish for speed, and to avoid the period of two years of separation that had been the 1969 Parliamentary hope for so-called 'civilised' divorces. It is the wives who often need the ancillary financial powers of the divorce court, which in turn requires a divorce petition, hence their petitioning in greater numbers. Moreover many specialist lawyers are distrustful of separation agreements, entered into in the expectation that there will be a divorce two years later with a final financial consent order made in the terms of the agreement. There is always a real risk that after two years of separation, one spouse may on divorce seek a different financial outcome, including if circumstances have changed. The courts have been willing to allow this. Hence many specialist lawyers recommend an immediate divorce for the better protection of their clients.

⁶⁹ If when one party is not required to support the other financially on an ongoing basis.

The fault grounds given and relied on rarely represent the real reasons why the marriage has broken down. Indeed, many family lawyers specifically endeavour to avoid referring to the more sensitive issues surrounding the possible reasons for the breakdown of the marriage, in order to reduce feelings and emotions on divorce.⁷⁰ However it is widely acknowledged that the grievance and unhappiness that the creation of blame and fault creates can spill over into other aspects around the time of family breakdown.

Moreover, it must be remembered that divorce is generally not the end. In many instances, the couple have a continuing relationship, most obviously as parents, sometimes as members of a small community or in a local area, or in the same area of work or social life. Non-fault divorce can support and better enable the post marital relationships between divorcing spouses, while fault-based divorce can make it harder for couples to carry on their lives post separation.

One of the most dramatic changes in our divorce law over the past 50 years has probably been the so-called special procedure, once known as the 'quickie divorce', which has nothing to do with the grounds of a divorce, whether fault or non-fault.⁷¹ Whilst we do not argue against this procedure, we consider very strongly that it is this element which has dramatically affected perceptions and attitudes to divorce, perhaps even being responsible in part for removing any stigma to divorce. Public perceptions are not necessarily always the consequence of the grounds for the divorce itself.

No-fault divorce is a very sensitive and difficult issue. However the primary problem in 1996 was not ultimately the non-fault divorce aspect itself but the information meetings, legal aid referrals to mediation, preconditions for the final divorce order etc., which pulled it down and eventually caused it to be dropped. A second problem was that through the Parliamentary debate, the initial and reasonable notice/separation period of 12 months became extended to an unworkable 24 months. Thirdly, there were attempts by some to introduce conduct at several stages of the divorce process, which, in our experience, is rarely beneficial or indeed relevant to the real facts.

For only a few in our society did the new no-fault divorce law mean an easier or quicker divorce, despite allegations to the contrary in parts of the media and in Parliament. For the majority, the new divorce laws (as finally enacted by

70 Many spouses feel aggrieved that they are the respondent to a divorce in circumstances where they may feel the other spouse was either more to blame for the break-up or at least the break-up was the fault of both sides. Yet the court documents, even many years later, will show one party is the claiming petitioning party and the other is the respondent, the perceived guilty party.

71 Originally the spouse seeking a divorce had to attend court to give evidence on oath, sometimes at a public hearing, even when a divorce was unopposed. The change was to convert the divorce procedure into an entirely administrative and paper application. A judge sitting in his room looks over the papers, is satisfied that the law and procedure has been complied with and sets the matter down for the pronouncement of the first divorce order, the decree nisi. This is known as the special procedure although there is nothing special about it as probably 99 per cent of divorces are dealt with in this fashion. Certainly there is a public hearing when the decrees nisi are read out. However in practice no one ever attends. The final decree, the decree absolute, is a totally paper application.

Parliament in 1996) created a very long process from beginning to end, often coming after a long and emotional period of parting and separation.

There are clear attractions with the concept of no-fault divorce, even as it entered Parliament in the 1995 Bill, namely irretrievable breakdown on the basis of a period of time after giving notice, a period of three months reflection and consideration followed by nine months for the divorce and then a one-month period for the application of the final divorce order itself. Nevertheless we have three major anxieties about non-fault divorce both generally and within the scheme of family law.

First, we remain concerned about the signal which no-fault divorce, as the sole basis for divorce in a society, gives about marriage, marriage commitments and the ease of opportunity to leave a marriage. Even in a situation where a couple accept the marriage has broken down irretrievably and can produce a fault-based divorce, and thereby a quicker divorce than reliance on the separation grounds, nevertheless the fault basis remains as a message to the community about the importance of marriage. Moreover, in those situations, where one spouse does not consider that the marriage has broken down irretrievably, fault-based divorce gives some opportunity to oppose the divorce being granted immediately.

Secondly, there are some cases in which the fault basis does indeed recognise the reality of the breakdown of the marriage. There are some petitioners who want this recognition. Whilst undoubtedly in many marriage breakdowns there is fault on both sides, perhaps equal or unequal, there are also some marriage breakdowns where fault lies wholly or very substantially with one spouse alone. We are satisfied that it would be wrong in these cases for there not to be any fault basis.

Thirdly, we are very conscious that this is an area which has previously divided Parliament and the public and which we anticipate may do so again if divorce law reform was proposed. We are aware of other very urgent areas of family law and family life which require statutory reform, as set out elsewhere in this report. We believe that in the scheme of family law reform, these are the priority areas and we heard this continually from many who made submissions to us. A long and disputed Parliamentary debate over no-fault legislation would distract attention from the fundamental issues and the necessary reforms. It might discourage Parliament from engaging in family law issues.

For these reasons, we do not promote non-fault divorce in our reforms.

There are however several more discrete reforms concerning divorce that we consider would nevertheless have significant impact.

2.3.3 PERIOD OF REFLECTION AND CONSIDERATION

In the 1996 legislation there was a three month period of reflection and consideration at the beginning of the process. We are still attracted to it, in large part as we consider it could provide practical, psychological and emotional benefits. We propose it should be re-instated. Apart from protective

and preservative orders being available, nothing would happen as far as the legal process is concerned during this three month period. It would be a mandatory slowing down of the divorce to allow a specific opportunity for reflection and consideration. Mediation and other ADR would be available if required and should be available on legal aid, even though there may be no ongoing proceedings. Marital counselling would of course be available. For many it would serve as a vital opportunity to gather legal, practical and emotional information about the impact of the divorce on themselves, their finances and their children, including whether in fact divorce is the route to take.

A written notice would commence this period. However whilst it would indicate the start of the divorce process and it would state the proposed grounds of the divorce (technically the fact of the divorce), it would specifically not set out any of the particulars and allegations, as this would inevitably polarise. It would also mean that during this three month period, the parties may be able to agree that other grounds for divorce may be preferred. It is presently good practice for family lawyers to try to agree the grounds and particulars of a divorce in advance of the divorce petition being presented. The reality is that this rarely happens for various reasons. This three month period would allow this sort of reflection. At the end of the three months, either party i.e. not just the party who gave the original notice, could then proceed with what is now called the divorce petition. It could be on any grounds then available. There would be encouragement to joint petitions, as we discuss below.

Crucially, within those three months and other than in cases of emergency, standard applications such as in Form A, application for financial provision on divorce, would not be made. There is nothing to prevent voluntary disclosure taking place by agreement with the first appointment then expedited because of the voluntary disclosure progress already made. There would also naturally be opportunity for domestic violence injunctions for reasons of safety. Applications regarding children could also be made as they would be freestanding. Matters of disputed jurisdiction could be raised. Freezing orders and similar court steps to preserve the financial status quo could be made. There would be no cross petitions by the respondent. It would be crucial that the start of the three month period of reflection and consideration is the start of proceedings, for instance for the purposes of *Brussels II* in respect of which party is first to issue proceedings in which country.

We are aware that versions of this ‘cooling off’ period exist successfully in various forms in a number of countries, such as France. In some Islamic states it is judicially imposed and is referred to in some contexts as an *iddat*. As a result it is more likely to be adhered to; for example England will recognise a foreign *talaq*, an Islamic divorce abroad. The existence of this component in the divorce process will not surprise many families with international connections.

Sir Mark Potter, President of the Family Division, who gave evidence to the Family Law Review, supported a three-month period of reflection and reconciliation at the commencement of proceedings. He said one of the 'criticisms of the present system is that it devalues marriage by making divorce too easy and too quick...A system which required people to wait, and even perhaps receive advice or seek conciliation would focus the mind of the litigant on the seriousness of what he or she was doing.'

Professor Janet Walker in her evidence to the Family Law Review, said she thought three months was 'a realistic waiting time', and that '3 months is not long in a lifetime, to reflect on the consequences.'

Our proposal is that the notice should have a lifespan of no more than six months and if a divorce petition was not presented in that period by either party, the notice would lapse and would have to be presented afresh and time start to run again. It is unreasonable that a spouse should have this notice hanging over them for any long period of time.

This three month period is endeavouring to save saveable marriages. During this period one or both spouses could take advantage of the pre-divorce information meetings or other resources available to consider reconciliation or Alternative Dispute Resolution (ADR).

Parliament decided in the 1996 legislation that there were significant benefits in having this period of reflection and consideration at the outset of the divorce process. As we have reviewed the intentions of Parliament at that time and considered how matters have developed in the intervening decade, we remain convinced that this would be beneficial to many, neutral to some and disadvantageous to very few. We recommend its introduction.

2.3.4 JOINT PETITIONS

As long ago as the Booth Committee report in 1985, there were recommendations that both parties should be able to present a petition together to the court, recognising a joint acceptance that the marriage had broken down, and a joint recognition of the need and wish to end the legal status of the marriage. It is found in a number of European countries.⁷² It would have been possible with the 1996 legislation. It is not possible under present legislation.

⁷² These include Italy, Spain, France and Germany. For example: In 1987 in Italy amendments were made to *The Divorce Law* (1978). The legislator introduced various innovations, including divorce by joint petition, based on the consensual judicial separation procedure (Article 158 of the Italian Civil Code and Article 711 of the Code of Civil Procedure). In Germany a consensual divorce may be sought: either both spouses apply jointly for the divorce order, or the other spouse joins the application which has already been made by the other party, (§ 630 II 1 Zivilprozessordnung).

The 1996 legislation intended a procedure allowing joint petitions, i.e. an application for a divorce made jointly, in circumstances where it was on the basis of a two-year separation. We support this. It is clear evidence of agreed matrimonial breakdown.

2.3.5 OTHER ASPECTS ON DIVORCE REFORM

In the 1996 legislation there was a provision that there can be no decree absolute without the financial arrangements being in place. This is compelling in some ways, but psychologically there can be an advantage in the final decree; bringing about closure and helping people move on. On balance, we prefer reliance on and improvement⁷³ to the existing Section 10(2) MCA: namely no decree absolute if there would be any financial prejudice to either party by the decree being pronounced before the final financial settlement and its implementation.

At present there is a 6 week period between decrees. This is a largely historic feature. It is no longer needed. Instead we recommend it is replaced by a four-week period after which an application can be automatically made, unless there has been an order stopping the final divorce order, based upon Section 10(2) MCA as above. Moreover, there is no longer any justification for the petitioner to be able to apply for the final decree absolute three months earlier than the respondent which causes considerable resentment. Once the court has found that a marriage has broken down by granting the first decree, we recommend that either party should be able to apply at the expiry of four weeks thereafter.

At present, before a divorce petition can proceed, a solicitor acting for the petitioner must provide a certificate stating whether they have discussed prospects of reconciliation. This was well-meaning when it was introduced by Parliament in 1969. However the document is never considered in court proceedings and having to produce this document rarely has any impact on whether a lawyer discusses reconciliation. We recommend it is scrapped.

2.3.6 SUMMARY OF RECOMMENDATIONS

- **Discussing no-fault divorce is a low priority in contrast to other family law reforms;**
- **Creation of a period of reflection and consideration at the outset of the divorce process, which would now be commenced only by a short written notice without any allegations;**
- **The period of reflection and consideration should last three months and could be abridged by the court in exceptional circumstances;**
- **Apart from urgent measures and protective or preservative orders, no other steps would be taken during the period of reflection and consideration;**

73 To extend benefit to both parties and to all 5 facts/grounds of a divorce.

- At the expiry of the three months, either party could proceed with a petition for divorce whereupon the present procedure would follow;
- Parties should be able to petition jointly under existing law;
- Decree absolute of divorce should be capable of being applied for after four weeks from the decree nisi, instead of the present time periods;
- Either party should be able to apply for the decree absolute irrespective of whether they are petitioner or respondent;
- The certificate of reconciliation should be abolished;
- Improvements to the circumstances in which either party may prevent the granting of the final decree until the final financial settlement and its implementation.

2.4 Cohabitation

2.4.1 DEFINITION

Following the *Civil Partnership Act 2004*, cohabitation is now any domestic, usually sexual, relationship other than marriage or civil partnership. In the context of this report, references to cohabitation are to those relationships outside of marriage or civil partnership. We deal with civil partnership in section 2.5 following. In practice, the same sex community is relatively small across the country and most of our comments and recommendations are therefore referable to the heterosexual community, and those married and those living together who are not married.

2.4.2 TRENDS IN COHABITATION

Over the last ten years the proportion of cohabiting couple families in the UK has increased to 14 per cent from 9 per cent. The proportion of married couple families has decreased over the same period, accounting for 71 per cent of

families in 2006, compared with 76 per cent in 1996.⁷⁴ However, as these figures show, and as stated earlier (section 2.1.3), despite the increase in the proportion of people cohabiting and the decrease in the overall number of people getting married, marriage is still the most common form of partnership for men and women.

Generally, cohabiting couple families are much younger than married couple families. In 2001, half of cohabiting couple families in the UK were headed by a person aged under 35, compared with just over a tenth of married



In 2001, half of cohabiting couple families in the UK were headed by a person aged under 35.
(Photo by Bill Meyring.)

74

ONS, October 2007, *Focus on Families: Overview of Families*, <http://www.statistics.gov.uk/CCI/nugget.asp?ID=1865&Pos=1&ColRank=2&Rank=1000>

couple families.⁷⁵ This reflects the greater acceptance of cohabitation by younger generations. The time couples spend living together in cohabiting unions before either marrying each other or separating is usually very short; the median duration is about two years.

With the exception of the periods immediately following the two World Wars, few births occurred outside marriage during the first 60 years of the 20th century. Births outside marriage became more commonplace during the 1960s and 1970s and by 2006, 44 per cent of all births in the UK occurred outside marriage, compared with 25 per cent in 1988. Much of this increase was the result of increasing numbers of births to cohabiting parents. A factor common to almost all of the EU-27 countries is the increase in the percentage of births occurring outside marriage, with the UK having one of the highest. In the UK, the proportion of jointly registered births has risen consistently, from 17 per cent in 1988 to 37 per cent in 2006.⁷⁶

Professor Scott Stanley⁷⁷ claims that non-marital commitment is not just associated with lower commitment to the institution of marriage, but also with lower commitment to the partner in a cohabiting relationship. His research has found that on average, once married after cohabiting, men are less committed to their wives than men who did not cohabit with their wives. This, he believes, is because many couples proceed along a trajectory of relational changes without making explicit choices about the destination. He terms this ‘sliding versus deciding’. As a result they enter stages of the relationship (e.g. cohabitation) without having recognised that they are closing off options (reducing choice). Inertia results not in higher intrinsic risk, but in risky couples staying together longer, because it is generally harder to leave a cohabiting relationship (with a house, and/or children) than a non-cohabiting relationship.⁷⁸ The pressing problem from a policy perspective is that children are increasingly being born to these commitment-vulnerable couples.

2.4.3 LINK BETWEEN COHABITATION AND FAMILY BREAKDOWN

Current estimates suggest that 28 per cent of all children will experience parental divorce by the time they are aged 16.⁷⁹ However, of even greater concern than divorce is the markedly more unstable nature of cohabitation and the growing tendency for parents not to live together at all. A commentary on findings from the British Household Panel Survey, by Professor John Ermisch (Economic Demography at ISER) reveals that:

“About 65 per cent of cohabiting unions which produce children subsequently dissolve.”

75 Ibid

76 ONS, 2008, *Social Trends* 38, p24.

77 Research professor at the University of Denver and co-director of the Center for Marital and Family Studies.

78 Stanley S. M., Rhoades G. K., & Markman, H. J., 2006 ‘Sliding vs. Deciding: Inertia and the pre-marital cohabitation effect’, *Family Relations*, 55, 499–509

79 Hunt, J. and Roberts, C., 2004, *Family Policy Briefing 3 – Child Contact with Non Resident Parents*, University of Oxford Department of Social Policy and Social Work, p1

The cohabiting unions that produce children are much less likely to be converted into marriage and more likely to break up than childless ones. About 65 per cent of cohabiting unions which produce children subsequently dissolve. In contrast only 40 per cent of childless unions dissolve. In other words, only 35 per cent of children born into a cohabiting union will live with both parents throughout their childhood (to their 16th birthday), compared with 70 per cent of children born within marriage. So having a child in a cohabiting union is often not indicative of a long-term partnership.

He concludes that:

The rise in births outside marriage is a real cause for concern. It is primarily attributable to the increase in people's tendency to cohabit in their first partnership and to have children within these unions. The instability of these unions means, however, that more British children will spend significant parts of their childhood in families with only one parent – and this appears to have long-term negative consequences for children.⁸⁰

Kiernan's study of European countries and the US found that across most countries there has been a discernible movement away from having a child within marriage to having a child within a cohabiting union. In all the countries included in her analysis, children born within marriage were less likely to see their parents separate than those born in a cohabiting union.⁸¹

“By a child's fifth birthday fewer than 1 in 12 married parents have split up compared to nearly 1 in 2 of couples who never marry.”⁸²

In other words, the continued ongoing rise in family breakdown (affecting many young children) has been driven by the dissolution of cohabiting partnerships. European data cited earlier shows that by a child's fifth birthday fewer than 1 in 12 married parents have split up compared to nearly 1 in 2 of couples who never marry.⁸³ Whilst the average length of marriage on divorce was 11.6 years in 2005⁸⁴ as noted above, the average live-in relationship lasts two years before separation or marriage.⁸⁵ This accords with other research that indicates that whilst marriage tends to be stabilised by childbearing, the opposite is true for cohabitation.⁸⁶

80 Ermisch, J., September 2008, *In Praise of Panel Surveys: The achievements of the British Household Panel Survey* p13

81 Kiernan, K., 2003, *Cohabitation and divorce across nations and generations*, Centre for Analysis of Social Exclusion, LSE, CASE paper 65, cited in 'Fractured Families': Volume 2 *Breakdown Britain*, 2006, Centre for Social Justice, p43

82 Kiernan, K., 1999, 'Childbearing outside marriage in Western Europe' *Population Trends*, Vol.98, pp.11-20

83 Kiernan, K., 1999, 'Childbearing outside marriage in Western Europe' *Population Trends*, Vol.98, pp.11-20

84 ONS, 2008, *Social Trends* 39, p20

85 Ermisch, J., September 2008, *In Praise of Panel Surveys: The achievements of the British Household Panel Survey*, p2

86 See Social Justice Policy Group, 2006, 'Fractured Families' Volume 2 of *Breakdown Britain*, Centre for Social Justice, pp98-99

2.4.4 THE CURRENT LAW

There is a widespread yet erroneous belief that the law recognises cohabitants as ‘common law spouses’ once they live together for a certain length of time and that thereafter they are treated as if they were married. Unlike marriages or civil partnerships, when cohabitants separate the courts do not automatically, by virtue of their relationship itself, have the power or discretion to adjust a couple’s assets by way of property adjustment orders, lump sum orders or periodical payments to meet maintenance needs. In short, cohabitants have no such entitlements.

So far as property is concerned, again there are currently no statutory provisions governing agreements between cohabitants. The courts’ powers are also limited to establishing equitable principles of property law and the possible interest in the family home. Despite many judicial attempts over recent years to push the boundaries of equitable property owning principles to create a ‘fairer’ law, the onus lies very much with the cohabitant claiming ownership or an interest in property.

Cohabitants must rely on the general law of contract, property and trusts and upon the relevant body of case law culminating in the leading cases of *Oxley v. Hiscock* [2004] EWCA Civ 546, [2005] Fam 211 CA, and more recently *Stack v. Dowden* [2007] UKHL 17, [2007] 2 AC 432.

Some argue that the current laws are not satisfactory and there is strong case for change, not least because there is a body of deserving claimants amongst the cohabiting population. This body, it is argued, would justify the cost of increased referrals to the already overworked family courts, stretched legal aid resources, and the impact on other family law cases. Some have argued for very significant changes in law, procedure and otherwise, in effect to give rights very similar to those who are married. This is on the basis, it is said, that there is no longer in society any real distinction between marriage and cohabitation. We consider this is erroneous as an assertion of the present values, perceptions and beliefs of our society. It is also unnecessary because practical self-help remedies for cohabitants are already available; and it is dangerous because of the adverse impact on the distinctive status of marriage.

We accept current laws are inadequate and unsatisfactory. However before there is any dramatic change in the law, especially with any equivalence to marriage, we consider there should be a much more concerted and urgent attempt to acquaint cohabitants with their lack of legal protection and available existing remedies. Our YouGov polling found that over half of respondents (57 per cent) thought the law should promote marriage in preference to other kinds of family structures such as cohabitation (a quarter, 27 per cent, thought that it should not). A similar number (58 per cent) thought that giving cohabitants similar rights to marriage would undermine marriage and make people less likely to bother to get married.

We are satisfied the state should not be conferring on cohabitants a similar set of rights to those pertaining to marriage when this could seriously harm the

standing of marriage and might therefore be socially harmful, in particular to children.

2.4.5 THE LAW COMMISSION REPORT 2007: 'COHABITATION: THE FINANCIAL CONSEQUENCES OF RELATIONSHIP BREAKDOWN'

In July 2007, the Law Commission made recommendations to Parliament on certain aspects of the law relating to cohabitants in their report *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307). They concluded that reform was needed to address inadequacies in the current law and recommended a statutory scheme designed specifically for cohabitants on separation. There was careful consideration of alleged impact of reform on marriage and they said that any reform should be distinctly different to marriage. They proposed a system which they said was crucially different to outcomes on divorce.

The scheme applied only to cohabitants who have had children together or who have lived together for a specified number of years. It proposed that financial relief should be available between cohabiting couples based on the economic impact of cohabitation on the parties, defined as where contributions made by the parties during the relationship had led to a 'retained benefit' by one party or 'an economic disadvantage' to the other on its breakdown. Contributions did not need to be financial and could include future contributions, such as the care of the children of the parties after separation. Cohabitants could opt out by a written agreement after legal advice.

However the proposals are far from clear on the subject of the size of the economic disadvantages suffered by the cohabitants or the benefit gained by them. By not following financial provision as on divorce but creating thoroughly new criteria for awards separate to marriage and divorce, whilst commendable in itself, the new law would create considerable litigation over the next decade to establish how it operates in practice.

This report is being prepared at a time when there is a Private Members' Bill (PMB) in Parliament for cohabitation law reform, sponsored by Lord Lester. This is very different to the Law Commission's proposed reforms. We have concerns that the Lester Bill will, in practice, provide very similar outcomes to divorce, because it will create an equivalence of cohabitation with marriage and thereby weaken marriage. Specifically it is inappropriate to consider cohabitation reform as Parliament should first reform financial provision on divorce. (See section 6.2)

2.4.6 KEY ISSUES

Despite claims that these proposed reforms would retain distinctions between cohabitation and marriage, some have expressed serious reservations about the Law Commission proposals. This is primarily because of concerns that the proposals are likely to encourage yet more

couples to cohabit and thus to embrace a family structure that is inherently unstable for adults and their children.⁸⁷ Our YouGov polling found that over half of respondents thought that giving cohabitants similar rights to marriage would undermine marriage and make people less likely to bother to get married.

Whilst Baroness Deech told the review:

People who don't get married have reasons for doing so. To extend the law to cohabitants would be a bonanza for lawyers...We should respect the expectations of cohabiting couples...Imposing marriage laws on non married couples is to deny people's human rights.

“Our YouGov polling found that 58 per cent of respondents thought that giving cohabitants similar legal rights to marriage would undermine marriage and would make people less likely to bother getting married.”

We do not believe that reforms of the law should simply ‘chase the practice’. Given the steep rise in cohabitation, an approach which is supportive of marriage arguably precludes legal protection for cohabitants (or at the very least, any extension of rights to equivalence with marriage and thereby confusion with marriage). *Breakthrough Britain* expressed

...grave concern over the negative implications of imposing rights and responsibilities on cohabiting couples. Notwithstanding individual cases of apparent injustice, many cohabitees have voluntarily chosen to reject marriage with the protection it provides. The liberal argument that people should not be penalised for this choice is flawed. Attaching legal provision would be illiberal (because it imposes a contractual obligation not freely entered into) and intrusive and would encourage inherently more unstable relationships.⁸⁸

It concluded that if we want to encourage a high-commitment culture, it is counter-intuitive to make additional provisions, within the law, for lower forms of commitment. It also noted that some legal provision is already made for the children of cohabiting couples through Schedule 1 of the Children Act 1989. The Law Commission point out that few couples make use of such provision because either they ‘do not seek legal advice’ or ‘it is possible that some advisors ... overlook the potential of Schedule 1 or consider it unsuitable for their clients circumstances.’⁸⁹

Although existing law protects children, it may be underused because it does not also provide for mothers in their own right. (They may for example be

87 For further discussion on this matter see Social Justice Policy Group, 2006, ‘Fractured Families’ Volume 2 of *Breakdown Britain*, Centre for Social Justice, p13.

88 Social Justice Policy Group, 2007, ‘Family Breakdown’ Volume 1 of *Breakthrough Britain*, Centre for Social Justice, p10

89 Law Commission, 2006, *Cohabitation: The Financial Consequences of Relationship Breakdown, A Consultation Paper (Overview)*, pp16-17

“We consider there is an urgent need to educate people and raise greater awareness of the limitations, risks and disadvantages of cohabitation for couples and children.”

allowed to live in the home with their children until the children reach majority, after which point they currently may have no legal right to remain.) The proposals for new laws aim to minimise the gap in financial rights of married and unmarried couples who separate. However, *Breakthrough Britain*

concluded that whilst doing much to address perceived injustices, these proposals are not obviously compatible with a long-term national policy aimed at improving family stability by encouraging marriage and discouraging markedly more unstable cohabitation.⁹⁰

In view of cultural shifts and our concern with promoting family stability and encouraging commitment, especially amongst cohabiting couples, we have assessed Professor Scott Stanley’s compelling ‘sliding versus deciding’ transition and risk model (see section 2.4.1).

The *Breakthrough Britain* report cited recent research revealing fundamental differences in the way men and women view commitment. Whilst women tend to commit on moving in, men tend to commit when they make clear decisions about their future.⁹¹

There are less dramatic changes in the law, such as reform to Schedule 1 of the *Children Act 1989* (in terms of property readjustment as a different way of tackling disadvantages to children in cohabiting relationships) which would improve fairness without the creation of a new cohabitation law with all its implications.

We record that after careful consideration we have taken the decision not to make recommendations in this area. This is for several reasons:

First, we are aware that the Law Commission has recently engaged in very substantial consideration of this issue, incorporating widespread consultation of many interested parties. In the circumstances we considered there was no point reworking or trying to shadow the work already undertaken.

Secondly, we have made significant proposals elsewhere in this report for reform of ancillary relief and financial provision on divorce, when a marriage is brought to an end, also on dissolution of civil partnership. These are the primary status-recognised relationships in society and are the priority areas for reform.

Thirdly, there are many different categories of cohabitants. Some specifically are choosing cohabitation because they do not want the obligations, commitments, legal burdens and other features of marriage. We do not consider reform should be automatically imposed upon them. Furthermore, we are not convinced that there is a significant number of vulnerable persons in cohabitation relationships for whom there is a justifiable need for significant

90 We would add at this point that lawyers say that every new piece of legislation creates ten years of good new work. Anything that is likely to result in an increase in litigation is unhelpful for the parties involved.

91 Rhoades G., Stanley S., & Markman, H., 2006, ‘Pre-engagement cohabitation and gender asymmetry in marital commitment’ *Journal of Family Psychology*, 20, 553-560

change in the law, when taking account of the other factors and criteria that inevitably arise with such a major change in the law and the impact on court resources, legal aid and other costs implications.

Fourthly, there are steps which can be taken by those in a cohabitation relationship to record their intentions regarding the financial aspects of the relationship including recording intentions in respect of ownership of real property and other assets, what will happen to assets on death and retirement and many other similar eventualities. There are existing remedies.⁹² We remain unconvinced, on balance, that a dramatic new law with significant implications is justified in these circumstances.

Finally, as noted, we have a major concern about the impact of cohabitation law reform on marriage, the respect for and status of marriage and the likelihood of couples deciding to get married instead of cohabiting. We believe that the impact of the introduction of a cohabitation law, which provided very similar rights and entitlements to marriage, will have a long-term and highly detrimental effect on marriage itself. Moreover, within this area of social life, changes and trends occur often relatively slowly but then with a deep-seated effect. It may be many years, perhaps decades or even a generation, before the effect of cohabitation law reform would be known. By then, the damage could be very serious and the impact on relationships and within society very dramatic.

2.4.7 SUMMARY OF RECOMMENDATIONS

- **For the different reasons set out above, we do not consider that it is appropriate to make any proposals for cohabitation law reform at this time;**
- **We oppose the present Private Members' Bill on the basis that it provides very similar rights to marriage;**
- **We recommend more education of couples to raise greater awareness of their rights and limitations in their relationships, and opportunities to provide certainty and planning in their financial affairs.**

2.5 Civil partnership

The *Civil Partnership Act 2004* permits same-sex couples to enter into a relationship recognised by the state, publicly registered, with the requirements regarding formality and capacity, and creating duties and obligations on the dissolution of the civil partnership. It is specifically not, in law, marriage. It came into force on 5 December 2005.

In the first year, there were 18,059 civil partnerships.⁹³ This inevitably included very many same-sex couples who had been living together and who

92 E.g. Transfer documentation at the time of purchase and regularisation at HM Land Registry, simple deed of trust, cohabitation contract, will, letters of wishes, nominations and assignments of pensions policies and life policies, power of attorney including enduring powers of attorney.

93 Office of National Statistics, Civil Partnership: numbers and rates, www.statistics.gov.uk/statbase/Product.asp?vlnk=14675



The Civil Partnership Act came into force in 2005.
(photo by: Auntie P)

were waiting for the new law. This figure is therefore unrepresentative. In the second year, there were 8,728 civil partnerships.⁹⁴ This is therefore probably a much more representative figure. It will be observed for instance that it contrasts with the approximately 231,450 marriages in 2007 and 239,450 marriages in 2006, the marriage rate itself falling as observed above. The number of civil partnerships are therefore small relative to marriages.

We consider that it is still too early in the operation of this legislation to make any reliable comment upon relationship breakdown as a consequence of civil partnership, either specifically or relatively to marriage. It is argued that there are different behavioural patterns within the same sex community in contrast to the heterosexual community and that this may have an impact on dissolution statistics.

This legislation is still very much in its infancy. It will take several years for reliable patterns of formation and dissolution of same-sex registered partnerships to become evident. As a consequence, in this report we are not making any recommendations or proposals in respect of civil partnerships.

94 Office of National Statistics, *Civil Partnerships*, www.statistics.gov.uk/cci/nugget.asp?id=1685

THREE

Family law and family life support

3.1 Pre-marriage information and preparation

3.1.1 INFORMATION WHEN GETTING MARRIED

Our society requires us to be coached, informed, trained and qualified in many areas of our lives, all the more when the social and financial stakes are high, such as taking on a new employee or buying a house. Yet marriage, which ought to outlast any job, can be entered into easily, quickly and with little understanding of its implications, responsibilities and pressures. A couple simply gives notice, attends the wedding venue and are married. A couple get married, return from their honeymoon and then have to address this new situation: 'being married.' No pre-planning, no mentoring, no warnings about the inevitable natural crisis periods and stresses, no resources and no obvious places to go for help.

“Our YouGov poll found that only 8 per cent of married couples took marriage preparation classes before they got married.”

Whilst there is a multi-million pound industry associated with getting married, this industry is not directed at helping couples prepare for married life, nor specifically for dealing with the inevitable difficult times everyone experiences at some stage during marriage. Our YouGov poll found that only 8 per cent of married couples took marriage preparation classes. A report from the Relationships Foundation notes that in the UK at present, about 132,000 people (24 per cent of individuals marrying each year) receive some form of marriage preparation, but only a small minority receive in depth interventions of a duration identified from the research as being more likely to deliver significant benefits.¹

The majority of couples today cohabit before marriage. It has become regarded as a trial run for marriage. Whilst this may help to inform their decision whether or not to marry by giving a foretaste of married life, it can be distinctly misleading and unreliable in other regards. Marriage carries the

¹ Benefits such as higher levels of marital satisfaction and lower levels of relationship instability, Clark, M., Lynas, R., & Percival, D. 2009, *Relationship Education: Building a National Agenda*. Relationships Foundation, p15 and 31. *Forthcoming*. See also section 3.1.1 footnote 6.

incomparable additional elements of commitment, longevity, financial arrangements, involvement of wider family and other third parties and more. Moving directly from a cohabitation relationship into a marriage relationship with little preparation, agreed behavioural shifts and attitudinal changes can be problematical for one or both partners, and therefore for the relationship as a whole.

One couple offering marriage preparation noted that:

We often find we're doing marriage preparation with people who are in fact experiencing a crisis in their relationship already. It's fairly easy to see why so many marriages breakdown in the first five years when their relationship is already strained...Through a short course we can equip couples with skills to help them work through their relationship issues, giving them a much greater chance of staying together once they're married.²

If one premise on which cohabitation is based is a rejection of the lifelong, public commitment of marriage, temporary cohabitation cannot provide appropriate preparation for the commitment required for an enduring marriage. Cohabiting couples will continue in ignorance as to what it would really be like to be married until an exclusive and public commitment to the other person has been made. One cannot 'trial run' this lifelong commitment. The problem then is that:

Less confidence in the stability of their relationship among cohabitees may carry over into marriage and undermine commitment and the acquisition of relationship skills.³

As professor and author, John Bayley, said in 1997:

Merely living with someone ... is quite a different experience, which, by apparently imitating it, paradoxically falsifies the idea of marriage. You must do the real thing to find out what it is.⁴

If the breakdown of marriage were an exclusively private matter, with no cost to anyone except the couple concerned, with no impact on children, with no impact on public costs such as courts, welfare benefits, housing needs, employment and similar, then we acknowledge the response that it is a matter

2 Helen and David Bennett's comment in *Preparation – a key ingredient for a stronger marriage*, Care for the Family magazine, August 2008

3 Cohan, C., and Kleinbault, S., 2002, 'Toward a Greater Understanding of the Cohabitation Effect: Premarital Cohabitation and Marital Communication', *Journal of Marriage and the Family*, 64, No 1

4 Bayley, J. The Times, 22 April 1997

for the couple concerned what they do about any preparation for marriage. However the breakdown of marriage is now a public matter, due to the high impact on the public purse. In commercial terms, our nation can no longer afford the direct and indirect public cost of relationship breakdown, including marriage breakdown. As stated earlier (section 2.2.2) estimated costs have reached at least £20-£24 billion per annum, or £680-£820 for every taxpayer. Our nation has an interest in reducing this relationship breakdown culture because it will reduce the public cost. Our nation therefore has for this further reason a considerable interest in ensuring that marriages are strengthened and maintained.

Therefore the lack of any widespread preparation for marriage within our society becomes stunning by its omission. Whilst married couples, as couples and as parents, rarely need any material help when everything is going well in terms of relationship, finances and parenting, they do need help when difficulties arise. These crises may be external e.g. financial, loss of job, loss of parents. The crises may be internal e.g. ill-health or emotional changes. The crises may go to the heart of the relationship e.g. marital unfaithfulness or marital mistreatment. It is at these points of crisis that, for example, geographical proximity of close wider family members becomes pivotal. The support mechanisms for a couple are often difficult to find even if the crisis can be identified in time.

It is at these times that the couple needs help. They need to know in advance how to identify the crisis and how and where and when to turn for help. Many marriages break down simply because a couple does not know what it takes to make a marriage work. Although much more should be done to help families at particular known crisis points, (see the section 3.2 below on marriage support), pre-marital understanding and awareness of these issues prior to crises is essential. There is no other contractual relationship within society in which, on anything going wrong, there is such a high public and private cost and which does not involve some prior training, mentoring or assistance. A marriage has always had independence of formation, perhaps along with an expectation that anyone can marry and make a very good job of marriage. Present trends simply give testimony to that lie.

Over 10 years ago, the Government made proposals in *Supporting Families*⁵ regarding advice for couples before marriage and how the availability of this advice might best be promoted. It proposed changes in practice at Register Offices such as Superintendent Registrars, who would provide more information and support to couples preparing for marriage (including packs containing information on pre-marriage support services). *Breakthrough Britain* described how, when these measures did *not* become government policy, the voluntary sector, most notably the National Couple Support Network (see below), stepped in, aiming to provide 'coordinators' in every registration district through whom

5 Home Office, 1998, *Supporting Families*, London: The Stationary Office

engaged couples can access marriage preparation services. However, the lack of government validation for marriage preparation and refusal to publicly recognise research that indicates its likely effectiveness⁶ is discouraging many registrars from engaging with these coordinators.⁷

Marriage preparation can significantly reduce the likelihood of marriage breakdown. It provides couples with the opportunity to take a step back to learn skills and begin to develop good habits, to understand choice and commitment, and to set in place the foundations for the years to come. Pre-marital programmes have been shown to reduce family breakdown and improve family outcomes⁸ (see also section 3.2.1), thus there is a strong case for improving both access and provision, as well as normalising such programmes from their current position at the margins.⁹ Provision is currently very disjointed, with no consistent quality control or standardisation. Service is patchy across the country.

Past government initiatives have been bedevilled by the almost impossible task of proving a financial net benefit of these courses on the basis that, were they to be Government funded, they should produce at least the same amount of saving elsewhere (and quite quickly) in the public sector. Cost benefit savings are difficult to assess because responses and results are intangible and mostly financially unquantifiable. Finding the control models may be impossible. Separating out the various constituent factors may be impossible. In any event, it would take very many years for the financial benefits and direct costs savings of this pre-marriage information and training to be seen, e.g. in longer relationships and in more satisfactory and established relationships including the upbringing of children. The nation simply does not have the luxury of this long-term statistical study to provide this concrete evidence.

Even if a cost-benefit analysis is unavailable, we note that most other elements of social and commercial life require some form of training, guidance or mentoring. Married life is no less complex, and so we are of the opinion that this should also be the case with marriage.

The National Couple Support Network (NCSN)¹⁰ and Relate are both successful relationship education umbrella organisations that could be

6 Carol and Doherty in their comprehensive review of the literature found that: 'The average person who participated in a pre-marital prevention program was better off after the program than 79 per cent of the people who did not receive a similar educational experience.' They cite a US study using PREP (Prevention and Relationship Enhancement Program) among couples planning their first marriage, which found that at 3 years post programme 'experimental couples continued to show higher levels of marital satisfaction and lower levels of relationship instability than control couples did.' At 4 years post intervention the study reported that, 'intervention couples showed less negative interaction, more positive interaction, lower rates of relationship aggression, lower combined rates of breakup or divorce and higher levels of relationship satisfaction.' Carroll, J. & Doherty, W., 2003, 'Evaluating the effectiveness of pre-marital prevention programs: A meta-analytic review of research', *Family Relations*, 52, p112-113.

7 Social Justice Policy Group, 2007, 'Family Breakdown' Volume 1 of *Breakthrough Britain*, Centre for Social Justice, p44

8 See section 3.1.1 footnote 6- Carroll, J. & Doherty, W., 2003, 'Evaluating the effectiveness of pre-marital prevention programs: A meta-analytic review of research', *Family Relations*, 52, p112-113.

9 *Breakthrough Britain* recommended more broadly that relationship education be made or nationally available for all couples, single parents and families, at whatever stage of life to support parenting and couple relationships whether partners were married or not.

10 www.ncsn.org.uk

expanded further, given the necessary resources and support. The NCSN ultimately hopes to offer marriage preparation to engaged couples throughout the country. The plan is to appoint a coordinator in each of the 344 registration districts who will contact engaged couples through the churches and the Register Offices. The church and Register Office are strategic gateways, as every engaged couple needs to have contact with either a church leader or registrar in order to make the legal arrangements for the wedding. Engaged couples will be offered a marriage preparation course to attend, a questionnaire to complete and a link with a married couple – a ‘support couple.’¹¹ Civil registrars provide an excellent example of a workable access point because of their contact with families at key life stages. However, as *Breakthrough Britain* noted, until recently the vast majority of registrars have been unable to provide additional services beyond those required by their statutory obligations. However a tiny minority of registrars have voluntarily taken the opportunity to promote marriage preparation courses when couples register for their wedding. Some registrars have been unwilling to provide even this service, citing time limitations. However, under the 2007 Statistics and Registration Service Bill, registrars will become direct employees of local authorities. For the first time, this gives local authorities both the power and the opportunity to require their registrars to publicise and promote relationship and parenting education programmes.¹²

The NCSN also works closely with the successful Marriage Course and Marriage Preparation Course run by Nicky and Sila Lee who presented to the Review.¹³

They summed up the marriage course to the review by saying, ‘it provides very practical tools that will equip couples so that their marriage will last a lifetime.’

Although originating in the church community, the Marriage Course has been taken out into a civil context, including into prisons. It is publicised by Register Offices. The particularly distinctive faith content has been removed. It is accessible and adaptable and can be used across the country. In appendix 9 is a note on one marriage course attended by a member of our working group.



Nicky and Sila Lee, founders of the Marriage Course, giving evidence to the Family Law Review.

“There is not enough education about how to deal with relationship breakdown. People often find themselves in the midst of it without any preparation for coping with its effects”

Senior District Judge Waller, in evidence to the Family Law Review.

It's a great shame to think of any well-intentioned marriage ending in the formality of divorce before it has had access to this kind of simple, effective

¹¹ There are currently 49 volunteer coordinators working in registration districts across the country. National Couple Support Network, <http://www.engagetoday.org.uk/equip/marriage/national-couple-support-network>.

¹² Social Justice Policy Group, 2007, ‘Family Breakdown’ Volume 1 of *Breakthrough Britain*, Centre for Social Justice, p100

¹³ For more details on the courses see <http://relationshipcentral.org/marriage-course>

help. It isn't going to be the cure-all of all relationships, but based on our experiences I would expect it to save or improve many.

Benjamin Fry, after attending the Marriage Course

3.1.2 PRE-MARRIAGE OPPORTUNITIES

We have therefore considered the possibility that before a marriage can take place in our country, each party should be required to take part in a marriage education and information course. They would not need to attend together, which would overcome geographical obstacles. The course should be widely available and publicly funded. As an alternative, couples should be allowed the flexibility to choose more distinctive, privately funded services which would carry the same endorsement.

The providers of the information would be accredited with a material degree of standardisation although we anticipate that distinctive courses would incorporate the basic information but include additional elements. This might be particularly popular within the faith communities and similar. They would be accessed through Register Offices, although contact could also be made direct with the course providers. Information would be available from Family Relationship Hubs, as below. Attendance on the course would be evidenced and shown to the Register Office.

The average cost of a wedding in England and Wales is in excess of £15,000. The period of wedding planning is often at least a year. Yet within this cost and this period there is rarely any formalised planning for marriage itself. Many express their frustration at the relatively rapid disintegration of their marriage, made more acute by the amount of time and money spent in preparing the wedding. Our proposal involves only a modest amount of time and a modest cost both generally and relative to the wedding preparation. Yet for many couples this time and cost will dramatically improve their married life, parenting and prospects of overcoming marital crises, which might otherwise lead to breakdown.

Elsewhere in this report we recommend that there should be the opportunity for a couple to enter into a binding pre-marriage agreement. Each party would take specialist legal advice before entering into such an agreement, and it would be an opportunity, not a mandatory requirement. These couples would need assistance when talking through the very sensitive and difficult issues of what would happen during the marital relationship when for example a child is born, there is a loss of employment, a loss of health and other such circumstances. This would go closely hand-in-hand with the pre-marriage information and discussions.

Further investigation is needed to assess the costing and whether these courses should be fully or partly publicly funded.¹⁴ There should be further investigation of the possibilities of any credit or non-payment of marriage

¹⁴ For more information on this area and the costing of marriage information and preparation courses see Social Justice Policy Group, 2007, 'Family Breakdown' Volume 1 of *Breakthrough Britain*, Centre for Social Justice, Chapter 2

registration fees as a resulting benefit. The direct and indirect savings will justify the cost.

Our initial recommendation is that the course would consist of three sessions of which the first and third would be face-to-face and the second could be through DVD, computer programme or similar. We note the findings under Marriage Support (section 3.2) below, that 10 hours is a recommended maximum.

We consider it to be important that the courses should have certain minimum content. However other courses with additional information, perhaps directed specifically to certain sections e.g. faith communities, civil partners, etc, could also be provided.

Attendance will also increase awareness of the benefits of ongoing couple relationship education, so that the pre-marriage information, some of which will be relatively short-term, would have continuous beneficial impact and create a culture of valuing relationship skills.

3.1.3 SHOULD ATTENDANCE BE BINDING?

We have considered whether attendance at such a course should be binding. There are compelling arguments for pre-marital preparation, as already noted. The extent, impact and cost of relationship breakdown in our nation is phenomenal. It is possibly one of the most deep-seated issues in our society, our communities and our country. Dramatic and radical action is needed. Does this go so far as to require everyone entering into a marriage, and civil partnership, to attend this preliminary information course?

We have considered carefully whether the scale of the relationship breakdown culture of our nation warrants mandatory preliminary information. In other areas of society, where there is a similarly dramatic social and economic impact, there would be little debate. If our nation were a commercial business of which marriage was one of its services, there would again be little doubt about the commercial demands for mandatory preliminary information. We believe that if the very considerable longer-term, as well as established short-term, benefits of pre-marriage information was widely known and appreciated, there would be little doubt over whether to make it mandatory for all.

Nevertheless we prefer on balance not to recommend this. We hope that strong encouragement and support for a pre-marriage information culture, endorsed by the Government and others, with accredited, branded and standardised high-quality delivery, will result in many attending pre-marriage information courses and other similar courses. This will require in certain regards more work, effort and encouragement than making it mandatory. We think this is the appropriate approach at this stage.

We have referred elsewhere to the considerable emphasis that must be given to changing the relationship breakdown culture in our nation.¹⁵ A driving

¹⁵ See sections 2.2.3, 3.2.1, 3.2.4 and 9

factor to spur this culture change would be government recognition of the importance of pre-relationship information. We consider that attendance on a course should be optional although highly encouraged. In the context of the timetable and cost for the vast majority of weddings, it is a very small commitment and yet it has the potential to make a dramatic and long lasting difference to the relationship.

The time may come in the life of our nation when such information provision should become mandatory. We do not believe that time has yet come and we hope that the widespread acceptance of the benefits of pre-relationship information will mean that it will not subsequently need to be mandatory.

So we urge the Government to support, fund and promote marriage information provision courses across the country. Those delivering it should be accredited. Information should be available generally and specifically through Register Offices and other places where marriages occur and from Family Relationship Hubs (section 3.3). Local details should specifically be provided when notice is given of intention to marry. The registrar of marriages should be informed, and note made for statistical purposes, if there has been an attendance.

We have been convinced that these courses should be incentivised by a reduction in the cost of the marriage licence fee, presently £60 per couple, for those who attend a course. Though this may make little difference for some given the dramatic cost of weddings, for others it will be of some value. More importantly, however, it is part of the signal given by the Government to the nation that attendance at these courses matters and is specifically encouraged.

3.1.4 CONCLUSION

We consider that widespread use of good quality marriage information and training will enhance marriage and help couples prepare better for the married life ahead of them, most crucially for the many crises which occur during normal married life, and help them better in an understanding of parenting and parenting skills. It will have many spin-off benefits in costs savings for the Government and will serve as an important signal of support for marriage.

3.1.5 SUMMARY OF PROPOSALS

- **Before being married in England and Wales a couple should be strongly encouraged by Government to attend a pre-marriage information course. A note should be made by the registrar of marriages of those who attend in order to measure effectiveness and usage;**
- **The course may consist of three sessions, of which the middle one maybe undertaken at home by watching a DVD, reading a book or similar;**
- **The course does not have to be undertaken at the location of the marriage nor do the couple have to attend together;**

- The course would be partly or fully publicly funded, and provided by accredited services;
- Attendance would result in a discount on the marriage fee;
- The course would provide marriage preparation and information, and specifically cover how to deal with crises and pressure points within marriage.

3.2 Marriage support

3.2.1 INTRODUCTION

Couple relationship education should not stop at the date of marriage. Consistently, many whom we met with spoke about the fundamental importance of relationship education as being key to changing the relationship breakdown culture. This opinion came from the most senior judiciary, across the legal representatives of the professions, the ancillary dispute resolution professionals and the organisations working with those at various stages in the family law process.

Nicky and Sila Lee who run The Marriage Course told the Family Law Review that ‘there needs to be a change in the stigma for relationship education and people’s perceptions, so people don’t think it is only for those whose marriage is in crisis.’

The President of the United States, Barrack Obama, says:

Preliminary research shows that marriage education workshops can make a real difference in helping married couples stay together and in encouraging unmarried couples who are living together to form a more lasting bond. Expanding access to such services to low-income couples, perhaps in concert with job training and placement, medical coverage and other services already available, should be something everybody can agree on.

He describes policies to strengthen marriage as ‘sensible goals to pursue.’¹⁶ Naturally, we endorse his approach.

A consequence of increasing geographical mobility is that fewer people now live close enough to extended family to access traditional sources of wisdom and practical support. Thus many parents and partners can experience a sense of psychological isolation, all too aware of the shortcomings in their relational skills, but unaware of how improvements might be made to prevent future family breakdown. This is compounded by a wariness that many people have of seeking advice on how to manage relationships at home, considering it is

16 Obama, B. 2006. *The Audacity of Hope*. Crown, p334

only for those with problems.¹⁷ Therefore it is estimated that 75 per cent of all relationship support involves the treatment of problems, such as counselling through providers like Relate, rather than their prevention.¹⁸ In other words, intervention is coming too late.

Mr Justice Coleridge commented to the review that we ‘need to get to people earlier and educate them to see that breaking up is not the answer to everything.’

This is compounded by the piecemeal statutory and voluntary support available. CARE has compiled a brief history of UK Government support and funding for marriage and relationship education which tracks the dilution of support for marriage-based programmes. It demonstrates that since 2003-4 Britain has moved from a place where there was a government funding stream for marriage and relationship support, with marriage in its title (*Marriage and Relationship Support*), worth £5 million per annum, to a place where marriage support has ceased to exist (in the sense of coming from a funding stream where marriage support is a criterion against which funding applications can be made – let alone featuring in the title). Despite this there is still some ‘unofficial funding’ (in the sense of not being mandated by the funding criteria) but this is very much less than the £5 million of 2002-2004.¹⁹



Effective relationship programmes strengthen and improve relationships and reduce family conflict and divorce.

Yet evaluations of effective relationship and parenting skills programmes show that they can improve relationship adjustment and parenting behaviour as well as reduce family conflict and divorce.²⁰ The best research on the best programmes shows that couples can learn effective communication, conflict management, and other relational skills, and are highly satisfied with what they learn.²¹ Even programmes lasting just a few hours can strengthen family relationships over a period of one to five years.²²

- 17 Social Justice Policy Group, 2007, ‘Family Breakdown’ Volume 1 of *Breakthrough Britain*, Centre for Social Justice, p17.
- 18 Social Justice Policy Group, 2007, ‘Family Breakdown’ Volume 1 of *Breakthrough Britain*, Centre for Social Justice, p44
- 19 ‘It would seem that (subject to qualifications about the provisional nature of the assessment that has been possible without civil service input) less than £3,123,500 – probably significantly less – is currently invested in marriage and relationship support.’ Boucher, D., *Marriage Support Services: Review 2008*, CARE, p3 and p23
- 20 Benson, H., 2005, *What interventions strengthen family relationships: A review of the evidence*. Paper presented at 2nd National Conference on Relationships Education, London
- 21 Most available research has been done on the US. For example, Halford, K., Markman, H., Kline, G. & Stanley, S., 2003, ‘Best practice in couple relationship education’, *Journal of Marital and Family Therapy*, 29, 385 – 406; Stanley, S., 2001, ‘Making a Case for Pre-marital Education’, *Family Relations*, 50, 272-280; Carroll, J. & Doherty, W., 2003, ‘Evaluating the effectiveness of pre-marital prevention programs: A meta-analytic review of research’, *Family Relations*, 52, 105-118
- 22 Benson, H., 2005, ‘What interventions strengthen family relationships: A review of the evidence’, *Paper presented at 2nd National Conference on Relationships Education*, London, www.bcf.co.uk; Carroll, J. & Doherty, W., 2003, ‘Evaluating the effectiveness of pre-marital prevention programs: A meta-analytic review of research’ *Family Relations*, 52, 105-118; Moran, P., Ghate, D., & van der Merwe, A., 2004, *What works in parenting support: A review of the international evidence*, DfES: Policy Research Bureau

Thus there is a strong case for improving access and provision as well as normalising such programmes from their current position at the margins.

Whilst preparing our report, two other reports were in preparation on this subject, covering the issue in considerable detail. They are The Relationships Foundation's report *Relationship education: building a national agenda* (2009) and The Family and Parenting Institute's report *Couple Relationships: a review of the nature and effectiveness of support services* (2009). The latter covers a wider area than the former in that it explores the nature and usefulness of support services for couples, considering all available published literature and websites of relevant organisations in the UK. It is however narrower in scope in that it concentrates on the support services rather than necessarily making recommendations for the future. Both provide valuable research and investigation with recommendations. We have reviewed their proposals below.

3.2.2 REPORT BY THE RELATIONSHIPS FOUNDATION

The Relationships Foundation records that:

Proponents of relationship education for couples have for some years lamented the apparent lack of public interest in, and government support for, their work. Such support is rapidly becoming established in the USA and Australia. This can be regarded as a key missing element in the way society in the UK seeks to enable couples to achieve their aspirations, both personally, and in the wider community.

The report found a marked change in social attitudes towards relationship and marriage from the last generation. Whereas relationship education previously took place in informal family groups or social settings, it has grown in the UK in more formal delivery of information and advice, originally with Relate and Marriage Care. However they have both over the more recent years tended to focus on the provision of therapeutic and counselling services rather than preventative education. In the last 30 years or so there has been a piecemeal growth of organisations, many faith-based, providing relationship education, both to strengthen marriages and in marriage preparation.

The report categorises various forms of marriage support delivered in various ways as couple relationship education (CRE). They define CRE as:

The communication of a set of values, strategies and interpersonal behaviours designed to build harmony and intimacy in the relationship, thus increasing stability and satisfaction for the couple. Attitudes, skills and behaviour needed for a successful marriage or long term relationship can be modelled and learned.

There are key life events (e.g. marriage, birth of child, etc) which create both access points for delivery of CRE, and a context where recipients are most

receptive. The report states that the duration of CRE needs to be sufficient to ensure effective learning impact – typically up to 10 hours is beneficial and there is little increased benefit in longer durations.

The report recommends that CRE should be widely available to all couples who wish to access it, particularly pre-marriage, and also to help during existing marriages. It will be adaptable to particular groups and communities. It is important to appreciate that CRE cannot fix all issues of relationship breakdown and has to work in conjunction with other services. This is a fundamental element of the Family Relationship Hubs referred to elsewhere in this report, bringing together the various services as may be needed by individuals or couples. Thus far, the report describes, CRE has been missing from the possible solutions put forward by the Government for the present relationship breakdown crisis in our country.

Carroll and Doherty found that the average person who took part in a pre-marital programme was better off afterwards than 79 per cent of people who had not done so.

We have referred above to the very real difficulties in analysing data on effectiveness of pre-marriage information. The same applies even more with CRE. As the US researcher, Scott Stanley notes, ‘We know enough to take action but we also need to take action to know more.’²³ We have briefly recorded above (section 3.1.1, footnote 6) some of the findings on the effectiveness of marriage support, such as those of Carroll and Doherty in 2003 who concluded: ‘the average person who participated in a pre-marital prevention program was better off after the programme than 79 per cent of the people who did not receive a similar educational experience.’²⁴ There have also been positive results in its use amongst prisoners in the US and the UK. Thus, the empirical research, whilst limited, gives cause for optimism that appropriately delivered CRE can influence the outcomes for individuals, and collectively for society. Generally, it seems that CRE is not well regarded by the population at large, but is well received and then recommended by those who do attend.²⁵

Although there is only limited evaluation of the impact of CRE currently being undertaken within the sector, cost effectiveness has been demonstrated amongst couples at greatest risk of divorce. But even amongst those in generally intact relationships, studies in 2007 showed a better rate

23 Stanley, S. M., 2001, ‘Making the case for premarital education,’ *Family Relations*, 50, 272–280

24 Carroll, J. and Doherty, W., 2003, ‘Evaluating the Effectiveness of Premarital Prevention Programs: A Meta-analytic Review of Outcome Research’. Cited in Clark, M., Lynas, R., Percival, D. 2009, *Relationship Education: Building a National Agenda*, Relationship Foundation, p14. *Forthcoming*.

25 Clark, M., Lynas, R., Percival, D. 2009. *Relationship Education: Building a National Agenda*, Relationship Foundation, p16. *Forthcoming*.

of return than similar funding in the medical arena. In short, The Relationships Foundation found that couple relationship education was sufficiently cost-effective to warrant public funding so that more can be learned to identify and implement more programmes, especially working with other services.

3.2.2.1 Conclusions and Recommendations of the Relationships Foundation Report

Amongst the conclusions of the report is an awareness of the need for a multi-faceted awareness campaign to overcome public inertia. Such a programme may be best initially focussed on reaching those most receptive to the benefits of improved relationships, with those most resistant tackled later. There is also a need to develop value-language and a shared framework for CRE that reflects the diversity of viewpoints amongst providers and recipients of CRE. Clearly comprehensive evaluation will be required.

Amongst the recommendations are the following:

- The provision of CRE should be expanded through an approach which encompasses:
 - Actively encouraging, or potentially requiring, those who naturally form ‘gate-keepers’ at key relationship stages (e.g. registrars, health visitors etc) to promote awareness of relationship skills, and the provision of CRE;
 - Encouraging the wide range of local social voluntary providers already in existence to expand and develop their services with an approach to regulation which is kept to a minimum level, so as to encourage, not stifle, local initiative;
 - Defining ‘minimum conditions of satisfaction’ that any course must encompass – i.e. defining a minimum core curriculum, and minimum duration, but maximising the freedom of providers to develop those aspects appropriate for their target recipients;
 - Providing funding into the sector primarily through market-led mechanisms where the amount of funding received by providers is driven by the quantity of recognised CRE delivered;
 - Supporting local providers of CRE in the training of those involved in delivery of services by funding such training.
- Funding to the sector from public funds should be increased from an initial level of around £7.7 million in year 1, to around £27 million in year 10 to develop the sector, all at today’s prices.
- Funding for expansion of CRE should come from both central and local government, and from the voluntary sector, with a gradual shift towards direct payment by recipients who can afford it as CRE becomes more widely accepted.

3.2.3 'COUPLE RELATIONSHIPS: A REVIEW OF THE NATURE AND EFFECTIVENESS OF SUPPORT SERVICES'²⁶

The 2009 report by The Family and Parenting Institute explores the nature and usefulness of support services for couples. It involved a search of all available published literature and websites. It identifies factors considered to contribute to the maintenance and strengthening of relationship and conversely factors associated with risks of relationship instability and breakdown. It outlines approaches to relationship support, describing a range of services including pre-marriage preventative programmes, a variety of interventions to meet the needs of couples at various stages of relationship development and services specifically designed to help couples experiencing particular difficulties. It has an overview of the evaluation of the service's effectiveness and considers implications for further research and policy development.

The report found that forming good intimate couple relationships was still believed to be a private and personal matter, but women were less reluctant than men to seek professional help for relationship issues and that men found information through less personal channels e.g. websites, to be more congenial. It therefore highlighted how to encourage use of services before relationship difficulties become entrenched. As set out elsewhere in our report, it highlighted the new opportunities for service delivery from the internet, whilst including a major caveat that there were some who still do not have immediate and easy internet access.

There was evidence that programmes designed to prevent relationship breakdown (such as information sessions and skills-based courses) are generally positively received and helpful in the short term. There is less evidence about the long-term effects although this may be due to the limited number of studies and methodology. There was evidence of the short-term benefit of some couple counselling and marriage enrichment programmes. The report highlighted the need for more training to alert the awareness and skills of frontline professionals such as GPs, health visitors, court officials amongst others. Overall there was found to be a need for a better understanding of how to make information more readily available to more couples at key points in their relationships. This has been highlighted elsewhere in our report.

The report found that although there was the beginning of moves towards better coordination of existing services, the impression gained was that it was often difficult for couples to find out which services are available in their area and also difficult to ascertain exactly what those services might offer. Service availability, accessibility and quality appear to vary from area to area. This finding corresponds to other proposals elsewhere in our report for the creation of a service of Family Relationship Hubs to overcome exactly this problem. They concluded that the 'big question is how individuals, or couples, can best access the information or guidance that, according to their individual personal

26 Chang, Y. and Barrett, H. 2009, 'Couple relationships: a review of the nature and effectiveness of support services', Family and Parenting Institute

skills profiles, might help them to avoid relationship difficulties and to manage the effects.’

They found the three most consistent themes in their research on the variety of services were, firstly, the apparent patchiness of services within the UK, secondly the lack of funding for sound empirical research and thirdly the potential value of changing societal attitudes towards relationship strength building so that this engagement becomes less taboo and less expensive.

3.2.4 RELATIONSHIP EDUCATION IN SCHOOLS

When discussing factors that could help prevent relationship breakdown, Mr Justice Coleridge told the review that what is required is ‘a re-education of the importance of the stability of the family.’

Although in this section reference is made to couple relationship education in the context of the ongoing relationship, education generally about relationships is very important, right from the younger years and specifically well before the formation of committed adult family relationships.

The lack of sound information to teenagers of the benefits of marriage and of a stable, sound, long-term family relationship, especially for the children of less stable or broken relationships is of concern to us. As family breakdown increases, children can grow up with a desire for family stability yet lacking personal family experience, knowledge or confidence that this is attainable. Schools have a potentially important role to play in educating children and young people about the nature of marriage, family and relationships. However, as long as education authorities adamantly refuse to promote any education of the respective merits and advantages of different forms of domestic sexual relationships, changing the relationship breakdown culture from the younger generation will be very hard indeed. The proposals in this report must be coupled with work undertaken with the younger generation regarding relationship models.

It is clearly important to avoid stigmatising young people whose personal experience of family and relationships may be very negative. However the priority is that any curriculum must focus substantially on successful relationship formation and maintenance. This would include providing information about family structure, supported by explanations of what to look for in a potential mate, why it is risky to move in before you are clear about your future, why married couples do better, why it is better to commit, how men and women commit in different ways and so on.



Education about relationships and the stability of the family is hugely important.

(Photo by: Lynne Featherstone.)

Breakthrough Britain made two recommendations on how this might be achieved.²⁷ The first is that schools' curricula include a specific opportunity to learn about, explore and discuss the nature of marriage, family and relationships. The voluntary sector should be actively encouraged and welcomed to provide resources for relationship education.

Education is needed for teenagers regarding the importance of seeking external help in relationships, in order that their relationships might continue and grow rather than end when a crisis occurs. Many teenagers primarily look for help from external sources e.g. the Internet and helplines. This must be capitalised upon in the message for teenagers, at the early stages in their adult relationship developments, to inform, encourage and normalise the seeking of help during difficult periods from reliable sources. This would then have a beneficial effect for the future generation in information provision, supplying relationship assistance and greater couple relationship education.

3.2.5 CONCLUSION

Just as marriage *per se* does not guarantee a good outcome, neither does relationship education. However enough is known to be confident that widespread provision of relationship education will make a significant and positive difference to the stability of Britain's families.²⁸

Although the two reports, above, were prepared independently and yet in parallel and were published at approximately the same time, there is a considerable amount of overlap and similar outcomes to their research and analysis. Moreover although our report was prepared independently and at the same time, we have been struck by the significant overlap of ideas, concepts and proposals. Hence we endorse the creation of a culture of couple relationship education in this country. We believe it would be well delivered through Family Relationship Hubs.

3.2.6 SUMMARY OF PROPOSALS

- **Government should reinstate Marriage Support Services funding and the Marriage Support Services Directory.**

We particularly endorse and support the following proposals, as made by the Relationship Foundation and the Family and Parenting Institute:

²⁷ Social Justice Policy Group, 2007, 'Family Breakdown' Volume 1 of *Breakthrough Britain*, Centre for Social Justice, p52

²⁸ Social Justice Policy Group, 2007, 'Family Breakdown' Volume 1 of *Breakthrough Britain*, Centre for Social Justice, p48

- A comprehensive and coherent framework should be developed encompassing all areas of relationship education. However we see no reason why our proposals, above, for pre-marriage information should be delayed whilst this is being developed. Instead it will generate more interest in couple relationship education.
- The provision of CRE should be expanded through an approach which encompasses:
 - Actively encouraging, or potentially requiring, those who naturally form ‘gate-keepers’ at key relationship stages (e.g. registrars, health visitors, etc) to promote awareness of relationship skills, and the provision of CRE;
 - Encouraging the wide range of local social voluntary providers already in existence to expand and develop their services with an approach to regulation which is kept to a minimum level, so as to encourage, not stifle, local initiative;
 - Defining ‘minimum conditions of satisfaction’ that any course must encompass – i.e. defining a minimum core curriculum, and minimum duration, but maximising the freedom of providers to develop those aspects appropriate for their target recipients;
 - Providing funding into the sector primarily through market-led mechanisms where the amount of funding received by providers is driven by the quantity of recognised CRE delivered;
 - Supporting local providers of CRE in the training of those involved in delivery of services by funding such training;
- Funding for expansion of CRE should come from both central and local government, and from the voluntary sector, with a gradual shift towards direct payment by recipients who can afford it as CRE becomes more widely accepted.
- Details of couple relationship education to be specifically provided through the Family Relationship Hubs referred to below. This will provide consistency of service across the country, overcome patchiness of provision and yet encourage local initiatives.
- The PSHE curriculum is to include a specific opportunity to learn about, explore and discuss the nature of marriage, family and relationships, and encourage voluntary sector involvement in relationship education delivery.

3.3 Family Relationship Hubs

3.3.1 INTRODUCTION

The overarching aim of the Family Law Review is to develop policies which will increase stability, support and encourage commitment in relationships,

especially marriage. This may be before the commencement of the relationship, during the relationship, during any period of relationship difficulties and possible breakdown and then on and after separation. The support and encouragement cannot be found alone in the legal process, which is directed to dispute resolution. We have elsewhere in this report proposed pre-marriage information and couple relationship education (CRE). We hope this will help couples to recognise the danger signals of potential relationship crisis points and seek timely and local assistance. Part of changing the culture of family relationship breakdown is to recognise that help is needed and should be sought. But from where?

Assistance can be found from a vast variety of resources and services covering everything from child parenting issues and 'mild' family relationship differences, to more serious behavioural issues such as those relating to drugs or mental health. We have found that many resources and services already exist. Yet they are patchy across the country, as reported under Marriage Support above (section 3.2). We did not conclude that generally there was a lack of resources and services.

We did however conclude that existing resources and services were:

- Specifically not joined up with other relevant local resources;
- Rarely coordinated with other relevant local resources;
- Not always well known locally or nationally;
- Specifically not branded as a combined family relationship or parenting support service;
- Often not uniformly accredited to national standards;
- Patchy across the country with some clear gaps in available resources.

Crucially we concluded this was failing families in our country not because of any inadequacies in the individual services and resources but because together and structurally the knowledge of the overall services were not coordinated and combined for the public. This might previously have not been a major problem. However the size and impact of the relationship breakdown culture in our country at present demands that there should be a structure and coordination of these services and resources by way of local 'centralisation' to make them more easily and readily accessible and to create a new culture of use of such services and resources.

This may not require changing the existing services and resources. It would however be necessary for different providers to work together to inform families of which services are available, beneficial and appropriate for them.

Having come to these conclusions and being aware of worldwide developments in family matters, we considered the approach currently being undertaken by the Australian government through the introduction of their

Family Relationship Centres (FRCs) and examined if they could be introduced into the British context in a suitable manner to achieve our goals.

3.3.2 AUSTRALIAN FAMILY RELATIONSHIP CENTRES

The Australian concept has evolved into a philosophy that post-separation parenting should not be seen first and foremost as a legal issue. This has extended further into the general sphere of family relationship issues and disputes. We believe fundamentally that the UK too could benefit from a similar cultural change in attitude to family breakdown. Contrary to current trends,²⁹ the adversarial/litigious nature of legal proceedings in many cases is generally not the best option for separating families. The financial and emotional costs are compounded by the often irreversible polarisation that can often ensue between the parties. In some cases, readily available advice, mediation and information on a range of topics may be what is required to support families and relationships that are struggling, and deter them from resorting to legal measures. Some of the main areas include: child support, child contact, care issues, economic and emotional support and therapeutic intervention. This is acknowledged through the implementation of the Australian Family Relationship Centres.

One of the most common problems experienced by people undergoing relationship difficulties, especially in the immediate aftermath of separation, is where to find appropriate and reliable help, advice and support.³⁰ The first few weeks and months after separation are a particularly important period.³¹ Heralded as the cornerstone of the Australian government's new family law system, the Family Relationship Centres offer an early intervention strategy to assist parents considering possible separation, and those actually going through separation, at a time when most of them have not yet begun legal proceedings. They specifically offer services to save relationships and help couples going through relationship difficulties.

“We believe that the UK could benefit from a cultural change in attitude to family breakdown; similar to that which has taken place in Australia.”



Family Law Review member Helen Grant with the Family Relationship Centre team in Campbelltown, Australia.

29 In one major British study, 81 per cent of people experiencing family or relationship difficulties chose to visit a solicitor: Genn, H et al, 1999, *Paths to Justice: What People Do and Think About Going to Law*, Hart, Oxford

30 Since December 2008, judges have been able to order separated parents embroiled in court battles over their children to go to parent information programmes. These classes teach parents the long-term effects of their warfare on their children and give them tips on how to avoid conflict with their ex-partner. They have proved highly successful in other countries, including Australia. However The Guardian reports that both CAFCASS and family courts are making very infrequent use of the parenting programmes, jeopardising funding for providers. There has been some uncertainty about availability and which agency should be making referrals, (see <http://www.guardian.co.uk/society/2009/jun/24/court-ordered-parenting-programmes>). There will be key lessons to be learned from this initiative which would inform the implementation of the educative programmes we are recommending.

31 Parkinson, P., 'Keeping In Contact: The Role Of Family Relationship Centres In Australia', *Child and Family Law Quarterly*, Vol 18, No 2, pp157-174

The Family Law Review has taken an in-depth look at these centres, their aims, impact and potential to effect a cultural re-think of our approach to relationships, to the promotion of stronger families and to reducing the levels of animosity when relationships do break down irretrievably. A study visit to Australia was made in early November 2008. Our report is in appendix 8.

The Australian Family Relationship Centres have four major functions:

- Provide information for families: people of all ages who need information to help them with relationships and parenting will find it in one place or at one referral point;
- Help families use other services: the centres have been described as portals, making it easier for families to find out about and use the many existing services that can help them. These other services include early intervention services that help prevent relationships from breaking down;
- Run public information sessions covering family relationship issues, including parenting after separation;
- Provide assistance for separating families: as well as providing information and referral, centres are able to help separating parents in a number of ways, including:
 - Individual interviews for separating/separated parents to help them identify issues and options and focus on the needs of their children;
 - Group programmes on parenting after separation;
 - Joint sessions for separating parents to help them reach agreement on parenting arrangements.³²

In our study, set out in more detail in appendix 8, there were found to be the following positive observations in Australia:

- There was an 18 per cent reduction in the number of family law applications between July 2007 and June 2008 compared with the same period in the previous year when the effects of the new FRC programme would not have been significant. (The first 15 FRCs only started to open from July 2006, with a further 40 opening on or after July 2007.) This is the first drop in such applications for 25 years although it appears that initially it is only the simpler types of case where the volumes have reduced. Whilst it was felt by many that the FRCs have played a significant role in this result, it seems widely accepted that they were one of several measures that have worked in unison. We do believe our proposals also require a combined, holistic introduction if they are to work successfully.

32 This information comes from the Australian Government's website *Family Relationships Online*: <http://familyrelationships.gov.au/www/agd/familyreonline.nsf/AllDocs/4567CCA299F85DF7CA25735B00041945?OpenDocument>, [accessed February 20, 2008]

- This fall in court applications, moreover, must be seen in the context of one consequence of the 2006 Australian legislative reforms, which has resulted in more fathers making applications to the court under the new law, thus giving rise to a larger number of more complex cases now coming through the court process.
- There is widespread acceptance of the idea that a mandatory 'community based' Family Dispute Resolution (FDR) process represents a significant cultural change from the traditional view of Family Law, the biggest change for many decades according to one very senior advocate, Federal Judge John Faulkes, Deputy Chief Justice of the Family Court of Australia. The new system in children matters seeks to 'Take the Law out of Family Law' and avoid the adversarial nature of the court environment and family court hearings. There is a swing away from legal issues toward relationship issues.
- The consensus is that mandatory FDR is a good starting point in children cases. The expectation is that most families, for whom mandatory mediation is a first step, will not then need to proceed to court. Further, of those who do still require an adjudication, many will have had the opportunity to test alternatives before using the court system. The Australian statutory definition of FDR is deliberately generic to take in processes that depend on consensual outcomes rather than adjudication. FDR does however, still allow for mediation, conciliation, early neutral evaluation (non-binding), case appraisal, advisory mediation, and evaluatory mediation where considered appropriate. The process is handled by a trained professional (known as dispute resolution practitioner), not an arbitrator.
- Group parenting sessions as well as resources and child mediation training from the 'Children In Focus' programme have proved very effective in focusing parents on the effect of conflict on their children and the need to cooperate for their children's futures.
- There was unanimous support for FRCs being in high visibility primary locations in high streets and shopping malls. Together with a strong government backed 'brand', the centres have avoided the 'divorce shop' image and are portrayed as a welcoming and unembarrassing centre for information. The generic title gets a wide range of people through the door and clients seem to have a high level of trust and confidence, due to the link with government and implied links with the court system, even though FRCs are actually run by NGOs. The UK challenge is the cost of this high visibility which is a chief component of the Australian cost yet also a chief selling and accessibility factor.
- For applicants who reach the court, the individual docket system (One Judge/One Family) is an important innovation. The general principle



Federal Judge John Faulkes, Deputy Chief Justice of the Family Court of Australia, with FLR member Helen Grant.

underlying this is that each case commenced in the court is randomly allocated to a judge, who is then responsible for managing the case until final disposition. England and Wales would like to introduce this but practical difficulties are often given by court offices for not doing so. It should be actively reviewed.

- The success of FRCs has relied upon two ministers within two political departments (The Attorney General's Office & the Minister for Children and Youth Affairs within FaHCSIA) working together in cooperation, and this has been successful thus far.

3.3.3 UK FAMILY RELATIONSHIP HUBS

We propose that the UK should introduce a form of the Australian FRCs, with a number of similarities and some UK distinctive differences. We refer to them as Family Relationship Hubs to focus on the coordinating and centralising role they will play locally.

We have become convinced that there is a need for a much more joined up provision of resources and services for families and parents (see section 3.2 above). The present arrangement cannot continue. There is a need for a national service to act as an umbrella organisation to specify and implement local coordinated services within Family Relationship Hubs. Following the Australian experience, these Family Relationship Hubs need to be carefully branded with high standards, to gain the confidence of the public. The Family Relationship Hubs will not necessarily provide all of the services and resources, although they may do so in some instances. They will however coordinate what is available, identify what additional services and resources are needed and they will provide a service to the public to inform them of the available resources and services, which are appropriate for particular couples and families. The beneficial outcome of the Australian FRCs acting as a portal is an attractive one.

We refer elsewhere in this report to pre-marriage information and couple relationship education. It is our hope and expectation that receiving this information and taking part in CRE courses will become a cultural norm. Details of the pre-marriage information will of course be available from Register Offices at the time of giving notification of an intention to marry. However, details would also be available through the Family Relationship Hubs.

We refer elsewhere in this report to the requirement for certain information before the commencement of family court proceedings. We intend that this information, including certification of either attendance on courses or receipt of the information, should be through the Family Relationship Hubs. It may be that some Hubs will provide the information themselves. In other locations, the information may be provided in other ways but it should be undertaken through the Family Relationship Hubs, which will then work closely with HM Court Service.

The question of the method of delivery of the information remains a vexed and difficult one. We deal with this in more detail elsewhere in this report. (See section 4.1 on 'Information before the issue of proceedings'.)

One key feature of the Australian experience has been the high visibility profile of the Australian FRCs. Whilst many of them are in shopping malls and high streets, the November 2008 study visit identified that some were only in secondary or tertiary locations. Indeed, although none of those visited were in primary retail sites, they were nonetheless providing excellent service as referred to in this report in appendix 8 and as anticipated for the UK Family Relationship Hubs. We recommend a similar situation in the UK in terms of high visibility. We are realistic about funding in the present UK and world economy. However, in this present economic state, commercial property rentals may be more attractive and good visibility sites may be an attainable goal. In any event, we believe that provided the Family Relationship Hubs are attractive, accessible, safe, child-friendly and appropriate for the locality then it should be possible for them to be run without a high visibility profile in primary locations being a pre-requisite. However, hub locations should ideally be high profile, embracing one of the fundamental factors of the success of the Australian experience.

Another key feature of the Australian experience, also a priority issue for the UK, is the branding of the service. The Australian government created a name, logo, image and overall brand to the service including ancillary resources. In doing so, it gave confidence to the public. It is highly desirable that the same occurs at the Family Relationship Hubs in the UK.

Whilst the UK population is three times that of Australia, the UK has favourable advantages in terms of its physical size, geography, density of population and population distribution. Sixty-five Australian centres were required to cover 20 million people spread across 7.6 million square kilometres, but it does not follow that a proportional number (195 centres) would be required to cover the UK's 60 million population and much smaller land area of 245,000 km². This is a significant costs issue that requires further analysis. There is also existing infrastructure that could be utilised within a UK version of the scheme, with potentially large costs savings advantages. We want to explore the use of existing Surestart Children's Centres.



3.3.4 MANDATORY DISPUTE RESOLUTION IN CHILDREN MATTERS

We refer elsewhere in the report to the requirement to receive certain information before the issue of proceedings. In relation to matters regarding children and in the context of the available services through the Family Relationship Hubs, we want to go further.

In Australia since July 2007, separating partners who remain in dispute over parenting are required in the first instance to attempt to resolve difficulties out of court with the assistance of a registered family dispute resolution practitioner. (There are exceptions such as urgency or cases with allegations of violence.) These practitioners are most commonly (but not exclusively) accessed through FRCs. A further innovation for family members who may live at some distance apart, whether in terms of mileage or time of travel, has been the setting up of a telephone dispute resolution service.

If a dispute resolution practitioner deems a dispute to be irresolvable or inappropriate out of court, he or she issues a certificate that enables the parties to proceed to court.

Many disputes before the courts concern the lack of contact, either total or insufficient by one parent with their children. Although some are concerned with issues of violence and other features which make them inappropriate for resolution outside of court adjudication, the vast majority of these contact disputes are entirely suitable for an initial consideration of dispute resolution outside of the court system. This has already been demonstrated to some extent within the Principal Registry of the Family Division, where for several decades a conciliation scheme has operated in which, after the issue of an application, no statements can be filed and the parties attend a first meeting before a district judge and a court reporter, often a CAFCASS officer, who helps the parties reach a resolution. Children over the age of 9 attend, although they do not appear in court. This scheme has been very successful and is operated with variations in many local family courts. Critically, it only operates after the issue of a court application. We see no reason why a UK version of the Australian family dispute resolution process should not occur before the commencement of proceedings provided it is operated professionally and competently through the Family Relationship Hubs.³³ People who might be suitable for training as family dispute resolution practitioners might be CAFCASS officers, family mediators, lawyers and others. Funding, training and supervision resources might be similar to that already in place for these organisations and individuals. The Australian model is very well developed with regard to training and supervision and a national accreditation scheme is about to be launched. Much is likely to translate directly into the UK context.

We record that mandatory dispute resolution of financial matters would not be appropriate before the issue of proceedings because of the importance of the disclosure process. Whilst this can be voluntary, in which case the parties have access to mediation services, experience shows that it is often better for those involved to have the structure and timetable of the court based rules. This certainly does not mean that the dispute will require a final hearing as the vast majority of cases settle, normally at or around the time of the Financial Dispute Resolution hearing, an early neutral evaluation by an experienced family court

³³ It may be that this will be a second stage in the formation of the National Service of Family Relationship Hubs.

judge with the benefit of disclosure and with the task of narrowing the issues and encouraging a settlement. This works very well and we wish to encourage it. We do not consider therefore that it would be appropriate in most cases before the issue of proceedings.

Professor Janet Walker told the review that:

There needs to be multiple entry points. Some people are quite far down the line [in separation/divorce proceedings] but where else do they go? If you want to get people to talk you need to have something that makes it possible to walk in and talk to someone, getting to people at a point so they can think about what they're doing. People get caught up into a spiral and then it's too late and they're in a lawyer's office. If we're concerned about marital breakdown we have to find a way to get to people early and where they're at and not make it difficult for people.

3.3.5 CONCLUSION

We consider the Australian model of Family Relationship Centres could be applicable within the British context. *Breakthrough Britain* highlighted the need for Family Justice Centres,³⁴ similar to that which is currently working in Croydon,³⁵ where co-location and coordination of services in a one-stop shop format is successfully providing for both the legal and non-legal needs of individuals suffering from violence in the home. Vitally we consider they could be geared, as much as possible, towards prevention of breakdown. We propose a nationwide service of Family Relationship Hubs, providing local focus of provision of family relationship resources.

3.3.6 SUMMARY OF RECOMMENDATIONS

- **An extra layer of advice, assistance, support and guidance is needed in the UK for people experiencing family troubles to allow them an alternative to the polarising and adversarial route of litigation and the court service. A form of Family Relationship Centre is therefore considered a valid and viable option for the UK. We refer to them as Family Relationship Hubs, to focus on the coordinating and centralising role they will play.**
- **The UK model should include, where practicable and appropriate, a comprehensive range of services that might include (and act as a referral source for) family dispute resolution, post separation services,**

34 Social Justice Policy Group, 2007, 'Family Breakdown' Volume 1 of *Breakthrough Britain*, Centre for Social Justice, p36

35 Croydon Family Justice Centre was established in 2005. It is limited however to cases involving domestic violence.

child contact services, early intervention services, counselling services, mediation, pre-marriage information, pre-issue information, and preventative and educational services.

- **These services should where possible be co-located together within Family Relationship Hubs for the benefit of clients, staff and economies of scale in funding matters. Where co-location is not possible or practicable, a formal referral process undertaken by the Hubs would guide clients to the appropriate local resources.**
- **The locations should be highly visible and accessible to the public, with strong government branding to promote trust and confidence.**
- **A recruitment, accreditation and continuing education scheme is likely to be required, as is a body with compliance and oversight functions.**
- **It is essential to engage all stakeholders in the consultation process, including (but not limited to) domestic violence organisations, men's groups, the Court Service and solicitors.**
- **Responsibility for funding would be between central government, local government and external agencies.**

At the outset of this report we set out certain principles. One was a holistic, joined up set of reforms to help families. We record in this section, and the start of the next section, our proposals for:

- Information to be provided to couples at the beginning of the relationship to strengthen and prepare for the relationship;
- Marriage support in various forms of couple relationship education including appropriate interventions at a specific time in relationships;
- Local centres to provide information and/or resources to help individuals and families;
- Mandatory referral to information before the commencement of court proceedings;
- Mandatory attempts at resolution in children matters before proceedings.

These must work together. They need to be coordinated, branded, with quality standards and quality delivery and accessibility. They cover the spectrum from the months before the relationship begins through the relationship itself until the period immediately before the commencement of proceedings concerning its breakdown.

The UK has never before had such a consistent approach to marriage and family support, provision of services across the spectrum of society and throughout the various stages of domestic relationships. We consider that these combined services and proposals will make a dramatic difference to the family relationship culture in our country and hugely benefit the experience of family life.

FOUR

Family law and the family law process

4.1 Information before the issue of proceedings

It has been a theme of family law policy over the past decade to try to find ways to give good and reliable information to those contemplating family court proceedings of any kind. There is hardly any need to justify such a policy. It was present in the 1996 legislation in the form of information meetings. It is an inherent requirement in law at present that a party seeking legal aid for family law proceedings must first meet with a mediator to see if mediation is more suitable than proceedings. It has been tried subsequently with projects such as FAInS.¹ Despite the success or otherwise of these initiatives, there has been no serious questioning of the importance of the policy.

We heard it constantly at our evidence sessions, from senior judiciary through to practising lawyers to organisations representing members of the public

“People still think that breaking up is a private matter between you and your partner and immediate family. We need the public to be educated in that it is a public matter. If you divorce, it is a huge issue which affects many people.”

Mr Justice Coleridge, in evidence to the Family Law Review.

1 The Family Advice and Information Services (FAInS) was piloted from 2002. It aimed to encourage family law solicitors to create networks of local agencies to advise and support clients with a range of problems related to family breakdown – domestic violence, debt, welfare benefits, and housing. FAInS solicitors were given increased Legal Aid rates to spend more time with clients identifying their needs, referring them to other relevant services, and preparing a ‘*Personal Action Plan*’ stating what the solicitor would do, and what the client should do to resolve the most urgent problems. The pilot has been evaluated by the Newcastle Centre for Family Studies and the final report on the pilot is published on the LSC website. (See [http://www.legalservices.gov.uk/docs/fains_and_mediation/FAInS_evaluation_report_2007_\(2.56mb\).pdf](http://www.legalservices.gov.uk/docs/fains_and_mediation/FAInS_evaluation_report_2007_(2.56mb).pdf)) They found that: ‘The piloting of FAInS has shown that it is not easy or straightforward to require solicitors to change the way they practise when they consider that they are already conforming to best-practice principles. Nor is it easy and straightforward to promote joined-up working through the establishment of networks of suppliers’. The report also concluded:

1. Solicitors are not necessarily the best people to identify and deal with non-legal problems for two key reasons:
 - Solicitors were not good at exploring non-legal problems or ‘problem clusters’ with clients – they tended to focus on the key legal problems
 - Clients with clusters of problems were usually already in contact with the support services they needed by the time they got to see their solicitor.
2. Clients seemed to like having a Personal Action Plan, but there was little evidence that they received a better, more tailored or more comprehensive service as a result.
3. FAInS-type services are unlikely to provide any cost benefit – FAInS cases were less likely to need a legal aid certificate, but legal help costs were higher.

involved in family law proceedings: there must be much better information given about the likely impact of the proceedings on the individual, on the couple, on any children, on any wider family, on the finances and similar issues. We heard constantly that too many litigants felt that they had not had sufficient information before they embarked upon the process and the proceedings.

This is certainly the case in respect of the divorce itself. Whilst most would have gone on with a divorce, if they had known what would occur, greater information about the legal, practical and emotional impacts of divorce on families and children might have changed the nature of the proceedings and timings.



Better information is needed about the impact of the proceedings on the individual, on a couple, on any children or wider family and on their finances.

It is also the case in respect of children proceedings where considerably more information in advance may have changed either the nature of the application, or even persuaded the couple to consider resolution without court proceedings. This includes information about the impact of court proceedings on children. It would certainly include information for parents about the responses and behaviours of children at a time of parental separation, thus showing that a court application may not necessarily be the appropriate course of action arising from certain events concerning post separation parenting.

It is also the case in respect of financial proceedings on separation, including on divorce, where more information about costs and the procedure etc. would be beneficial; such as knowing about the different forms of resolving matters without final court hearings, known as Alternative Dispute Resolution (ADR), the appropriateness of

different forms of ADR, the availability and the cost.

Of the importance of this provision of information there can be no doubt. It has already been debated and decided by Parliament in 1996.

It occurs in other jurisdictions. Australia has required information meetings at the start of proceedings for many years. Recently they have introduced provisions for mandatory meetings and attempted resolutions before the issue of certain proceedings.

4.1.1 DELIVERY OF INFORMATION AND THE INVOLVEMENT OF LAWYERS

The constant problem is assessing what sort of delivery of information should occur. We are aware of the successes but also the failures of the pilot projects for information meetings at the time of the 1996 legislation and subsequently. Undoubtedly considerable government funds were committed to the project and a variety of different information meetings and different deliveries of information was carefully considered. The FAInS project more recently was

developed with the concept of a 'gatekeeper' who would inform individuals of the various personnel, resources and help available. This project has not succeeded.²

It seems that the problem with past Governments' keenness to exclude lawyers from the process is that often the public places their confidence in lawyers at a time of relationship conflict. Previous pilot projects of information meetings attempted to disconnect the provision of information from the involvement of the family lawyer. However, a reason provided for the failure of the information meetings after the 1996 legislation was that outcomes showed that more people would consult a lawyer after attending the information meetings than those who had not attended such an information meeting.³ This was clearly contrary to the agenda behind the information meetings, of encouraging parties away from lawyers and courts and into other forms of dispute resolution.

“Approximately 80 per cent of people with a family relationship problem go first to a lawyer.”

Approximately 80 per cent of people with a family relationship problem go first to a lawyer. This is proving a constant percentage, having now been recorded over time and through both Hazel Genn's work (*Paths to Justice*) and latterly Pascoe Pleasance (*Causes of Action*).⁴

This is unsurprising for two reasons. First, separation, divorce and other issues of family relationship breakdown have a legal component which is easily identifiable. The second is deeply rooted in our culture, as people go to lawyers for advice, who provide representation and hold information integral to this process and in this regard many still view divorce and family relationship disputes, at least initially, as a 'fight.' They seek out in the first instance a legal 'champion', despite many conciliatory family lawyers viewing themselves more as seeking a fair solution. This cultural element of initial referral to lawyers is a matter we seek to highlight and change in some regards within this report, starting with our proposal for mandatory attempts at dispute resolution in respect of children cases before the issue of proceeding. This is on the basis, in part, that the culture of seeking legal representation is more deep-seated and appropriate within finance than children disputes.

Moreover, at a time of relationship breakdown, many couples present a variety of legal problems such as child care arrangements, the obtaining of a divorce, financial resolution, perhaps domestic abuse, etc. which in turn requires knowledge of a broad range of family law issues, often at a fairly experienced level. Many family lawyers regard the initial meeting with a client

² See for example footnote 1, in section 4.1 above and the Newcastle evaluation Report

³ Walker, J. et al, 2007, *The Family Advice and Information Service: A Changing Role for Family Lawyers in England and Wales? Final Evaluation Report*, Newcastle Centre for Family Studies, Newcastle University, pp9-11

⁴ Genn, H., 1999, *Paths to Justice: what people do and think about going to law*, Hart Publishing; Pleasance, P., 2006, *Causes of Action: Civil Law and Social Justice*, Stationary Office

as often the most demanding of their expertise and experience, as a wide variety of problems are presented, often needing urgent advice on which action should then be taken. The first meeting is rarely appropriate for an inexperienced, low-grade lawyer.

Coupled with this element is that people can be suspicious when they are referred away from their lawyer to other professionals and service providers, anxious that they will lose their ‘champion’ and representative, particularly when some other professionals and service providers detract from the legal representation. This may nevertheless be warranted, for instance because the client has an inappropriate regard to the element of representation that may be needed or there is a non-legal problem which needs resolving before other disputes can be sorted out. Nevertheless, this aspect again cannot be ignored and argues for a more cohesive and joined up group of services, each being supportive of the role of others and with an awareness of the attributes and strengths of each service provider.

Whatever form the information provision may take in the future, it cannot be pitted against the important representative role of the lawyer. At a time of emotional and financial vulnerability and anxiety, many people seek someone to look after their interests; the classic representative role of the family lawyer. Any implementation of pre-issue information which seeks to detract from or minimise the importance of the role of the family lawyer, including the representative role, is bound to fail.

As a consequence of the experience with the information meetings provision, FAInS attempted to use family lawyers as the ‘gateway’ they clearly are at present in the process. There is ongoing research about why FAInS failed in its expectations.⁵ In part it was due to the provision of information other than the purely legal i.e. information in regard to managing personal emotions, arrangements for co-parenting, managing debt, issues of housing and other practical matters. Lawyers were unable and not suited to provide this. Moreover, even using family lawyers as a gateway was problematical because the level of remuneration meant that less qualified and experienced practitioners were operating this information provision and were sometimes deficient in their abilities to ‘problem notice’ and/or to successfully advise on other services or to refer onwards appropriately. Balancing the necessary level of legal experience to provide the personalised proper and appropriate information with the necessary level of knowledge of other resources and services is at the heart of the problem of information delivery.

4.1.2 DELIVERY OF INFORMATION AND ‘CULTURAL’ ELEMENTS

As part of the cultural element within our UK society, there is a strong resistance to any group activities which relate to deeply held feelings or emotions, or simply those which relate to ‘personal business.’ What happens

⁵ See footnote 1, in section 4.1 above.

and is successful in similar countries may not be transportable here. It can be a particular problem in local areas as some people are concerned about being 'seen' in their local community attending such groups. So attempts to introduce mass information provision via groups have thus far failed. Moreover, outcomes from the 1996 Act pilots found that people often went to the groups wanting one or two specific pieces of information, which they sometimes did not get because it was generalised information and could not therefore address personal situations.⁶ Generalised information was not perceived as particularly helpful and time or cost effective by those attending. In contrast, family lawyers were perceived as giving individualised advice, even though it was in fact often information.

A further finding from FAInS was that people do not like being referred onwards several times to other services and get frustrated and upset by having to retell their story to more than one or two agencies. By the second or third occasion many had simply given up. It seems to us that this argues very strongly for the Family Relationship Hubs, referred to elsewhere in this report, having very knowledgeable intake officers who may not necessarily themselves be skilled at dealing with the issues arising for the individual or couple but will know precisely to whom to refer the client for the appropriate services and resources. Moreover with coordinated, perhaps even co-located services, there might be some reduction in the repetition of information.

Other jurisdictions have struggled with the difficulty of getting people to sources of information other than family lawyers. Many have required that people contemplating proceedings must go through certain 'hoops' before they can proceed e.g. attend parenting programmes (USA), attempt mediation (USA/Australia) or in-court provided information (Australia). Research is ongoing although cultural and national differences can mean that some methods of delivery are appropriate in one country but not in another.

It is also extremely difficult, probably impossible, to combine everything into one type of information provision because people have specific needs personal to their own circumstances at a time of stress and distress which also affects their ability to absorb. Unfortunately, 'distress purchases' mean that it is also difficult to get people to take-up information opportunities before the event, rather like making a will during periods of good health.

Therefore providing information prior to relationship breakdown or prior to proceedings is difficult and may need to be via more than one source. Specifically, information prior to the issue of proceedings should best be seen

6 Walker, J et al, *The Family Advice and Information Service: A Changing Role for Family Lawyers in England and Wales? Final Evaluation Report*, Newcastle Centre for Family Studies, Newcastle University, 2007, pp8-10

in the overall context of the provision of relationship information and assistance which will therefore tend to take away from a perception of a hoop through which a party has to jump before court proceedings can be commenced. It should then be seen as more of a holistic whole with relationship education in schools, pre-marriage information, couple relationship education, parenting skills and available resources at times of relationship difficulties. This will lead to a much greater acceptability of the benefits of pre-application information and will assist in the process of removing the perception of family lawyers as always and inevitably the first port of call.

4.1.3 DELIVERY OF INFORMATION AND NEW TECHNOLOGY

We are very conscious that in the intervening 10 years from the implementation of the pilot information meetings after the 1996 legislation, there has been a transformation in society in the use of electronic communication and information which is now both sophisticated and extensively available. Information technology has made the dissemination of information a great deal easier. Therefore any future delivery must take account of how much people now use new technology. The internet is particularly useful because it is anonymous and easy to access for large swathes of the population. By way of examples, Directgov already provides a wealth of information, as does the MoJ, CAFCASS and DCSE. Telephone services may also have a part to play – particularly as England has become such a ‘service base’ community. CLS Direct is experimenting with family information (mostly promoting ADR opportunities). There are other charities who offer information on relationship breakdown from their own particular interest, both by phone and internet, for example Parentline Plus (for parents), Relate, National Family and Parenting Institute, One Plus One, Care for the Family, and Fathers Direct.

It will be important to consider the use of CD/DVD technology. They can be extremely informative, are fairly cheap to mass produce, can be viewed anonymously and at home. Participants in a recent trial of a relationship preparation course that was computer based (ePREP) experienced improved relationship outcomes. It was found that the flexibility of this type of intervention enabled it to overcome some of the key obstacles in the dissemination of relationship education.⁷ Podcasts may be another means of delivery.

Proving that these have been viewed and read rather than just being received could be problematical. We are aware it is possible with online information to produce a unique identifier for each person who has accessed the information. We would be unhappy about going to this amount of

7 Braithwaite, S., & Fincham, F, 2009, ‘A randomized clinical trial of a computer based preventive intervention: Replication and extension of ePREP’, *Journal of Family Psychology*. Vol. 23(1), 32-38, <http://psycnet.apa.org/journals/fam/23/1/32/>

intrusion. If having been provided with the opportunity for consideration of this information, a person refuses to do so, then we doubt any further measures would be beneficial in such a case. The task will be to give the message of the benefit of receiving and considering the information.

4.1.4 SUMMARY OF DELIVERY OF INFORMATION:

- Any attempt to exclude lawyers from the process, including opportunities for early initial advice and representation, is likely to cause the process to fail.
- At a time of relationship difficulty, people have a wide range of problems including a variety of pure legal problems and assistance for a variety of non-legal problems; this cannot be provided by one information provider but should be well coordinated to avoid repetitions of the situation by the person.
- Service providers of information and assistance must work together, trust each other and have confidence in the role played by each other and be well coordinated.
- Group meetings are mostly contrary to the wishes of many people and English culture.
- Generalised information is rarely beneficial when individuals want specific information on particular problems or issues; delivery of general information is counter-productive without opportunity for personalised information.
- Pre-application information should be in the context of overall relationship education delivered at a variety of stages in relationships.
- Information technology can significantly assist delivery in ways which were impossible in the initial 1996 pilot information meetings and in ways which are already proving successful.

4.1.5 PRACTICAL APPLICATION

Pre-issue information will dramatically increase knowledge of what is involved in family law proceedings, save saveable marriages, save costs, reduce use of lawyers, courts and judicial resources, will encourage much greater use of Alternative Dispute Resolution (ADR), will benefit the children, and generally lead to more satisfaction with the family law resolution process by members of the public.

We therefore re-state past Parliamentary policy, logically extended from divorce to all family court proceedings. Before any proceedings in family law can be commenced, with certain exceptions, the applicant must have had the opportunity to consider certain information, in the various ways described above. This would include reconciliation opportunities and resources, ADR, impact on children, costs and court procedures and other relatively basic information. It would apply to any party seeking to make an application in existing proceedings for example in a cross divorce petition or Form A. There

would only be the need for this one source of information provision even though there may be a variety of proceedings commenced. It would have a sell by date i.e. proceedings could be commenced within a period after the attendance on the information provision.

Naturally there would have to be exceptions. It would not apply in the context of domestic violence applications. It would not apply in respect of urgent applications. There would be other justifiable exceptions. However, even in these cases, there would be a requirement to attend this information provision within a period of time after the commencement of the proceedings. A certificate of attendance would be required before proceedings could be issued.

“In his evidence to the Family Law Review Sir Mark Potter, President of the Family Division, expressed his support for the revival of information meetings in divorce and all other forms of family applications, ‘to inform potential litigants of what they were letting themselves in for, so as to afford them a chance to reconsider.’”

We propose elsewhere in this report a three-month period of reflection and consideration before the divorce petition itself goes ahead (see section 2.3.3). This is a direct encouragement to the obtaining of this information during the three-month period to reflect on the relationship, the impact of any divorce and ancillary proceedings and specifically any prospects of reconciliation.

It is anticipated that provision or arrangement of this pre-application information would be a crucial role of the Family Relationship Hubs referred to elsewhere in this report. (See section 3.3.3) The Hubs will be able to provide

the necessary information and other ancillary resources and assistance that the individuals may require and seek in advance of commencing proceedings. The Hubs will also be working closely with the court service.

It is preferable that couples attend jointly. However we understand why there may be many reasons for not doing so. This cannot be compulsory.

The 1996 legislation anticipated that the service would be free. We do not depart from this. The subsequent savings, albeit perhaps years later, will substantially compensate. *Breakthrough Britain* estimated that the prevention of unnecessary divorce and family breakdown could save the taxpayer £107 million per year and within five years the cumulative annual net gain could amount to £500 million or more.⁸

Where a party sought legal aid, the information provision could be given by a person qualified and accredited as a mediator and thereby it would not be necessary for this person to attend both the information provision and the legal aid mediation meeting. They would serve jointly to save costs and time.

Naturally there would need to be safeguards for personal protection and safety. These issues were fully canvassed and worked through in the 1996

⁸ Social Justice Policy Group, 2007, ‘Family Breakdown’ Volume 1 of *Breakthrough Britain*, Centre for Social Justice, p52

legislation and are still not contentious. We accept that finding the appropriate form or forms of the information provision is still problematical. We consider face to face consultations to be the preferred manner of provision, so that there is an opportunity to tailor the information to particular individual needs and circumstances. However whatever means of delivery is adopted, the key principle is that information must be provided as a precondition of making any application in family law proceedings.

4.1.6 PRE-ISSUE INFORMATION AND MANDATORY ATTEMPTS AT ADR IN CHILDREN CASES

As referred to elsewhere in this report in respect of Family Relationship Hubs and in respect of ADR (see sections 3.3.4 and 4.2.1), there would be a mandatory attempt at resolution of children disputes before an application could be made to the court, save the usual exceptions. This would be operated through the Family Relationship Hubs. It would not however require any delay in the implementation of the requirement of pre-application information provision. Baroness Butler-Sloss, former President of the Family Division supported pre-issue ADR in children's cases and the provision of information. She highlighted to the Family Law Review that it helped 'identify the issues for the couple. If the couple cannot agree, these issues are identified for when they go to court. If they are able to do it before they get to court, it would save a lot of money.'



Baroness Butler-Sloss giving evidence to the Family Law Review.

Professor Janet Walker similarly supported pre-issue information, particularly in the context of a centralised location where people could walk in and talk to someone about their family life problems. She told the review: 'people get caught in a spiral and then it's too late and they are in a lawyer's office. As we are concerned about marital breakdown, we have to find a way to get to people early and where they are at.' She said it had to be 'one to one and personally tailored.'

Sir Mark Potter, President of the Family Division, was keen to see the introduction of a requirement that, before commencing children proceedings, 'parents should attend a form of out-of-court mediation in an effort to avoid the necessity of those proceedings.'

4.1.7 SUMMARY OF RECOMMENDATIONS

- **There should be information provision before the commencement of family law proceedings.**

- Receipt of this information is a precondition of issuing proceedings, evidenced by the form of a certificate or similar.
- This applies to all family law proceedings, including divorce, children proceedings and financial proceedings, including substantive applications made in existing proceedings.
- There would be an exception in respect of proceedings for domestic violence and in other proceedings where there are issues of urgency, for safety and similar, although in such circumstances the information provision should be received and considered within a time period after the issue of proceedings.
- Once the information provision had been received, any number of family law proceedings could be undertaken within a period of time thereafter; it does not relate to only one set of proceedings.
- In designing the information provision consideration must be given to its delivery, length, content, cost and manner of providing the information. Face-to-face consultations or meetings are preferable so that the information can be tailor-made to meet individual circumstances.
- Information providers would be accredited and quality assured.
- The information provision can take place at the same time as a mediation meeting for a party seeking legal aid.
- The information provision is likely to be provided by or through the Family Relationship Hubs.
- With respect to children matters there would also be a mandatory attempt at dispute resolution, organised through the Family Relationship Hubs, although this may be a second stage in the development of pre-application information and the Family Relationship Hubs.

4.2 Alternative Dispute Resolution: ADR

4.2.1 INTRODUCTION

The vast majority of cases do not need to go to a final court hearing.

However this is not the same as not starting proceedings. Very often there is a considerable benefit in commencing proceedings, including creating a more formal and structured timetable and preventing delay, having the opportunity to seek additional disclosure and facts or prevent unreasonable requests for excessive disclosure, and having the assistance of experienced family court judges in guidance and prediction on outcomes.

There are only a few cases which require a final hearing in court: to test evidence, perhaps to resolve complex points of law or simply because the other side are being utterly unreasonable. Such cases are a rarity and final court hearings should be avoided wherever possible. In reality, final court hearings are the preserve of either the legally aided or the very wealthy. Few others can

afford the costs of going to a final hearing or, if they lose, then appealing to obtain a correct and fair outcome. Few choose to afford the risks of going to a final hearing when possible outcomes are so wide. Access to this Rolls-Royce justice system is highly restricted due to cost.

The majority of the public involved in family court proceedings either want to settle without a final court hearing or cannot afford to go on to a final court hearing.⁹ As a consequence, the family law system must be directed more specifically and more overtly to finding ways to encourage a settlement without a final court hearing. One means of doing so is through using alternative dispute resolution methods, known as ADR. This can no longer be regarded simply as a ‘civilised’ method, a collaborative way forward or constructive co-parenting, although it is all these things. The simple reality is that parties to family law litigation must find a way to settle.

Settling a case, rather than having an outcome interposed by a court, creates greater satisfaction and greater likelihood of implementation and is much better for the children affected. It helps couples in any future disputes which may arise. It is invariably quicker to settle than with a final court hearing and involves less legal costs.

There are many different ways to resolve a case without a final court hearing. We do not propose to set them out here by way of detailed explanation however this summary is set out in appendix 6. What is important is to choose the best and most appropriate method for each case and at each stage of a case.

In turn, this requires the parties to be given every opportunity to explore appropriate ADR at each appropriate stage of the case to maximise the opportunity to settle without a final hearing, to save costs, to save the polarisation and contentiousness inherent within final hearings and generally for the benefit of the parties and any children.

We strongly recommend that ADR should be properly regarded as the primary dispute resolution. Final court hearings should be the last resort resolution. Many specialist family lawyers have an additional qualification in some form of ADR e.g. mediator, directive mediator, collaborative lawyer, etc. Most specialist family lawyers are thoroughly committed to trying to find a way to settle the matter without unnecessary final court hearings.

“Settling a case, rather than having an outcome interposed by a court, creates greater satisfaction and greater likelihood of implementation and is much better for the children affected. It helps couples in any future disputes which may arise. It is invariably quicker to settle than with a final court hearing and involves less legal costs.”

⁹ Elsewhere in this report we make recommendations for more certain and more predictable outcomes, thus avoiding the need for final court hearings.

4.2.2 1996 INNOVATIONS

In its White Paper of April 1995 the Government stated that it had reached the view that a greater use of mediation as part of the divorce process would help it achieve the objective of a good divorce system.¹⁰ Mediation cannot be compulsory but the Government considered that there should be a definite and greater encouragement to couples to use family mediation.

It went on to say that there were three primary reasons, namely:

- (1) Marriages which are capable of being saved, were more likely to be identified through mediation than through the legal process; referral to marriage guidance can occur at any time and the door to reconciliation is always kept open, as spouses do not have to take up opposing stances from the outset;
- (2) Spouses are enabled to take responsibility for the breakdown in their marriage, can acknowledge responsibility for the ending of their marriage and deal with matters of fault, blame, anger and hurt with the minimum of bitterness and hostility;
- (3) Couples are encouraged to look to their responsibilities – the responsibilities of marriage and parenthood – and to cooperate in making arrangements for the future rather than focusing on the past and engaging in recrimination.

The 1996 legislation was built on a foundation that many more cases would be referred to mediation, with an expectation that this would be cheaper for court resources, legal aid and in general. There was in depth training and accreditation of family mediators in readiness along with government funding of the fragmented and disparate family mediation profession, and with publicity about its benefits. Much good was done and many mediators were trained. There was and still is a requirement that a party cannot obtain legal aid for family law proceedings unless they had first been to a meeting with a mediator to consider whether mediation may be appropriate.

The legal aid mediation imperative survived the subsequent decision not to go ahead with the 1996 non-fault legislation. Nevertheless the inevitable consequence was a perception that mediation was no longer so central. There is less mediation now than 10 years ago and most is carried out by not-for-profit services, primarily in the context of children work. The not-for-profit services do an excellent job although there are some concerns from the family law professions when they undertake mediations dealing with financial issues. Directive mediation has been introduced over the last few years, based on an Australian model. This is more suited to family lawyers have trained as mediators and so are in a position to give a good

¹⁰ H.M. Government (1995) *Looking to the Future: Mediation and the Ground for Divorce, The Government's Proposals*. Cm 2799. London; HMSO, para 5.21

indication of what would happen if the matter were dealt with at court and therefore guide and direct the parties towards the more likely outcomes. Directive mediation is often chosen as the lawyers for the parties may also be present in the mediation room, which some couples prefer.

There is an obligation on anyone seeking public funding, legal aid, to attend a meeting to consider whether mediation may be suitable (see section 4.3.) This is commendable and we wish to make sure it is continued. However it is inevitably very limited because it does not apply to private paying parties. We propose elsewhere in this report (see section 4.1) that it should be mandatory to attend an information provision meeting to include a full explanation of ADR before commencing any form of family law proceedings, and then to certify attendance before proceedings can be issued by the court. This would be extended to respondents who counter apply in any existing proceedings. This would then include information about ADR and an opportunity to take part in some form of ADR. It would include a mandatory attempt at ADR resolution in children cases.



We recommend a mandatory attempt at ADR resolution in children cases.

4.2.3 POWER TO ADJOURN PROCEEDINGS FOR THE PURPOSES OF ADR

The 1996 Act also incorporated in sections 13 and 14 specific powers and obligations on the courts to adjourn cases for the purposes of mediation and to require reports on what progress had been made in mediation. These powers were lost with the no-fault divorce. We consider it is of fundamental importance that they are reintroduced, and adapted now to cover all forms of ADR rather than just mediation.

These two sections allow the court to ‘persuade’ couples strongly to take part in mediation or other alternative means of resolving a family dispute. The courts would have to be well informed about local mediation services and the circumstances in which it is appropriate especially given its voluntary nature. We believe adjournments to consider mediation would have become commonplace if the 1996 legislation had been introduced. The court itself may often be a primary referral source for mediation. Moreover cases should be adjourned to consider alternative means of dispute resolution in addition to mediation. These measures in the 1996 legislation should be urgently reintroduced.

We have seen similar powers incorporated into the draft Family Procedure Rules, Part 3. This is excellent. The rules may be in force from late 2010 or 2011. If it is certain that the powers to adjourn for the purposes of ADR will be incorporated in the rules, there would be no need for primary legislation.

4.2.4 ARBITRATION

Arbitration is commonplace in civil disputes. In many shipping cases it is much more used than the civil courts. It is frequently used in international civil disputes. It is required in many consumer contracts. It is now found in family law in countries such as Australia and Canada, who have similar family law to England. Yet under English family law nothing can bind the family court such as agreements or arbitrated awards.

Over the last few years progress has been made in setting up an arbitration scheme in England and Wales in conjunction with the Chartered Institute of Arbitrators. The Family Law Arbitration Scheme is close to being finalised and launched. The initial family law arbitrators will be senior family law professionals including retired judiciary.

There are several acknowledged benefits of family law arbitration namely:

- The selection of the decision maker i.e. specific to the dispute and acknowledged as an expert on the particular area of family law;
- The direct, continuous involvement of the decision maker rather than different judges dealing with a case every time the matter goes back to court, potentially with different approaches and styles;
- Flexibility and individual choice of adjudication process, so it can be tailored and adapted for the particular needs of the parties, the lawyers and the case;
- Privacy and confidentiality, which is of increasing importance now the family courts are opened up to the public, (from 27 April 2009);
- Avoidance of court delays and standardisation;
- Use for discrete issues of case or for the whole case;
- Speed;
- Saving of court resources.

Conversely, there is the disadvantage of the private cost of the arbitrator.

Clearly not all cases will be suited to arbitration (and the consent of both parties to go into arbitration is required). Equally, like all new ADR options, it will take time for family arbitration to merge with the legal culture and for practitioners to see it as a viable (and even preferred) option for their clients. (Unlike mediation which started in family law, arbitration is well established and growing in other areas of litigation and is often the resolution process of chosen by experienced litigation lawyers.) Moreover, there seems little doubt that within 5-10 years of the introduction of binding family arbitration, English lawyers will look back and wonder how they got along without it, especially given the ever-increasing complexity of disputes and delay, costs and standardisation of the traditional court processes.

Ultimately, family law arbitration cannot enter mainstream family law ADR unless it is binding, as is all other civil arbitration. Reform of primary legislation is needed, although not extensive amendments. Family law

arbitration would then sit alongside other civil arbitration and fit into the civil justice system accordingly. We recommend strongly that there should be primary legislation to make family law arbitration binding.

4.2.5 SUMMARY OF RECOMMENDATIONS

- **Sections 13 and 14 of the Family Law Act 1996 should be reintroduced, giving the court specific powers and obligations to adjourn cases for the purposes of mediation and other ADR, with reports on what progress has been made.**
- **Binding family law arbitration should be introduced.**
- **The requirement on legally aided parties to attend a meeting to ascertain if mediation might be suitable should be continued and extended as below.**
- **Applicants for divorce and dissolution of civil partnerships, for financial provision on relationship breakdown, for orders regarding children and other family court applications, and save matters of emergency or domestic abuse, must attend a pre-application information meeting which would include provision of details of mediation and other available ADR.**
- **There should be mandatory attempts at resolution of children disputes before the issue of proceedings.**
- **Forms of dispute resolution short of final court hearings should be regarded as primary dispute resolution, matters of first resort, and final court hearings regarded as matters of last resort.**

4.3 Legal aid

4.3.1 INTRODUCTION

All those whom we met in consultation in the preparation of this report and who had any experience of the legal aid system were unanimous: family legal aid is in its final throes of meltdown. It has barely sustained a discernible public service over several years, and has done so only through incredible commitment and financial sacrifice of many family lawyers. It is doubted whether there is any long-term future for family law legal aid in that there will be very few practitioners sufficiently experienced to undertake the necessary work. The present fee structures and arrangements for legal aid are driving even more solicitors away from providing family law legal aid services, restricting future access to justice for low income members of the public.

Moreover, even as our report was being prepared, there were new proposals from the Legal Services Commission to reduce even further the level of fees paid to lawyers undertaking family work.¹¹ The real anxiety and concern is

¹¹ Legal Services Commission, Press Release, 12 February 2009, *Legal Aid changes will focus help on most vulnerable families and children*, http://www.legalservices.gov.uk/aboutus/press_releases_9297.asp

“We regard the availability of legal aid as fundamental to family justice.”

twofold. First, will there be solicitors and barristers experienced in family law work spread across the country willing to undertake legal aid work? Secondly, will their expertise be sufficient for the complex cases in which representation is required? If, as we were told, there are genuine fears that one or both of the above will not continue to exist, then many deserving parties will simply have no access to representation. This will in turn result in dramatically increased numbers of parties acting in person, many more cases of injustice as one party is unable properly to represent their position and additional delays and costs in running the family justice system. We regard the availability of legal aid as fundamental to family justice.

4.3.2 HISTORY

Whilst some form of legal aid had been previously available, the present system derives from the dramatic post war changes to English society, specifically the introduction of the welfare state. Alongside provision of education and health was access to justice. The Rushcliffe Committee report in 1945 focused on improving civil legal help so that ‘litigants of sufficiently modest means should be provided with lawyers, drawn from the private sector, to represent them in courts and tribunals.’¹² This became the *Legal Aid Act 1949* which came into force in 1950. It has been one of the most glorious examples of the English justice system.

Costs started to increase in the 1960s however the more substantial increases in costs derived from the mid 1980s onwards. It was during the later part of the 1980s and the 1990s that the first round of dramatic reductions in the availability of legal aid and remuneration for legal aid were created by the then Conservative administration. Significantly smaller numbers of people were eligible for legal aid due to the means threshold being markedly increased and remuneration being significantly reduced (in relative terms) along with other changes meant fewer solicitors were willing or financially able to undertake legal aid work. This pattern has sadly been continued with the present Government. Many of the present difficulties with the legal aid system derive from these changes.

Costs to the legal aid budget further increased throughout the 1990s and the *Access to Justice Act 1999* made further changes. Legal aid for family court proceedings has been within the category of civil legal aid. It has been criminal legal aid where the biggest increases have occurred. Whereas in 1997 the cost of legal aid was £1.5 billion, this had risen to over £2 billion in 2004. In this period criminal legal aid increased by 37 per cent, whereas civil legal aid decreased by 24 per cent. In part this was due to the impact of conditional fee agreements in civil litigation, removing many cases from legal aid requirements. Criminal legal aid has increased recently, in part due to the

12 Department for Constitutional Affairs, July 2005, *A Fairer Deal for Legal Aid*, Cm 6591, p6

increasing complexity and length of criminal trials as a result of the *Criminal Justice Act 2003*.

Within family law, overall spending on child contact and residence cases declined in real terms by 16 per cent between 2000 and 2005 whereas childcare and related proceedings increased in the same period by 77 per cent. This is due to the proliferation of parties and greater use of experts.

Within ancillary relief work, the impact of the statutory charge significantly reduces the overall cost of legal aid. Where any money is recovered or preserved, the amount of the legal aid costs are repaid either immediately or later on, for example in circumstances where a home is purchased for the children for the duration of their minority. It is a loan, not a gift. The actual net cost of ancillary relief legal aid work is relatively small. How much money accrues back to the Treasury from the operation of this charge remains opaque. Too often the gross rather than net figures are included in government statistics, showing a disproportionate cost. The correct information of the net cost should be publicly available. Moreover we are also very concerned that the interest on the legal aid statutory charge is 8 per cent, a return to the government unavailable anywhere else in the market when the base rate is now 0.5 per cent.

4.3.3 THE FUTURE OF LEGAL AID: WHITHER OR WITHER?

The final writing of our report conveniently coincided with the latest proposals for reduction in rates in legal aid work. The consequence is that even fewer lawyers will be willing or financially able to do legal aid work. The Family Law Bar Association, representing over 2000 specialist family law barristers, has warned of the devastating impact the loss of family lawyers will have upon the weak and vulnerable citizens in need of help.¹³

There are now so-called 'deserts' in the country where few solicitors can be found to take on legally aided clients. In many cities, it is hard to find a legal aid lawyer. We have read with grave concern reports that the parents of a child involved in a ventilator withdrawal case had to approach some 80 firms of solicitors before any solicitor could be persuaded to act on even present legal aid rates.¹⁴ If this recent press report is even half right it should be a source of great concern to the Government. This outcome was clearly foreseen in 2007 when the Law Society challenged the introduction of new legal aid contracts and when Sir Mark Potter and the Family Justice Council warned of the 'exodus of dedicated, experienced and specialist' lawyers from family work.¹⁵ This has continued into a mass exodus.

13 Bar Council Press Release, 12 February 2009: *Family barristers voice concerns over the impact on women the cuts in legal help for vulnerable families and children*, <http://www.barcouncil.org.uk/news/press/660.html>

14 The Daily Mail, 22 March 2009, *80 lawyers refused to help baby OT, leaving the parents to fend for themselves*, <http://www.dailymail.co.uk/news/article-1163805/80-lawyers-refused-help-save-Baby-OT-leaving-parents-fend-themselves.html>

15 Family Justice Council, News Release, 28 March 2007, *Impact of Legal Aid reforms of the delivery of Family Justice*, http://www.family-justice-council.org.uk/docs/fjc_press_release_legal_aid.pdf

“Recent research suggested that a third of barristers would either greatly reduce or stop all legal aid work if fees were reduced by a percentage much lower than that now threatened.”¹⁶

The present proposal would lead to a very significant further reduction in fees; although the percentage reduction, conceded by the Legal Services Commission to be 38 per cent in complex cases, is said by the Family Law Bar Association to be in excess of 50 per cent when existing allowances (known as uplifts) upon remuneration are reduced or removed.¹⁷ The purported justification is that the expenditure has risen. The point has been made that the relevance of the uplifts introduced by the Government as part of the Graduated Fee serves only to underline the heavy demands of the work both in terms of complexity and time taken. We find it unusual that high responsibility and good service should lead to a reduction in reward. We would prefer to see a more conventional approach: one which rewards, not punishes, such efforts and achievements.

In a debate in May this year the former President of the Family Division warned the Government of the dangers in its declared course:

Following the Legal Services Commission's proposals, there is about to be a serious and irreparable loss of the pool of expertise.

My concern is not at all for lawyers; it is for the children and the parents who must be represented. The legal aid changes raise issues about the rights and welfare of children. They involve Article 12 of the UN Convention on the Rights of the Child and Articles 6 and 8 of the European Convention on Human Rights. There will be a lack of access to justice and a lack of adequate representation of children and of the parents who may be unfairly accused of misbehaviour and may lose their children for ever. Much more important is the grave danger of the loss for children of their parents if these cases are not properly tested.

*I cannot overemphasise the potential damage to these extremely vulnerable groups of children.*¹⁸

We have also noted the analysis by the Care Quality Commission in May this year which attributed lack of experience in child protection work as a factor in a child's death.¹⁹ Neither social workers nor lawyers can be expected to provide the service required without the opportunity to acquire such experience and

¹⁶ Price, D., and Laybourne, A., February 2009, *The Work of the Family Bar: Report of the Week-at-a-Glance Survey 2008*, King's College London, p37 and Table 27

¹⁷ Family Law Week, 3 April 2009, *Cat and Mouse- The Consultation over the future of family legal aid*, <http://www.familylawweek.co.uk/site.aspx?i=ed34217>

¹⁸ Hansard 14th May 2009, column 1123

¹⁹ New report by the Care Quality Commission on the NHS care of Baby Peter, 13 May 2009, http://www.cqc.org.uk/newsandevents/pressreleases.cfm?cit_id=34876&FAArea1=customWidgets.content_view_1&usecache=false

some incentive to assume these responsibilities. We note with approval the attempts by local authorities since the 'Baby P' imbroglio to attract more experienced social workers by increases, not decreases, in pay.

The Family Justice Council condemned many of the proposals, saying that there will be 'an inequality of arms between publicly funded litigants and privately funded litigants, with corresponding Article 6 implications.'²⁰ The Council also took seriously warnings that many member of the family legal profession would give up publicly funded work if the proposals were implemented. Such an outcome would have, they said, 'an extremely damaging effect on the family justice system as a whole' and would cause further delays in courts with:

- (i) less experienced advocates undertaking more complex work;
- (ii) longer (less focused) hearings;
- (iii) more hearings (less skilled case management);
- (iv) higher incidence of litigants in person;
- (v) greater likelihood of appeals where cases become de-railed because of inadequate representation at first instance.²¹

It must now be doubtful that any material number of solicitors and barristers, qualifying with student debts perhaps now approaching £60,000, will be attracted by such low rewards.

Only in May this year, in Parliamentary debate upon children and the family, Dame Elizabeth Butler-Sloss told the Upper Chamber:

Because of a marked reduction in those cases, there will be a most damaging effect on the availability of experienced family practitioners in those cases. There will be fewer family lawyers prepared to do this work. They will vote with their feet and there will be a great disincentive for young barristers coming into family work. As a former family judge, I already advise Bar students not to do family work. Following the Legal Services Commission's proposals, there is about to be a serious and irreparable loss of the pool of expertise.²²

Few solicitors, obliged to make prompt payment of rent and their many other expenses at commercial rates, can do so if reliant upon the receipt of legal aid rates, where payment is both low and slow.

20 Family Justice Council, April 2009, *Family Legal Aid Funding from 2010 A Consultation-Response of the Family Justice Council*, p3

21 Ibid

22 Hansard 14th May 2009, column 1123

We have approached our consideration on the basis that there should not be any gross inequality of arms in the quality of representation between litigants. In practice, it is recognised both by judges and practitioners that there is often such inequality where one spouse instructs solicitors privately and where the other, usually the wife or mother, is dependent upon finding lawyers in a dwindling pool of solicitors willing to accept her case on legal aid. The evidence is also of barristers already refusing to take a case because of the low fees, even at current rates, and this is especially so in ancillary relief and private law work.²³

4.3.4 THE WORK OF THE FAMILY LAWYER

We recognise the importance of advice and skilled representation in cases such as the recent tragedy of ‘Baby P’. Many clients, principally in care work, have serious mental and/or physical health problems. Yet such cases will often involve voluminous documentation, including detailed reports by psychiatrists and other experts who are often remunerated at a rate which dwarfs the fees allowed to the lawyers. Where financial issues are at stake, the court may need

“The NSPCC’s work to protect vulnerable children and families relies on the ability to access a pool of specialist advocates at the family bar. The NSPCC urges the Ministry of Justice to reconsider its plans to cut funding in these cases.”²⁴

analysis of company or trust structures as well as a more straightforward unravelling of financial deviousness. Applicants who do not receive a fair share of the marital assets through inadequate or no representation may well add to the public cost of social housing and state benefits.

The risk of injustice through lack of legal representation is great. We take seriously the clear warning of the N.S.P.C.C. that legal aid cuts risk miscarriages of family justice.

Sympathy for these distressed parents is not enough. It is vital that parents facing the permanent removal of their children may be properly protected against the strength of local authorities, which have easy access to experts in different disciplines and other resources. We are mindful of the comments of the Court of Appeal in May 2008, branding East Sussex County Council’s actions as ‘disgraceful’ when it had unlawfully proceeded with an adoption placement a day before the date of a court hearing at which the father was to oppose the placement.²⁵ We see an obvious need for representation to assist the weaker party in matters of such self-evident importance.

4.3.5 REMUNERATION

Recent figures reveal that 25 per cent of barristers undertaking family work earn less than £44,085, at least part of which will have been funded privately at

23 Price, D., and Laybourne, A., February 2009, *The Work of the Family Bar: Report of the Week-at-a-Glance Survey 2008*, King’s College London, p35

24 NSPCC response to MOJ proposals to cut legal aid, 18 March 2009

25 The Times, 2 May 2008, *Judges Condemn ‘foul play’ on adoptions*, <http://www.timesonline.co.uk/tol/news/uk/article3858204.ece>

a rate appreciably higher than allowed on legal aid rates.²⁶ This represents, at best, only around one-third of a General Practitioner's National Health Service income (but without such security or pensions) and again, taken as a maximum, is little more than the level of overtime payments alone for some constables in the Metropolitan Police.²⁷ The mean figure for gross receipts from legal aid for 2008 was £44,419, at a time when some 30 per cent of gross income was lost in overheads.²⁸

As in all areas of practice at the Bar, those with a high dependence on legal aid work earn the least.

Such analysis has prompted those who have read the words of the Secretary of State for Justice that '...there is certainly nothing ordained by the Almighty which says that of those paid for by the public purse, lawyers should be any higher than other professions', to enquire why they should so often be paid so much less.²⁹

Oliver Heald, Member for North East Hertfordshire and Chairman of the Society for Conservative Lawyers called Mr. Straw's comments an 'insult' to legal aid lawyers. We endorse his further comment: 'We should continue to have highly skilled lawyers available to deal with these cases and they should be fairly paid... The idea that it is more worthy to do commercial work is a terrible message for the government to be sending to legal aid lawyers and idealistic law students.'³¹

Those now less likely to undertake legal aid work includes senior practitioners whose expertise is particularly required in the most complex cases and where the time spent in preparation (said to sometimes to require as much as 100 hours of work a week) is accordingly greater. Remuneration for preparation may well reduce the profit in cases of complexity and importance, such as child abuse, to £20 or £30 per hour. Fixed fees for conferences even at an existing rate of £60, assuming no more than 3 hours of work in preparation and with the client, would even now pay no more than £20 per hour as a gross fee. This figure is no more than a mere 10 per cent of the gross fees of comparable professions.

As trailed in the speech by the Secretary of State for Justice, above, we have also had regard to a broad comparison with similar occupations whose incomes are publicly funded, such as dentists and doctors who often enjoy vastly greater incomes and security. We note with concern the well-publicised

“The Shadow Attorney General has acknowledged that ‘legal aid rates are plainly not commercial and profit margins are minute.’”³⁰

26 Price, D., and Laybourne, A., February 2009, *The Work of the Family Bar*, King's College London p9 and Table 12

27 *Evening Standard* 18th May 2009, upon figures released under the Freedom of Information Act

28 Price, D., and Laybourne, A., February 2009, *The Work of the Family Bar*, King's College London, Table 11

29 *Constitutional Continuity*, Jack Straw's speech at the London School of Economics, 3 March 2009, <http://www.justice.gov.uk/news/sp030309.htm>

30 Law Society Gazette, 26 March 2009, *Interview-Dominic Grieve, Shadow Justice Secretary*, <http://www.lawgazette.co.uk/features/clear-blue-water>

31 Law Society Gazette, 19 March 2009, *Tories Consider Private Solution to Legal Aid Shortfall*, <http://www.lawgazette.co.uk/news/tories-consider-private-solution-legal-aid-shortfall>

difficulties encountered by people unable to find a National Health Service dentist and so are literally pulling their own teeth out. As with the dentists, if the lawyers see no future in such work, they will simply continue to abandon publicly funded work and the newly qualified will plan their futures elsewhere rather than in this important public service.

An outcome of a mass exodus from legal aid work may well amount to a breach of statutory duty on the part of the Legal Services Commission under Section 2 of the *Access to Justice Act 1999*, which requires ‘that individuals have access to services that effectively meet their needs.’ While we also note the statutory duty to ‘aim to obtain the best possible value for money’, we question the value being obtained in this way and also bear in mind that cost and value are not necessarily the same.

This should all be a matter of concern to the public and to the next Government. The UK Government paper in July 2005 *A Fairer Deal for Legal Aid* said that ‘legal aid will ensure that all practitioners, from junior barristers to QCs, from police station representatives to experienced solicitors, are fairly remunerated for the work they have undertaken.’³²

We have seen the words of the Ministry of Justice in Mr Straw’s recent speech that ‘...it is entirely proper that lawyers are paid decent rates; indeed it is essential to justice that high quality legal representation is preserved.’³³ This sentiment was echoed in the House of Lords by Lord Bach in May this year who assured the chamber: ‘...we value very much the commitment of all lawyers who work in the interests of the most vulnerable members of society who become involved in family legal proceedings.’³⁴

We have found it impossible to bridge the chasm which exists between the Government’s words and its actions.

4.3.6 THE VIEWS OF THE JUDGES

We have also heard of the dependence of judges upon the assistance of the lawyers who appear before them. Sir Mark Potter, President of the Family Division, has helpfully explained to us the real advantages of good quality advice at an early stage and the saving in court time and consequential cost of such help:

The level of overall costs to the system can be reduced if the parties have access to good quality legal advice and representation at the outset. Unfortunately, restrictions on the availability of legal aid in private law cases has led to a steady increase in the number of parties acting in person, who thus lack helpful, independent advice and persist in cases which would otherwise settle. Consequently, cases last longer and are just as costly to the overall system in the end. In the field of public law, legal aid

³² Department for Constitutional Affairs, July 2005, *A Fairer Deal for Legal Aid*, Cm 6591, p19

³³ *Constitutional Continuity*, Jack Straw’s speech at the London School of Economics, 3 March 2009

³⁴ Hansard 18th May 2009, column 1202

is still generally available to the parties once proceedings commence. However, so far as pre-proceedings advice is concerned, the level of the fixed fee for pre-proceedings advice and attendance at family conferences is too meagre to cover the level of attention and attendance necessary to make, or persuade an anxious and resistant parent to accept, a realistic assessment of the likely outcome of care proceedings. Consequently, in public as well as private law proceedings, as a result of inadequacies in the legal aid scheme, the cost to the overall system is adverse.



The Royal Courts of Justice, where Sir Mark Potter, President of the Family Division presides.
(Photo by: Nick Garrod.)

Cases where there is proper advice may well settle. Cases where the parties act in person almost invariably last much longer and clutter up the courts, adding to the waiting times for other cases. Litigants in person often leave court with a sense of grievance and then embark upon further litigation by way of appeal, usually misconceived, and again causing delay to other work.

We have contrasted the position in the recent judgement of Mrs Justice Hogg in *Re J (Care Proceedings: Injuries)*,³⁵ a care case that concluded in January 2009:

In this case I had the advantage of the involvement of experienced counsel, solicitors and guardian. All helped to achieve the smooth running of this hearing, and an early conclusion. This was a complex case concerning a very young child involving complicated issues of fact and medical evidence... I could not have contemplated forcing a five day hearing into a four day slot without the cooperation of the legal teams, and the knowledge that counsel were experienced in care work. As it was I required detailed skeleton arguments in advance and subsequently written submissions to which counsel could, and did, speak. The evidence with full cross-examination was contained and focussed, and concluded on time. By the end of the third day of the hearing I had heard the evidence and submissions, which enabled me to prepare and give judgement on the fourth day.

4.3.7 COMPARISON WITH THE CROWN COURT

It is significant that in March 2009, the National Audit Office reported that the Crown Court (where international obligations, domestic law and the practical resolve to avoid waste of court time all combine to ensure that almost all defendants are professionally represented by properly paid counsel) is now facing an increasingly tight budgetary control through funding constraints.³⁶

³⁵ [2009] Fam Law 460

³⁶ HM Court Service, 6 March 2009, *Administration of the Crown Court*, Report by the comptroller and Auditor General

This reinforces the picture which was made all too clear, from the decision of the Crown Court at Harrow in May 2008. The court stayed confiscation proceedings involving millions of pounds on the grounds of abuse of process as no sufficiently experienced barristers in the land could be found to take on such work for the low fees offered on legal aid rates. The Judge ruled that the defendant could not have a fair hearing as the legal aid rates did 'not provide sufficient funding to pay for the necessary representation.'³⁷ Legal aid would only have provided a fixed rate of £172.25 per day gross for a hearing estimated to last six weeks; nothing would have been available for the long preparation required to scrutinise over 6,500 pages involving over 4,000 transactions.

We do not see that either individual rights or the public interest can be properly served by the inevitable consequences of this unrelenting emasculation of legal aid.

4.3.8 ALTERNATIVE SOURCES OF FUNDING

We consider insufficient attention has been given to other available sources of funding for those entitled to legal aid and/or with modest resources, yet who expect to receive a capital settlement at the conclusion of financial proceedings.

The court has the power to grant interim maintenance which includes provision of legal costs. This is judge made. Such orders are made to provide some, occasionally all, of the legal costs of the financially weaker party out of the income of the financially stronger party. This generally works very well. However the inevitable reality is that the vast majority of the public cannot fund their legal costs out of their own income, and certainly not the legal expenses of both. It has a narrow application.

However if the court had the power to grant interim lump sums to include provision for legal costs this would have a substantially wider application than interim maintenance and would provide considerably greater assistance in many cases. Judges have specifically said that they do not have this power. It relies on statute. The Government has indicated informally e.g. at the time of the introduction of new family costs rules in 2007, that it supported this provision. It was included in the 1996 legislation but fell as another innocent victim with the decision not to go ahead with no-fault divorce. It should be introduced immediately.

Although in a number of cases the only available asset is the family home, there are many cases where there are available liquid assets such as shareholdings, savings, investments, etc. Sometimes these are in the name of one spouse only, who as a consequence is able to use these funds to fund their own legal expenses. The other spouse may be starved of available funds and have no recourse to legal aid and so would possibly either act in person or

³⁷ The Times, 6 May 2008, *Drug offenders keep £4.5 m after 30 barristers refuse to take case*, <http://business.timesonline.co.uk/tol/business/law/article3876570.ece>

accept any proposal that is made because of the inability to pursue the litigation through legal representation. There is a very considerable inequality of representation as a consequence of one spouse having access to funds and the other either not having access or being refused. It is very unjust, and produces unfair outcomes, in the experience of many family lawyers. In other countries, for example Australia where there is power to grant interim lump sums for costs, it is usual for the court to order cash to be distributed from marital accounts or for particular investments or shares to be sold to fund the separate legal representation. It also makes it more consistent for the court to make no order as to costs at the conclusion of the case on the basis that marital funds have been used together for the legal representation. It also means the court has some control over what assets are used for legal representation.

The exercise of this power may mean that some are not then dependent upon legal aid, and that it would not involve any material change to court process or proceedings and would create a much more equal and fair process. The power of interim lump sums for costs should be introduced immediately. (See section 6.2 on financial provision on divorce.)

England does not have a very developed system of litigation loans to fund legal costs. There are some banks and financial institutions which will lend to fund legal expenses until the final conclusion. In some cases this funding is absolutely crucial to allow proper representation. However some lawyers are wary of using these litigation loans, often because ultimately the lawyers have to accept primary responsibility for the costs and they are unwilling to do so. Some banks have entered the market and then left fairly quickly. Other countries have a highly developed system of litigation loans which often become the primary source of litigation funding. We want an opportunity for dialogue with the banks and other financial institutions to find out what changes in law and procedure they need in order to feel more comfortable and secure in developing a system of litigation loans in family law. As before, this would reduce the need for legal aid and create a more equal and fairer system of representation for the financially weaker party.

4.3.9 CONCLUSION

We recognise the need to attract and retain specialist practitioners in all areas of family law.

We note with real concern that this social service, long described as the Cinderella of the social services, is now truly at breaking point. Total expenditure for the whole legal aid budget over the year (including crime and civil claims as well as family) is approximately that spent upon the National Health Service in a week. Over the whole year, family legal aid represents no more than a few weeks of payment of child tax credit payments.

Even with private work to supplement the legal aid rates, the majority of solicitors and barristers in family law legal aid make profits which sit most unfavourably alongside comparable professions.

We urge the Government unequivocally to recognise that access to justice, like education, health care and other front-line services, is an essential facet of any civilised society.

The Government must either give up any continuing pretence that the legal aid system, introduced at the same time as and in the spirit of the National Health Service, can any longer meet the needs of the citizen or it must urgently reverse years of cuts and make an enduring commitment now to fund this social service properly. Until some years ago those providing the service were to be rewarded on the basis of 'fair remuneration for work actually and reasonably done.'³⁸ This principle of fair remuneration was abandoned by the last Conservative administration and many of the present problems flow from this decision.

We deprecate the neglect both of those in need of this service and of those who have until recently been willing to provide it.

We recommend an immediate abandonment of all plans for further reductions in remuneration. The Government should return to the original basis of 'fair remuneration for work reasonably done' and must put an end to the erosion of eligibility which was also a feature of Mrs Thatcher's administration.

We also recommend that payments to the Legal Services Commission from the operation of the Statutory Charge should be clearly ring-fenced for use by the Commission and not lost in other revenue to the Exchequer.

The current rate of 8 per cent upon such charge is an affront to those who pay this high rate of interest and one which is likely disproportionately to affect the poorer client who may lack the option to obtain alternative finance at a fraction of that cost. The Government's continuing failure to act upon this aspect is conspicuously at variance with its repeated public exhortations to the banks themselves to reduce promptly rates paid by borrowers. It must be reduced immediately, linked with base rates and subject to review perhaps on an annual basis.

We also recommend that budgets for family legal aid work should be ring-fenced from other work and so protected from incursion intended to claw back money spent on criminal work when that budget is placed under sudden pressure, for example by a long running terrorist trial.

We appreciate that the legal aid expenditure in care cases needs to be carefully kept under review, consistent with the crucially important issues for the life of a child in such cases.

We support the continuation that a party seeking legal aid should first meet with a mediator to consider whether mediation may be more appropriate than the issue of court proceedings. We go further in our policy proposals. As there is no point in only the legally aided party having such a meeting, we propose

38 This phrase is taken from the *Legal Aid Act 1974*

elsewhere in this report that every party intending to commence any court proceedings should be informed about the merits and benefits of mediation and other forms of ADR (see section 4.1). This should work for the benefit of legally aided parties. Moreover in children cases, we propose that there should be an attempt at dispute resolution before proceedings are commenced, again for the benefit of savings in legal aid cases.

We support much greater use of mediation and other means of ADR and out-of-court settlements with specific proposals, as set out elsewhere in this report, (see section 4.2), to reduce overall legal costs in cases where final hearings are not needed, thereby further saving on legal aid.

We support the proposals in the UK Government paper of July 2005 *A Fairer Deal for Legal Aid*,³⁹ namely the consideration of alternative ways to assist those who can resolve problems short of final court hearings, promoting alternatives to court based approaches to resolving problems and the development of new and more efficient means of delivery to meet the needs of citizens for legal services. Many of the proposals in this paper are directed to those ends. (Our ancillary relief proposals commend themselves to an electronic model of calculation of outcomes.) We are satisfied that much more can be done. However the culture of dispute resolution will take time to change and adapt. In the meantime, the essential need for adequate and experienced representation remains.

We feel strongly that unless all these steps are urgently taken, the old jibe ‘that the doors of the court, like those of the Ritz, are open to rich and poor alike,’ will be too true to be even vaguely amusing.

4.3.10 SUMMARY OF RECOMMENDATIONS

- **Government should clearly place on record that access to justice, like education, health care and other front-line services, is an essential facet of any civilised society;**
- **The legal aid system must attract and retain specialist practitioners in all areas of family law;**
- **To this end, the Government must end all plans for further reductions in remuneration;**
- **Also to this end, the Government must return to the original basis of ‘fair remuneration for work reasonably done’;**
- **The Government must put an end to the erosion of eligibility for those in need of help;**
- **Payments to the Legal Services Commission from the operation of the Statutory Charge should be clearly identified and ring-fenced for use by the Commission and not lost in other revenue to the Exchequer;**
- **There should be proper transparency in the published cost of legal aid, so that the net cost (being gross expenditure net minus VAT) after**

39 Department for Constitutional Affairs, July 2005, *A Fairer Deal for Legal Aid*, Cm 6591

deduction of repayment of this statutory charge and interest on it is made public rather than the present opaque figure;

- The present high rate of interest paid upon the statutory charge must be reduced immediately, linked with base rates and subject to review on an annual basis;
- Budgets for family legal aid work should be ring-fenced from other areas such as crime;
- Power for the court to grant interim lump sums, for costs, should be introduced immediately; and
- There should be dialogue with the main banks and lending institutions to discuss what changes are needed to allow more family law litigation loans to be granted.

4.4 Domestic violence and abuse

4.4.1 INTRODUCTION

In the SJPG report, *Fractured Families*, the scale of the problem of domestic violence was highlighted.

Every minute of each day the police receive a domestic assistance call. British Crime Surveys from 1993-2003 estimate a million domestic assaults annually.⁴¹

“Domestic violence accounts for 25 per cent of all recorded crime classified as violence against the person, in England and Wales.”⁴⁰

Less widely acknowledged however, is that the problem of domestic violence is closely correlated with the problem of family breakdown, and that family breakdown dramatically raises the risk of domestic violence.⁴²

We have spent some time considering this issue, and collecting evidence in order to make informed recommendations. Due to space limitations much of the work we have reviewed is detailed in appendix 7. In the following section therefore we make some general comments followed by our recommendations.

The Government’s White Paper *Justice for All*⁴³ published in July 2002 outlined wide ranging plans for reform of all aspects of the criminal justice system, but it also specifically addressed the law concerning domestic violence. It considered, for example, whether breach of a non-molestation order could be made a criminal offence, whether allowing anonymity for victims, as there is for victims of sexual offences would increase the reporting of offences, and

40 Metropolitan Police, April 2006, *Violence against the person (VAP) – Summary of data and trends*, http://www.met.police.uk/foi/pdfs/priorities_and_how_we_are_doing/archive/2004/summary_performance_violence_against_the_person_2004-05.pdf

41 Social Justice Policy Group, 2006, ‘Fractured Families’ Volume 2 of *Breakdown Britain*, Centre for Social Justice, p39

42 See Social Justice Policy Group, 2006, ‘Fractured Families’ Volume 2 of *Breakdown Britain*, Centre for Social Justice, p48

43 H. M. Government, July 2002, *Justice for All* (Cm 5563), HMSO, <http://www.cjsonline.gov.uk/downloads/application/pdf/CJS%20White%20Paper%20-%20Justice%20For%20All.pdf>

how to encourage better liaison between the civil proceedings dealing with actions relating to the family and criminal proceedings for offences.⁴⁴

A consultation paper entitled *Safety and Justice: the Government's Proposals for Domestic Violence*⁴⁵ followed a year later in June 2003. It had specific proposals in Part 3: 'Protection and Justice' on reform of the various provisions of the Part IV in *Family Law Act 1996* (FLA), together with guidance for the police when dealing with domestic violence incidents. These considerations led to *The Domestic Violence, Crime and Victims Act 2004* (DVCVA). This Act has introduced reform both to the civil and criminal law dealing with the domestic violence. The headline provisions are the criminalisation of breaches of civil injunctive orders, the extension of categories of those able to seek civil injunctive orders and making common assault an arrestable offence.

This is now central to the issue of domestic violence. We have reviewed the impact and effect of these changes bearing in mind the objectives behind the legislation, namely, to ensure an effective police response when victims report domestic violence, making sure that the civil and criminal law together offer maximum protection to prevent re-occurrence, improving the prosecution of domestic violence cases, and making sure that sentences reflect the crime.

4.4.2 THE MAIN PROVISIONS OF THE DVCVA RELATING TO DOMESTIC VIOLENCE

Through Section 1 of the Act, non-molestation orders obtained in the civil court now include a criminal sanction for non-compliance with these orders. Part IV of the FLA 1996 enables the civil family courts to make orders protecting the applicant and any relevant child from molestation (not limited to assault or fear of assault, but also including harassment, molestation and interference generally) by an associated person. Breach of a non-molestation order is now a criminal offence which can incur a prison sentence of up to five years on conviction on indictment, 12 months on summary conviction. Magistrates courts can currently only impose a six month custodial sentence unless two or more cases are before them. Legislation allowing them to sentence up to 12 months for one offence has yet to be implemented.

Previously, breach of such a non-molestation order was punishable only as a civil contempt of court. Enforcement was via a number of routes. Police could arrest individuals for breaches and bring the perpetrator before the court which had made the order within 24 hours of arrest, but only if the original

44 5 priority areas for action were identified (Part 8.6)

- to increase safe accommodation choices for women and children
- to develop early and effective health care initiatives
- to improve the interface between the civil and the criminal law
- to ensure a consistent and appropriate response from the police and CPS
- to promote education and awareness raising

45 The Home Office, June 2003, *Safety and Justice: the Government's Proposals for Domestic Violence* (Cm 5847), HMSO, <http://www.archive2.official-documents.co.uk/document/cm58/5847/5847.pdf>

order had contained a power of arrest. Otherwise, the applicant either applied for an arrest warrant or, more commonly, commenced committal proceedings pursuant to Order 29 Civil Procedural Rules.

This innovation allows the police to arrest for breach of a non-molestation order without the need for the court to attach a power of arrest or for the victim to apply to the civil court for an arrest warrant. There is no requirement for the alleged perpetrator to be produced at court within 24 hours of arrest.

The DVCVA extends Part IV FLA to same-sex couples and non-cohabiting couples. Common assault is now an arrestable offence.

4.4.3 CONSIDERATION OF THE EFFECT OF THESE LEGISLATIVE CHANGES

Concerns as to whether objectives of the Act are being achieved have been expressed most vociferously by judges of the civil family courts, who have very considerable experience of the domestic violence legislation and have hitherto dealt exclusively with breaches of non-molestation orders and have seen firsthand the effects of the changes. The main points of concern appear to be the following:

- Whether victims were deterred from contacting police for fear of ‘criminalising’ the perpetrators i.e. a worry by those in a domestic setting that their partner may end up with a criminal record and/or be dragged through the criminal justice system;
- Whether incidents of domestic violence being reported to police and applications for injunctive protective measures have fallen due to this concern of criminalising a partner, and what proportion of matters reported are subsequently withdrawn;
- The effect of making breach of a non-molestation order a criminal offence has almost entirely shifted the business of dealing with breach of civil injunctions from the civil courts to the criminal courts.

There is a concern whether breaches of orders are being expeditiously prosecuted in the criminal courts by the Crown Prosecution Service (CPS) and the timescales and outcomes for those prosecutions, as well as the effect of the change of venue on the victims.

Have victims desisted from reporting incidents for fear of criminalising partners? Whilst a number of commentators have voiced concern that victims would desist from reporting incidents and/or making

applications for protective measures for fear of criminalising partners, a contrary view has been offered by a number of those directly involved with victims. The view of Karen Bailey, from the Greater London Domestic Violence Project (GDLVP), whose staff are involved and very experienced



A domestic violence victim receiving support.

with victim support provision in London prior to and post the Act, was that victims supported injunction breaches being criminal offences, viewing previous enforcement action on breaches as ‘pretty poor (and expensive.)’ She reported that women, having often experienced multiple breaches of injunctions, were not concerned with the criminalisation of the perpetrator and wanted stronger police sanction. The seeking of protective orders normally came about when victim and perpetrator had or were in the process of separating. She further commended the inclusion of breach of an injunction as an arrestable offence. She also noted that it was GLDVP’s experience that many Black, Asian, Ethnic Minority and Refugee (BAMER) women are so fearful of repercussions from the perpetrator, wider family members and the community, that an injunction was not even an option.

The Ministry of Justice’s own research in their early evaluation of the Act reports that the majority of victims’ advocates welcome the criminalisation.

Has there been a drop in the reporting of incidents to the police now that common assault is an arrestable offence? The early figures from two sample areas over one month do not support a resistance to report an incident for fear of arrest of a partner. This is perhaps unsurprising given that the victims would know that arrest may be likely for a number of other reasons, such as breach of the peace. The Ministry of Justice’s evaluation concluded that thus far there is insufficient (and often unreliable) data.⁴⁶ However their early evaluation ‘provides evidence of this aim being achieved, with professionals seeing the measure as a positive move that provided clarification of existing good practice, and a tentative finding of increasing use of common assault since this became an arrestable offence.’⁴⁷

Evidence gathered from professionals and victims for this report was unanimous in support for this measure: ‘the general view being that it would enable a perpetrator to be removed from a situation thus giving them time to ‘sober up or calm down.’⁴⁸ However, arrest is not always immediate or certain, and in some cases where no further criminal action is taken the perpetrator is allowed back into the home.

Has there been a decline in the number of applications/orders? Immediate caution is required when looking at the number of Family Law Act orders post the Act, as from 1st July 2007 there had to be separate orders for non-molestation orders and occupation orders. Therefore, as flagged by HHJ Platt⁴⁹ to us, the number of civil injunctive orders emanating out of the family courts does not equate to the number of applicants and ‘could well mask a large drop in the number of applicants seeking the protection of the courts.’⁵⁰

46 Hester. et al, 2008, *Early evaluation of the Domestic Violence, Crime and Victims Act 2004*, Ministry of Justice

47 Ibid, p32

48 Hester. et al, 2008, *Early evaluation of the Domestic Violence, Crime and Victims Act 2004*, Ministry of Justice, p11

49 HHJ Platt, Romford County Court

50 HHJ Platt also told the Family Law Review that anecdotal evidence from judges throughout the country certainly supports the proposition that there was a significant drop in the number of applicants in the twelve months after 1st July 2007.

Data obtained first hand by concerned judges such as District Judge Mornington⁵¹ showed that whilst results varied, some were the same, a few were higher, but that more were lower. On average applications were down by 15 per cent. DJ Mornington posited a number of reasons for this overall decrease, including solicitors believing that injunctions are now pointless, so that fewer were applying for them. This is directly linked with the perception among legal practitioners in her area that there is little action on breach by the police and the CPS was not doing enough.⁵²

The Ministry of Justice's 'Early Evaluation' supports the above findings about a reduction in applications:

Research published as this report went to press provided evidence of a decrease in the number of applications – between 15% - 30% across 6 county courts – when the six- month period prior to implementation (1 January 2007 – 30 June 2007) was compared with the following six-month period (1 July 2007 – 31 December 2007) (Platt, 2008).⁵³

Significantly, the Legal Services Commission (LSC) data shows that post implementation the number of legal aid certificates issued was down by 13 per cent on the previous year. It should be noted that the MOJ 'Early Evaluation' report provided statistics that in the years *prior* to the DVCVA there had been a steady decrease in the number of applications and orders. This continued a trend that had begun in 1994, with the FLA 1996 not proving as effective in terms of civil protection as anticipated.⁵⁴ These prior trends need to be kept in mind when looking at the impact of the criminalisation of breach, as it makes it difficult to conclude whether this is linked to the DVCV Act or whether it represents a consolidation of previous trends.

We have concluded that it remains too early to assess whether the significant decline in applications seen in 2007 has been sustained.

What has been the effect of criminalising the breach of a non-molestation order? It is suggested that this is the area of most concern, where the Act is not achieving an objective of first bringing perpetrators before the court upon breach and secondly securing conviction.

The system in place prior to the Act, whereby breaches were dealt with by the court that had imposed the order (most often a county court), provided a

51 DJ Mornington, Mansfield County Court

52 She quoted that previously her 'court had 2 committals per week and that now magistrates courts are doing 2 committals per year.'

53 Hester. et al, 2008, *Early evaluation of the Domestic Violence, Crime and Victims Act 2004*, Ministry of Justice, pp19-20

54 Edwards, S., 2001, *Reducing Domestic Violence... What Works? Civil Law Remedies*, Crime Reduction Series Briefing Note, London: Home Office. Cited in: Hester. et al, 2008, *Early evaluation of the Domestic Violence, Crime and Victims Act 2004*, Ministry of Justice, p34

swift outcome. The potential for delay following criminalisation was envisaged and debated by the Attorney General Baroness Scotland during debate in the House of Lords. She conceded that whilst cases may take longer to conclude, the increased sentence and criminalisation of the breach would justify any delay

There is widespread concern among practitioners about some of the practical implications associated with this measure, set out in more detail in appendix 7. District Judge Cole⁵⁵ points out that the power of arrest (now not available for non-molestation orders) was a very useful tool in that it was unequivocal, leaving no room for doubt (either for the perpetrator or the police) that breach would result in arrest and a return to the civil court. Now however a non-molestation order carries merely a notice warning that breach is a criminal offence. His view is that the new procedure is not nearly as effective and unequivocal as previously, as it leaves the discretion for dealing with breach with the police, who in his view often take no action, despite there being two possible offences, breach of the order and assault.

According to CPS sources, the CPS must now authorise charge on all cases of domestic violence irrespective of whether the defendant admits his/her guilt. However, before files are passed to the CPS, there is anecdotal evidence that the police deal with matters by way of caution, or by giving a harassment warning under the *Protection from Harassment Act 1997*.

The CPS makes a decision to prosecute based on the Code for Crown Prosecutors, whereby prosecutors must be satisfied that there is a reasonable prospect of conviction (the evidential stage) and that it is in the public interest to proceed. Foremost in the prosecutor's mind is the implication for safety for the victim and any children. The CPS must be satisfied that there is enough evidence to provide a 'realistic prospect of conviction'⁵⁶ but in DV cases the only evidence normally available will be that of the victim and possibly the police, who may have witnessed the aftermath of an incident. As a leading district judge, who did not wish to be named, pointed out, the nature of DV would mitigate against a high evidential burden: 'Domestic violence tends to happen in private and without witnesses and the lack of independent witnesses may influence against a prosecution.'

Positive benefits of criminalisation are the wider range of penalties in the criminal courts, such as the requirement for participation in a domestic abuse programme (run by the Probation Service) which can be imposed alongside another penalty, such as a community order and can be specified to last for up to two years.

We have queried whether there should be a repeal of Section 1 of the DVCVA with the extension of sentencing powers to the civil judges but we have considered that it would be premature to consider any repeal of parts of

55 DJ Cole, Croydon County Court and Croydon Integrated DV Court

56 This phrase is taken from the Evidential stage of the Full Code Test carried out by the CPS for every case, see http://www.cps.gov.uk/publications/code_for_crown_prosecutors/codetest.html

the Act without proper research into whether or not it is working. Clearly, repeal of the provision criminalising breach would represent a major departure from one of the main objectives of the legislation.

There would need to be a highly proactive approach to the LSC by solicitors seeking a civil route, pointing out that the criminal route is either unavailable through police inactivity or otherwise having to posit a reason why the criminal route is unsuitable before legal aid would be available. This is bound to have an impact on the drastic decline of this route as an option for victims.

4.4.4 PERFORMANCE OF THE CPS IN RELATION TO PROSECUTION OF BREACH

Mandy Burton has commented that:

Overall the rate of successful prosecutions for domestic violence has increased from 46% in 2003 to 67% in 2007-2008, if 'success' is measured by conviction rate. However as HASC (2008) observed this data only tells us about the proportion of charges resulting in conviction and is not related to data on incidence, reporting, arrest and charging. The attrition rate in DV cases is very high (Hester et al, 2003).⁵⁷

Rates of convictions in the specialist domestic violence courts (SDVCs) are reported to be high with good victim support and other practices such as specialised training for magistrates. CPS data demonstrates that the number of offences which reached a first hearing under this legislation in 2007-2008 was 603. The equivalent figure for 2008-2009 was 3,160. Currently the CPS is not able to provide any more detail in respect of the outcomes of these hearings.

It is wholly unsurprising that there is an increase in convictions given the legislative changes, which has placed responsibility for dealing with breach within the criminal justice system. What is urgently needed is data as to the number of cases passed to the CPS, the number of those cases a) prosecuted b) withdrawal or c) the matter discontinuing for other reasons. Also the conviction/acquittal rates, and timescales from arrest and charge to conviction/acquittal, in order to assess properly the impact of prosecution of breach in the criminal courts. During the writing of this report we put in a Freedom of Information request to the CPS, to specifically try and obtain this data. However the CPS was only able to provide us with statistics on the number of charged offences reaching one hearing. They informed us that, due to the way their data is collated they are unable to provide any data on specific outcomes in respect of discrete offence types. For example: the number of cases

⁵⁷ Burton, M, 2008, *Domestic Abuse Literature Review*, Review for the Legal Services Commission, p14, http://www.legalservices.gov.uk/docs/fains_and_mediation/DomesticAbuseLiteratureReview.pdf

achieving a successful outcome (i.e. a guilty plea or guilty outcome post trial). An improvement in the CPS conviction rate, viewed in isolation, does not assist. Clearly, the effectiveness of the new legislation cannot be measured to see if it is working. Therefore we would concur with the recommendation in a previous CSJ paper, *A Force to be Reckoned With*,⁵⁸ that a full review of the CPS must be carried out. A further concern, as noted above, is that cases are not getting to the CPS for consideration, and that police are using cautioning as a means of dealing with breaches.

The victim experience of prosecution in the criminal setting

Sharon Stratton⁵⁹ of the Metropolitan Police was keen to point out to the Family Law Review that victim support throughout the criminal process was to be commended and she felt that this had been lacking for the victim during the civil enforcement route. Many would disagree. Importantly in civil committal the victim had the support and exclusive attention of her own legal team as well as the benefit of victim support groups within her/his area. In the criminal system the victim is not represented. She is simply a witness.

The CPS are part of a multi-agency criminal justice team which endeavours to ensure victims are supported not only during the court process but where possible, beyond i.e. Independent Domestic Violence Advisers (IDVA), Multi-Agency Risk Assessment Conferences (MARAC) and risk assessments all enable the victim to have a more joined up approach which places her safety and well being at the centre of the process.

Karen Morgan-Read (CPS), in evidence to the Family Law Review.⁶⁰

Regarding delay, the effect of the legislation provision, providing as it does for up to 5 years imprisonment for breach of a civil order, is to give the accused the right to jury trial. This can delay matters by months. They should be compared to the civil route as described above whereby the vast majority of committals were heard and finally dealt with within 3-4 weeks of arrest. The pressure on a victim over months, waiting to give evidence in the criminal court, cannot be under estimated. The anxiety about the court case can take hold, increasing the likelihood of the victims withdrawing with the increased possibility of pressure on the victim. As stated, there is unfortunately no data available from the CPS dealing with withdrawal/attrition rates in the cases prosecuted.

58 See The Centre for Social Justice, March 2009, *A Force to be Reckoned With*, p141

59 Sharon Stratton, Detective Sergeant and DV coordinator for the Metropolitan Police Service

60 Karen Morgan-Read, Senior Policy Advisor, Crown Prosecution Service

4.4.6 CONCLUSION

The above focuses on the present difficulties with enforcement of domestic abuse orders. Nevertheless this present difficulty must not be allowed to detract from the fundamental importance of the condemnation of domestic abuse of any form, whether between adults or to children and/or when

witnessed by children. It can take the form of actual physical violence, threats of violence and other forms of intimidatory behaviour. This is why reference is to domestic abuse rather than solely domestic violence.

It is sadly spread across all society and is specifically not confined to any social or other group within society. It is not confined to either gender. It is unrelated to age or wealth. It is manifest at different times of relationships. It can be a consistent pattern of behaviour or occur only at times of particular stress. It is all unacceptable.



A poster highlighting the dangers of domestic violence.

Within any family law system, there must be every opportunity for protection of victims of domestic abuse. This is the very urgent protection found from law enforcement agencies and available refuges. It is the protection given by the courts.

However, protection for victims of domestic abuse extends to a knowledge and awareness of all those operating within the family law process. Too often in the past, and perhaps continuing, this awareness has not existed. There is now a better knowledge of the signs of domestic abuse and an awareness of its impact, amongst judges, lawyers, mediators and others. Certain processes such as mediation have deliberate screening opportunities. There is an ongoing process of education and information. This must continue. It is of fundamental importance for the safety and protection of victims of domestic abuse.

In summary, we have found that Part IV (DV) applications, overall appear to have fallen by some 15 per cent since the implementation of the DVCVA. The trend already in existence since 2000 was a general decline (a 16 per cent fall between 2000 - 2006) but was clearly not comparable to the current fall. If this level of decline continues this would be very worrying in terms of the victims' loss of confidence in the legislative provision.

The 'front line' view of victims as communicated through victim support groups, is that they welcome the main legislative changes of criminalising breach because of the perception that criminalisation means DV is taken seriously. They also welcome arrest for common assault.

The greatest concern among family law practitioners and the civil judges is that breaches are not routinely being prosecuted. This is of course disputed on behalf of the CPS. However, the concerns about the delay in the criminal system compared with the previous expeditious civil route are justified, as is concern about the effect of that delay on victims.

We are thus in a situation now where victim *choice* as to whether to pursue a civil or criminal remedy for breach has been all but taken away, given the

emphasis on the criminal route and the struggle for funding for the civil route.

4.4.7 SUMMARY OF RECOMMENDATIONS

- **Ongoing education to create knowledge and awareness of domestic abuse for all those involved in the family law process.**
- **Systematic evaluation of courses and success rates for offender intervention programmes, including community-based projects, with any shortfall in the availability of programmes to be addressed.**
- **Whilst it is too early to draw conclusions on the effect of the 2004 DVCV Act, there must be an ongoing consideration and review of its impact.**

FIVE

Family law and children

Introduction

Within any consideration of family life and family law reforms, very high priority must be given to the best interests of children. As stated at the outset,

“Children are fundamental to this review. They have been the innocent victims of the relationship breakdown culture in our country.”



children should not be prejudiced against or suffer as a matter of law or status because of decisions their parents and carers have taken in respect of domestic relationships they themselves have formed.

What is more, as also stated elsewhere in this report and in previous reports from the SJPG, children invariably thrive better in a stable and functional family relationship, and research has shown this is more likely to be within marriage. National statistics for 2004 for England and Wales showed that three quarters of family breakdown cases affecting children under five come from separation of non-married parents. In stark contrast, the breakdown rate of marriages with children under five actually declined between 1991-2003.¹

Therefore, even in the context of issues regarding children, we believe it is right to emphasise once again that the support for marriage is justifiably maintained. The Children's Commissioner, Sir Al Aynsley Green has said that what children fear most is the breakdown of their parents' relationship.² It is almost always the case that the

most beneficial thing parents can do for their children is have and maintain a good relationship together. Faced with a worsening family breakdown culture, building better and more durable relationships will undoubtedly be best for children.

Even when there is a parental separation there is so much that can be done to help protect and look after the children who are affected as a consequence.

Children are fundamental to this review. They have been the innocent victims of the relationship breakdown culture in our country. Parental

¹ ONS, Autumn 2004, *Population Trends* 117, p75

² Speaking on Radio 4's Today programme on 15th Oct 2007

separation and high parental conflict affects children's health, emotional development, education, sexual development and growth into maturity. Many children will continue to bear the scars of parental separation for their lifetime and may carry the impact into their own adult relationships, repeating a cycle of breakdown.

The consequences of family breakdown are many and varied. They include a breakdown of nurture and secure attachment within families, increased poverty and welfare dependency, increased delinquency and crime, compromised care for the elderly, pressure on limited housing stocks and, as noted elsewhere, a significant economic burden to the nation.⁴

The idea that the culture of family relationship breakdown has in fact created a divide in our society that affects children across the spectrum, was summed up by Mr Justice Coleridge in a recent speech (see appendix 5) as follows: 'Is it fair that there should be two tiers of children, those who have received a reasonable and secure upbringing and those who have suffered the traumas of family breakdown for most of their minority?' The relationship breakdown culture affects children across the social spectrum from the Royal family to the poorest immigrants.

The level of conflict in a home and parental relationship quality can have a significant impact on child well-being. Clearly it is better for children if conflict between their parents can be avoided. However it is too easy to assume that if the atmosphere between parents is difficult, divorce or separation can be good for children. The level of conflict is important. Very high conflict marriages are environments within which children do badly and outside of which children then do much better. In these cases, when the level of conflict is *high*, children may find it easier to accept parental separation because they can understand the reasons. But most divorces do not involve high levels of conflict;⁵ and, contrary to commonly held perceptions, there is evidence that, short of abuse or violence, quarrelling parents are less damaging for children than family breakdown and parental separation. Apart from extreme situations, children are resilient in the way they cope with less than ideal parental relationships. The impact of a parental split, on the other hand, can have a much greater impact on their lives and it is unlikely to leave them in

“Kiernan similarly found that if a cohabiting couple has a child they are six and a half times more likely to split up than a married couple with a child.”³

“If...separating couples can be categorised as low conflict, such 'amicable divorces' are leaving behind an unexpectedly devastating legacy for their children. This is an issue barely touched upon by UK social commentators, let alone public policy.”⁶

3 Kiernan, K., 1999, 'Childbearing outside marriage in Western Europe' *Population Trends*, Vol.98, p19

4 Booth, A. & Amato, P., 2001, 'Parental Predivorce Relations and Offspring Postdivorce Well-Being,' *Journal of Marriage and Family*, Vol.63, pp.197-212. This issue is covered in more detail in 'Fractured Families' Vol 2 *Breakdown Britain*, p10

5 Social Justice Policy Group, 2006, 'Fractured Families' Volume 2 of *Breakdown Britain*, Centre for Social Justice, p79

6 Social Justice Policy Group, 2006, 'Fractured Families' Volume 2 of *Breakdown Britain*, Centre for Social Justice, p79

secure possession of the most important elements in their lives: home, school, friendships, community ties and activities. In general then researchers have concluded that children may do badly either because of a high conflict marriage continuing in place or because of a low conflict marriage ending in divorce.⁷

It must be one of the greatest responsibilities of any government to look after its country's children. Many children in this country are suffering badly due to the relationship breakdown culture, from broken homes and from homes where there is a high degree of parental conflict. But even when there is unavoidable breakdown, there is much that can be done to protect and look after children affected as a consequence. They need primarily two reforms. First and foremost they need an end to this family breakdown culture and to be given a much greater likelihood that they will be raised in intact, peaceful and loving families. Secondly, where affected by family breakdown, they need laws and processes which will look after their best interests and minimise as far as possible its impact on them.

5.1 Contact and Residence

5.1.1 INTRODUCTION

The consultation process which led to the publication of the Social Justice Policy Group's report *Breakthrough Britain* attracted a large amount of evidence from many parents (especially fathers) who were dissatisfied with their legal position following divorce and separation. The Family Law Review has built on the findings of that report in formulating our own recommendations.

“Shared parenting is an aspiration I have for everybody – both those who break up and those who stay together.”

Anthony Douglas, Chief Executive CAFCASS.
In evidence to the Family Law Review.

Breakthrough Britain found that over 80 per cent of children from separated families live exclusively or mainly with their mother and whilst only one in ten parents use the law to sort out contact arrangements, the overwhelming majority of applicants who apply for contact with children post-separation (between 75 per cent and 86 per cent) are fathers.⁸

Some evidence, brought to the FLR by non-resident parents' (NRP) lobby groups, indicated a sense that 'the *Children Act 1989* might be past its sell-by date.' This Act represented a radical reconceptualisation of post-separation parenting: 'The philosophy of the *Children Act 1989* is that parental responsibility continues after separation as it existed before the relationship breakdown, subject to any orders to the contrary by the Court.'⁹ However as

7 Booth, A. & Amato, P., 2001, 'Parental Predivorce Relations and Offspring Postdivorce Well-Being,' *Journal of Marriage and Family*, Vol.63, pp.197-212 . This issue is covered in more detail in 'Fractured Families': Vol 2 *Breakdown Britain*, p79

8 Social Justice Policy Group, 2007, 'Family Breakdown' Volume 1 of *Breakthrough Britain*, Centre for Social Justice, p20

9 Parkinson, P., 2006, 'Family Law and the Indissolubility of Parenthood,' *Family Law Quarterly*, Volume 40, Number 2: 239-283

groundbreaking as it was in its day, the paramountcy principle of the welfare of the child is deemed by certain lobby groups to be insufficient to deal with the demands of NRPs, usually, but by no means always, fathers, who are considered to be at a disadvantage in the post-separation contact stakes.

The view was expressed that there was nothing in law that acknowledged the reality of early 21st century living, particularly the far greater involvement of both parents in children's lives before separation and the ongoing (and in some cases increasing) desire of the stereotypically less involved/hands-on parent to be intimately involved in day-to-day decisions concerning children post separation. However, although Trinder states that 'it is apparent that contact rights are heavily gendered,'¹⁰ Buchanan and Hunt's study of court welfare reporting shows that many mothers *and* fathers thought that the system favoured the other gender.¹¹

Although perceptions of injustice and gender bias cannot be ignored, neither can they wholly determine the course to be set in this area of the review. Rather we aim to address the more abstract notion of the indissolubility and post separation *continuity of parenthood* on which a new model of divorce is predicated. In the late 1960s and onwards into the 1970s, the model of divorce assumed a sharp differentiation in the respective roles of the custodial and non-custodial parent. It presupposed the divorce could end the relationship in such a way that people could get on with their respective lives with only residual ties to their former partners. Models of divorce in the context of parenting and post-separation parenting are now very different. We considered it best to avoid recommending any dramatic changes to the law which are characterised by Parkinson as being driven:

*...not by any philosophical shift in the meaning of divorce, but in a piecemeal way as a reaction to pressure from fathers' groups and because of the mounting body of evidence that the allocation model of divorce [i.e. allocating property and custody as a once and for all time process, as above] was inadequate to deal with the consequences of relationship breakdown.*¹²

In our view, whereas various consultees made suggestions for different presumptions to be enshrined in law (which would be rebuttable where there were domestic violence or 'safety of the child' considerations), this would introduce inflexibility into the system and hamper judges' discretion in a way that could conflict with the paramountcy principle. Although presumptions are based on widely agreed norms of what life should be like in the significant

10 Trinder, L., 2003, 'Working and Not Working Contact after Divorce' in Bainham, A., Lindley, B., Richards, M. and Trinder, L., *Children and their Families: Contact, rights and welfare*

11 Buchanan, A. and Hunt, J. 2003, 'Disputed Contact Cases in the Court' in Bainham, A., Lindley, B., Richards, M. and Trinder, L., *Children and their Families: Contact, rights and welfare*

12 Parkinson, P., 2006, 'Family Law and the Indissolubility of Parenthood', *Family Law Quarterly*, Volume 40, Number 2: 239-283

majority of cases, the small number which go to court are often somewhat unrepresentative, not least in that they are often highly conflicted. Such presumptions can hamstring judges in a way that the laying down of principles does not. Before setting out what principles would seem workable and helpful in an updated Children Act (however well-conceived and well-received it was, the 1989 Act is still twenty years old and makes very little mention about highly salient issues for today), we lay out which presumptions have been suggested to us by various bodies, before outlining some broad principles which might serve all interests better.

5.1.2 SUGGESTED PRESUMPTIONS

Families Need Fathers and others suggested that there should be a presumption of **shared care/parenting** with the possible starting point that both parents would have an expectation of an equal right to parenting time. We bear in mind that Australia has very recently introduced, under pressure from the men's lobby, the *Family Law Amendment (Shared Parental Responsibility) Act 2006*.

As Richard Chisholm, a highly regarded Australian High Court judge and now a professor at Sydney University, says,

...if there is an order for equal shared parental responsibility (or if one is about to be made) the court comes under an obligation to 'consider' whether equal time, or if not 'substantial and significant' time, would be practicable and in the child's best interests.¹³ 'Substantial and significant time' is defined to mean, essentially, weekdays and weekends and holidays, times that allow the parent to be involved in the child's daily routine as well as occasions and events that are of particular significance to the child or the parent.¹⁴

This is an important provision, but falls short of establishing a presumption that it is better for children to spend equal time, or substantial and significant time, with each parent. One obvious intention was to challenge any assumption that it is normally satisfactory for children to see one parent only for limited purposes, such as being entertained at weekends, which would make it difficult for that parent to be fully involved as a parent, and difficult for the child to maintain or consolidate a secure attachment with a parent whose behaviour is oriented only to visiting rather than care-giving.¹⁵

13 Section 65DAA. A separate consequence of an order for equal shared parental responsibility is that the parents acquire an obligation to consult about important decisions relating to the child: see s 65DAC.

14 The court must consider whether equal time would be in the child's best interests; and whether it would be practicable; and, if it is, consider making an order for equal time: s 65DAA(1). If not, then the court must consider the same issues in relation to 'substantial and significant' time: s 65DAA(2).

15 Chisholm, R., 2008, *Shared Care and Children's Best Interests: Working with the amendments of 2006*, paper prepared for the Legal Aid NSW Family Law Conference, Sydney, 22 August 2008

Whilst his comment is undoubtedly correct regarding the position adopted by the higher courts in Australia, it must also be recorded that the effect of the legislation on the ground, coupled with the expectations created in the publicity surrounding the introduction of the Australian legislation, is that many fathers, and mothers, now expect to negotiate on the basis of equal time. This has made it more difficult for mediators and others dispute resolution specialists to create practical contact arrangements. The public expectations created for any change in legislation as well as the actuality of the changes must always be taken into account.

This Australian legislation is not dissimilar to the call that there should be a presumption of **reasonable contact** and claims that the UK Government has erroneously assumed that this presumption is already the legal position and so has not sought to introduce it. This goes back to the days of their green paper on parental separation, which proposed that courts could issue parenting plans which would embody a formal recognition that the child needs the 'frequent and continuous contact with both parents, recommended by child development experts'. Parenting plans would outline what full and frequent contact meant in terms of time. (2003) Fam Law 455 notes that, in Florida, parenting plans setting out cycles of contact in average cases meant that American parents knew what kind of order a court was likely to make, reducing the likelihood of litigation.

However there are already pressures on lawyers and parents in this country not to litigate but to settle. The small percentage of those that do make it to the inside of the courtroom (estimated by Dr Liz Trinder in her evidence to be around 10 per cent of the 10 per cent who are too conflictual to make their own arrangements), need to be concluded by a final hearing.

So the argument of those calling for a presumption of reasonable contact is that it would increase predictability and provide a better starting point for the usually disadvantaged parent, by framing expectations differently and more clearly.

Finally, there is the more extreme and prescriptive suggested presumption that the starting point is a presumption of **shared residence**. Campaigners suggested that as (mainly) fathers feel marginalised and patronised by the current system (an impression shared by many we talked with), the starting point should be that shared residence was available and parties should negotiate from there around the notion of what would be in the best interests of the child. This starting point would, they say, make it impossible for one party to hold all the advantages and for the other party to be in the position of supplicant. Again, looking at Australia, there has been concern voiced in the academic literature that the children who are most likely to be



Families Need Fathers and others suggested that there should be a presumption of shared care/parenting.

in a shared residence/equal time arrangement may actually be those where parents are most conflicted, are most tenaciously holding onto a sense of their rights and are not holding the child's interests as the paramount consideration.¹⁶

The possibility that something similar to the Australian experience might occur if a presumption of shared residence was introduced in the UK should prompt us to consider whether we should be changing the law to provide new starting points or be intent instead on working more towards the spirit of the original *Children Act 1989* and keeping children's interests at the top of the agenda.

We considered it to be more fruitful to recommend instead the mandatory attempt to resolve children disputes before commencement of proceedings, more considerable information about mediation and other ADR and to emphasise relationship-based interventions. These mechanisms help to address the hurt which both parents are experiencing as a result of the separation and which may be framing their reactions to each other post-separation and driving contested contact disputes.

5.1.3 A DIFFERENT APPROACH – PRINCIPLES NOT PRESCRIPTION

We need to be principles-based but pragmatic. The *Children and Adoption Act 2006*, aimed to tackle many of the contact issues we are grappling with. It is still very early days in its implementation and its measures may be useful and in some cases very valuable. It was directed partly against the non-primary carer, often the father, who will not commit and comply with the contact arrangements that are made and also partly against the primary residential parent, most often the mother, who for various reasons engages in steps (at the extreme being intractable hostility in preventing contact for reasons), which may often have little to do with the best interests of the child. The family court has always struggled with appropriateness and proportionality of enforcement of contact orders against the primary residential parent, because of the inevitable impact on the child but to the frustration of the non-primary residential parent. However drastic action will be taken; for example in *Re K* [1999]¹⁷ the court transferred residency from the mother to the father because it was thought that he would be more likely to facilitate future contact. Whilst lobby groups we consulted considered the legislation to be moving in the right direction, the Act does not make any explicit statements about the status of parents post-separation.

¹⁶ It should be recorded that over the last few years some English family courts have been making more *shared residence orders*; not on the basis of equal time but where parents are enjoying good periods of contact with the children and it is perceived that making a shared residence order, rather than a sole residence and a contact order, would be psychologically beneficial. In one reported case where the father was the primary carer, a shared residence order was made 'to keep the mother happy'. Cases in which there has been equal sharing of holidays and alternate long weekend contact have been the subject of shared residence orders. Moreover such orders have been made when the parents are in different countries as a recognition of their continuing significant involvement and one parent having as much time with the children as the geographical logistics allow.

¹⁷ *Re K* (Residence Order: securing contact) [1999] IFLR 583

As Hunt and Macleod 2008 state:

The aim of this legislation, as far as the contact-related provisions were concerned, was to provide courts with a greater range of powers to facilitate and enforce contact. However much parliamentary time was devoted to debating proposed amendments which would introduce a statutory, rebuttable presumption of, under varying guises, minimum levels of contact, into the Children Act, 1989. At the heart of these attempts to change the law were concerns about non-resident parents who went to court for a contact order but ended up with little or no contact for insubstantial reasons.¹⁸

The government strongly resisted all arguments for introducing a statutory presumption of contact, let alone any particular quantity of contact, on the grounds that a) the courts already started from the point that contact was to be promoted unless there were good reasons to the contrary and b) that a statutory presumption would undermine the fundamental basis of the Children Act, the paramountcy of the interests of the child. It was acknowledged, however, that there was little statistical data on the outcomes of court proceedings. As Baroness Ashton, for the government, put it.

I believe that the time has come for us to look very carefully at repudiating some of the anecdotal evidence and to consider carefully what has happened in the court. To understand more about the process we shall research what happens when the courts start with a desire for contact and see what the final orders are. If the research recognises the problem...raised with me anecdotally, I will take action to address it, recognising the critical importance of establishing the evidence base.

Hunt and Macleod's study was commissioned to give effect to that commitment and its conclusions appeared to justify the government's position. These findings have been, and will continue to be, contested, but it raises the question, as stated earlier, should we be focusing on changing presumptions when recent legislation has refused to 'go there', or should we be focusing on the spirit of the *Children Act 1989* and making our recommendations fit with getting parents to hold the child more in view rather than their own rights? This review has concluded that we have to steer a middle course where we lay down principles rather than presumptions, but our other recommendations for example around the broad spectrum of relationship education services pre- and post-separation, repeatedly emphasise a focus on children.

18 Hunt, J. and Macleod, A., 2008, *Outcomes of applications to court for contact orders after parental separation or divorce* OXFLAP/MoJ

However, we are aware that this cannot only be about the child and that we need to acknowledge that parents do have rights. Bainham makes the point that ‘it is now clearly established in the decisions of the European Court that the right of contact between parent and child is a fundamental element in the idea of respect for family life.’¹⁹ Obviously the key corollary of those rights are the duties that some parties have also emphasised should be codified.

Bainham states that:

*A child’s right to contact with the father implies a duty on the mother to allow it, in so far as it is reasonably exercised. But if there is to be a duty to allow contact, why is the father not under a duty to exercise it? He should be and is in some jurisdictions... Scots law provides expressly that a parent has both a right and duty in relation to contact.*²⁰

There is a concern among academics and other consultees that rights should not be given out to men (fathers) without responsibility. Smart and Neale talk about how this can enhance gendered power without accountability although it has to be said that mothers also quickly reach for the notion of their own rights when decisions about children go against them.²¹ Arguably parental responsibility should be clarified in terms of its status as the necessary corollary to rights. Bainham recommends placing men under clearer legal duties to remain involved with their children and to seek ways of facilitating this continued involvement.²²

5.1.3.1 Conclusions on principles and presumptions

The Children Act needs to be amended to include principles for contact and residence that are clearer and more explicit but nevertheless leave room for flexibility and judgement in difficult cases. Currently the Act gives no guidance whatsoever about how time should be allocated between parents when the court is making contact orders, and what the goals of the decision-maker ought to be. The welfare of the child may be the paramount consideration, but that is open to widely diverging value judgements.

The case for change is that the Children Act was drafted in an era when the assumption was that courts were faced with a binary choice between two alternative homes – the mother’s home and the father’s home. Contact/access was what the loser received in the residence/custody dispute. Now we see many

19 Bainham, A., 2003, ‘Contact as a right and obligation’ in Bainham, A., Lindley, B., Richards, M. and Trinder, L., *Children and their Families: Contact, rights and welfare*, p 65

20 Ibid, p74

21 Smart, C. and Neale, B., 1999, *Family Fragments?*, Polity Press

22 Bainham, A., 2003, ‘Contact as a right and obligation’ in Bainham, A., Lindley, B., Richards, M. and Trinder, L., *Children and their Families: Contact, rights and welfare*

cases where the *level* of contact between the parents is really the issue. There is also a greater willingness to accept greater shared parenting, with a significant growth in equal time arrangements according to the latest research.²³ The pressure for reform reflects a greater degree of involvement by fathers in their children's lives in the last 15 years.

Parliament therefore needs to address a significantly changed social and parenting context since the *Children Act 1989* was drafted.



The pressure for reform reflects a greater degree of involvement by fathers in their children's lives in the last 15 years.

5.1.3.2 Principles to be laid down in amendments to the Children Act

As stated earlier, it is necessary to lay down principles which would represent values established by Parliament, rather than either leaving judges with just one presumption which produces what some may consider to be somewhat arbitrary decisions or hemming them in prescriptively. Such principles need to be stated at an appropriate level of abstraction and be framed in such a way that they also give guidance to parties such as mediators, CAFCASS and lawyers, so that they can assist clients to understand how judges will arrive at their decision (thereby removing some of the current uncertainty).

Section 11 of the Act is currently headed 'General principles and supplementary provisions' but it does not offer any particular principles concerning how to decide the case.

We recommend that a new subsection (1) be introduced along the following lines and the remaining subsections renumbered. It uses language already contained in s.11(1) and also a legislative statement about what is and is not likely to be best for children similar to that contained in s.1(2) of the Act. (We have maintained the gender-specific language of the Children Act (using 'he' and 'his') but of course the principles apply also where mothers are non-resident parents.)

- (1) In proceedings in which any question of making a section 8 or section 13 order, or any other question with respect to such an order, arises:
 - (a) the court shall, in addition to the considerations contained in s.1(3) of this Act, also have regard to the principles:
 - (i) all those with parental responsibility shall be considered to have an equal status in their children's lives following separation unless the contrary was shown;
 - (ii) that children are most likely to benefit from the substantial involvement of both parents in their lives subject to the need to protect them from abuse,

23 Smyth, B. and Moloney, L., 2008, 'Changes in patterns of post-separation parenting over time: a brief review', 14 *Journal of Family Studies* 7. Also Family Court of Australia, 'Shared Parental Responsibility Statistics' (2009) available at: http://www.familycourt.gov.au/wps/wcm/connect/FCAO/home/about/Business/Statistics/FCAO_stats_SPR

- violence or continuing high conflict.
- (b) in determining if, when and how to make an order providing for a parent to have a substantial involvement in the life of the child, the court shall in particular consider the benefit to the child, and the reasonable practicality, of contact of sufficient frequency and duration that the parent is able to have a substantial involvement in the child's day to day routine and activities; this may be in the form of a joint (or shared) residence arrangement.
- (c) in assessing the benefit to the child of making an order that allows for a parent to have a substantial involvement in the life of the child, the court shall have regard to the extent to which that parent has in the past had such an involvement and/or has fulfilled his parental responsibilities, including where appropriate, the regular payment of child support and other financial provision and support.
- (2) the court shall (in the light of any rules made by virtue of subsection (3) –
 - (a) draw up a timetable with a view to determining the question of making a section 8 or section 13 order without delay; and
 - (b) give such directions as it considers appropriate for the purpose of ensuring, so far as is reasonably practicable, that that timetable is adhered to.

A revised subsection of this kind is not prescriptive.

Paragraph (a) indicates that those who had parental responsibility prior to separation should be treated as having an equal status afterwards, and that children are likely to benefit from the substantial involvement of both parents in their lives, subject in both cases to the need to protect children from abuse, family violence or continuing high conflict. It applies to those who subsequently obtain parental responsibility. However, it leaves open the possibility, even in the absence of abuse, violence or continuing high conflict, that a child will not in fact benefit from the substantial involvement of both parents. A court may conclude this, for example, where the mature child is implacably opposed to seeing a parent, or where the parent has such a history of mental illness or other behavioural difficulties that he or she is unable to parent or care effectively. The court will still have regard to the 'welfare checklist' in s.1(3) of the Act, and factors that would indicate that substantial involvement is contraindicated will no doubt emerge from a consideration of those factors. The proposed paragraph refers to equal status, but not equal time. The former is an appropriate recognition of the equality of the parents; the latter is merely one way in which parenting can be organised – in appropriate cases.

Paragraph (b) requires the court in particular to consider the benefit to

the child of a contact order or shared residence order that allows for frequent contact.²⁴ It gives content to the term ‘substantial involvement’ by focusing on involvement in the child’s day to day routine and activities. Of course, this is subject to reasonable practicality. That level of involvement (taking the children to sports activities or music lessons during the week, for example) is dependent upon the parents living close enough to make it possible. Substantial involvement may be found in other ways and aspects within a parent-child relationship and does not necessarily require geographical closeness.

Paragraph (c) draws the court’s attention to whether the parent has had much involvement in the past. The law needs to support those parents who have been actively involved in their children’s lives to continue in that role. This is most likely to be the case where they have lived together and one parent has taken a significant parenting load prior to the separation. The paragraph allows the court to give short shrift to the claims of parents who have had little or no previous involvement in the life of their child, or who have neglected their responsibilities (for example by constantly failing to show up for contact or being several hours late).

The reference to child support and financial provision is very deliberate. A good indication of whether a non-resident parent really is committed to his child and willing to share parental responsibility and substantial involvement is whether he has provided financial support during the relationship, if able to do so, and whether he has paid child support, post separation if able to do so.

The proposed law will also be likely to shift the law of international relocation in cases where the proposed move would deprive a responsible and caring parent of substantial involvement in the life of the child. Subsection (a) ought to be read, in these circumstances, as overturning, or at least shifting the evidential burden of the decision in *Payne v Payne*.²⁵

The proposed draft clause draws on some of the more beneficial concepts in the Australian legislation (which itself draws in places on some good ideas from elsewhere including England), but does so in a way which will be unique to the Children Act. It maintains the simplicity and brevity of the Children

24 There is no intention as a consequence of this proposal, to create any additional obligation or duty on local government in respect of housing obligation.

There might be some concern that the granting of a shared residence order might act as an imperative on the Local Authority to provide a second home for the family. However, such a matter was recently before the House of Lords in *Holmes-Moorhouse v London Borough of Richmond-upon-Thames* [2009] UKHL 7 where the eventual decision was that shared residence does not create priority housing need. When the father left the matrimonial home a shared residence order was made in respect of three children. Under the terms of the order the children were to spend alternate weekends and half the school holidays with each parent. However the father was effectively homeless and approached Richmond Council, contending that he was to be treated as having priority need as a person with whom dependent children might reasonably be expected to reside (Part VII Housing Act 1996 and section 189 (b)). The council refused, contending that the father could not have a reasonable expectation if that expectation was based upon the council providing the children with a second home. The self-evident conflict between the statutes went to the House of Lords for resolution. They accepted that the Local Authority had to make a wider determination than that of the welfare of children alone (as per the Children Act 1989) because in this case, the children would be housed in any event. It was said that the family court could not exert pressure upon a housing authority to provide resources for one or other of the parties.

25 (2001) EWCA Civ 166. See section 5.3.

Act's approach to drafting.

The draft clause also offers much to both mothers and fathers. It addresses the concerns of many caring and involved non-resident parents (mostly fathers), while also addressing the concerns of parents' groups about violence, abuse, and high conflict. It also meets their concerns about fathers who will litigate to enforce their 'parental rights' while frequently neglecting their responsibilities. It builds on the 2006 legislation with the importance of good contact actually taking place for the benefit of the child with the non-primary residential parent. It is the hope and expectation that this draft clause, coupled with the 2006 legislation and the proposal elsewhere in this report for mandatory attempt at dispute resolution of children cases before the commencement of proceedings, should reduce the number of contact applications to the courts. It should increase the number of cases where contact takes place as agreed or decided to be in the best interests of the child. It is a constructive and positive provision, which nonetheless gives much more guidance to courts than the present Act and modernises it in an appropriate way.

5.1.4 OTHER ISSUES

Brussels II has crucially provided for the importance that the voice of the child is heard by the court before any decisions are taken.²⁶ Some countries such as Germany interpret this as a fundamental requirement that the judge actually sees and talks with the child. In England it has been interpreted that in circumstances where the voice of the child should be heard because of age and circumstances of the case, a report of CAFCASS or another court or social worker is sufficient. However children of mature years sometimes positively

“There are long delays in the family court process in hearings. In some situations this can mean that the parent who is not the primary residential parent and their child cannot enjoy a good relationship during that time.”

want to have the chance to speak to the judge and having done so, are more satisfied with the arrangements that are then directed. A good number of judges feel comfortable in seeing the children and would especially if there was specific training in how to do so. Some mediators have been specifically trained to have child inclusive mediation and this could be extended to judges. We hope that England will move cautiously and sensitively towards more opportunities for the court actually and directly to hear the voice of the child.

As stated elsewhere in this report, there are long delays in the family court process in hearings, including from the outset of an application to the final adjudication. There are many reasons for this. A number of the recommendations in this report seek to resolve difficulties which are creating the delays. Nevertheless these delays exist. In the context of contact applications, the greatest majority being of private law children cases, they invariably work against the applicant who is normally the

26 e.g. Article 23(b) Council Regulation (EC) No. 2201/2003)

father, who is seeking some or greater contact. This is not a gender bias within the court system. However the consequence of the delays and adjournments is to create a perception of a gender bias. An adjournment of a hearing regarding contact (for instance because the primary carer does not attend, or for a number of other reasons), may be justifiable in itself, but has the direct result that contact is even more delayed, to the direct prejudice of one parent and at a loss for the child in the relationship. Where the applicant for the greater contact is very much the supplicant, and no more contact is provided by the primary residential parent unless ordered by the court, delays of several weeks or more often months mean that the parent who is not the primary residential parent and their child are not able to enjoy a good relationship, if a relationship at all, during that time. With the adjournments for CAFCASS reports often being for at least 14 weeks, this is a severe prejudice against the applicant for better contact. The delay is against the best interests of the child.

Moreover, where there is a significant development, such as allegations of domestic violence, contact may be stopped altogether by the primary residential parent, perhaps encouraged by social services and others, until there can be a fact-finding hearing into the allegations. This hearing may take at least six months to occur. Throughout this time there may be no contact or very inadequate, supervised contact. At the hearing it may well be that the allegations are found to be false and as a consequence contact can be re-established. However by now the child has had no contact with one parent for many months and the recommendation is usually made that there should be a staged re-introduction! Yet even more time goes by before the parent has good contact again. Of course safety for the child requires that protective steps are put in place, which may be supervised contact. Nevertheless breaks in contact between a parent and child, for whatever reason, are thoroughly disadvantageous and detrimental and their duration should be minimised. There should be a priority given in circumstances where court delays will mean that a child is not having the benefit of contact or some contact.

At the time of the Children Bill, there was debate about a specified period in children proceedings between commencement and adjudication. It was not included in the final legislation. *Brussels II* requires six weeks in child abduction cases for adjudication. We raise for debate that the delays in the court system in dealing with contact are now becoming so prejudicial and disadvantageous to the applicant parent, as to be fundamentally against the best interests of the child and may require either statutory or practice direction guidance for setting prescribed periods.

Within the resolution of children cases, particularly contact, there is much emphasis placed on maintaining the status quo of the arrangements for the child until there can be an agreement or adjudication, and then usually thereafter the status quo is maintained as it is perceived as being beneficial for the child. This has naturally many benefits and advantages. Nevertheless it has a tendency to encourage self-help creation of a status quo, with parents taking

tactical action in the early days of the separation to create a status quo favourable to them. Having done so, the likelihood of obtaining a beneficial outcome to contested children proceedings is much increased. The family courts should be very alert and recognise that often it can work to the disadvantage of the parent seeking greater contact. There should probably be less weight given to immediate post separation parenting arrangements and more to looking at what the better longer term arrangements for the child are.

Finally, it is important to emphasise with both contact and relocation that domestic violence and high levels of conflict will affect outcomes.

5.1.5 SUMMARY OF PROPOSALS

An amendment to the *Children Act 1989* to include explicit principles of contact and residence, incorporating equal status of those with parental responsibility and the benefit to the children of both parents having a significant involvement in their lives, with the welfare of the child remaining the paramount consideration.

5.2 Contact centres

5.2.1 INTRODUCTION

There are nearly 250 contact centres in the UK which are members of the National Association of Child Contact Centres (NACCC). They are providing supported and supervised contact for parents who do not live with their child(ren). Although over two thirds of these receive some funding from CAF/CASS, we heard that there is a desperate need for funding for contact

centres. They may receive start-up funding but still struggle to fund themselves on an ongoing basis. Some centres are not always located in the areas of greatest need because they are often dependent on the goodwill of other organisations, who may sometimes not charge them for using their premises, thus allowing running costs to be low. In the more expensive urban areas and where all costs have to be covered, the figure can be as high as £25,000. The average cost of running a centre is only around £4000 per year because of the very heavy reliance on a committed volunteer base. Only one third are able to open

weekly (the majority open fortnightly). The total number of volunteers involved in contact centres is 4600, giving an estimated 170,500 hours of time per annum.

The social benefit of these contact centres, which facilitate 47,500 sessions of contact for 17,000 children a year, cannot be exaggerated. If they did not exist, there would be very many children who would rarely or never see one parent. There are many cases where as a consequence of past domestic violence or other relationship and behavioural difficulties, supervised contact is required.



If contact centres didn't exist there would very many children who would rarely or never see one parent.

(Photo courtesy of the National Association of Child Contact Centres)

Fred Devereux from the Salvation Army Contact Centre in Birmingham told us that Contact Centres are used in a wide variety of situations where parents cannot sort out unsupported contact. For example many Asian families attend where the parents had an arranged or forced marriage and have subsequently broken up. The ongoing family dynamics necessitate supported contact. More unusual family circumstances also require contact centres. 'We had a young mother who was in witness protection and had no contact with her child for 14 months or so. It took her a long time to regain custody at which point she had to use our contact centre to become familiar with her child again.'

Invariably this can only occur at contact centres with qualified staff. Sometimes this may only be for a matter of months or so until supported (unsupervised) contact can occur. The contact centres act as an invaluable bridge from the time of separation or the time of a domestic incident until it can be safe again for the child to be with one parent. In many cases, supported contact alone is needed, perhaps in circumstances where one parent is not comfortable with the other parent having contact without some assistance. The contact centre provides this support in a neutral, passive and child friendly environment. Sometimes as a matter of precaution, where serious allegations have been made by one parent, it is inappropriate for contact to take place outside of an environment such as a contact centre until the allegations have been investigated. This can often be harsh for the contact parent who denies the allegations, however it is the proper and safe course of action for the court to adopt for the child concerned. Often the contact centre is only a short or medium term assistance before unsupported contact occurs. Sometimes the contact centre is merely used as a safe public place for handover of contact between parents.

There are a variety of situations in which contact centres provide an invaluable service for parents and children in facilitating the relationship between child and parent. They are fundamental for many families post separation. Many children have had their relationships with one parent created, recreated or sustained through periods of contact at a contact centre.

However, they have a shrinking volunteer base and severe funding restrictions, as stated above.

We were told that CAFCASS are often willing only to part-fund even those centres which provide supervised contact which has been court ordered. The Legal Services Commission (the LSC), stopped funding these centres in April 2008. The justification given was that CAFCASS would either provide supervised contact or fund contact centres. However many centres saw a fall of between 5-70 per cent of their income, as CAFCASS do not want to be sole funders. They expect centres to apply to charitable trusts or find the necessary additional money from some other source, yet there is often no paid member

of staff e.g. a centre manager to do what can be the rather skilful work of fundraising. What is particularly demoralising is that there is no recognition that the contact centre model incorporates a very high contribution ‘in kind’, given volunteers’ own unpaid commitment and the fact that other charitable trusts e.g. churches, often make only a nominal charge for their premises or offer them for free.

“A senior member of the NACCC who has been running a contact centre for nearly 20 years told us that: ‘there is a glib assumption that someone else will pick up the tab but the need is increasing.’”

Volunteers who have been doing this work for a very long time, keep going because they can see the benefit not only to individuals, parents and children, but also to the public purse. Enormous amounts of money can be saved if contact centres are available and can prevent parenting situations from deteriorating. Local authorities are often loathe to put money into them because they do not have any statutory obligations for private law contact. However without contact centres, private law cases could evolve

into public law cases, due to child protection concerns which then become the financial responsibility of local authorities.

In the original *Breakthrough Britain* report it was recommended that local authorities should be obliged to compile local data on family breakdown so that it is treated the same as all the other causes of social exclusion identified by the Government. It was stated that ‘this would allow both national and local government to target resources more appropriately towards the reduction and prevention of family breakdown. Such a measure is likely to facilitate and enhance local action from the voluntary sector.’²⁷ If local authorities were compelled to adopt a preventative approach at all levels, primary through to tertiary, and their performance on key indices was measured, they would be incentivised to play their part in stemming the tide of family breakdown. This is what Mr Justice Coleridge described as ‘a ceaseless river of human distress’ in his speech to the Resolution National Conference in 2008, the full speech being set out in appendix 5.

Finally however, the funding model applied to many contact centres especially, we were told, in the North of England, assumes that there is no charge on the families using the centres. Obviously charging users has its complications: some non-resident parents resent having to use the centre and arguably if only one of the parents is paying this can affect the neutrality of the service. However, we challenge the notion that such a service should be free. The other legal costs associated with family breakdown are so enormous that there is very little public funding left over for these facilities, especially in the current financial climate. Hesitancy over charging users may sometimes and in some cases betray an assumption that family breakdown is something that is inevitable; it just happens and that the state will have to pick up the pieces.

²⁷ Social Justice Policy Group, 2007, ‘Family Breakdown’ Volume 1 of *Breakthrough Britain*, Centre for Social Justice, p98

People do not tend to value services for which they have not paid. Obviously there should be some sliding scale of charges with respect to incomes, but it is worth pointing out, that even for those on low income, other alternative venues for contact will cost money. Lunching in McDonalds could cost £10, going round a zoo together could cost double that amount.

5.2.2 RECOMMENDATIONS ON CONTACT CENTRES

We therefore recommend that responsibility for funding contact centres be spread between CAFCASS, the local authorities and end-users. A key aim behind this proposal is to help engender much needed cultural change around the subject of family breakdown. There has to be a preventative ethos in national and local government, either by preventing breakdown happening in the first place, or by preventing a deterioration of ongoing contact arrangements to the extent that private law issues degenerate into public law concerns, or one parent has no or minimal contact with the child. Similarly an all-important message has to be conveyed to end-users that the state cannot pick up the whole tab for services provided post-separation.

It is possible, even likely, that some contact centres which have never charged will be extremely reluctant to do so now. This is understandable, not least because many people would prefer not to have to use their centres. However we are conscious of the important principle of personal responsibility in issues concerning their children and the costs and consequences associated with having them. However we are mindful of the practicalities of outworking this principle, when those who use the centres are on exceptionally low incomes and would genuinely not be in a position to make payments. In these limited circumstances we felt some accommodation would have to be made, but that the norm should shift towards charging the majority of users regardless of whether or not they have been compelled to use these centres in order to see their children.

A new funding model might incorporate a discretionary element in which centres have to fund themselves either by fundraising or charging. It is anticipated that this amount would be smaller than it is at present, as local authorities should also be putting money into the pot.

The charitable sector has many creative ways of charging end-users in order to facilitate choice and indeed buy-in. Through an 'opt in' system it is possible to set a basic charge to be levied on those who are using the centre somewhat reluctantly. As indicated above, there are costs with contact and there should be an expectation that the users of the contact centre, and specifically not necessarily just the party having the benefit of contact, should make a contribution as they are able. To reiterate, charging no one, because some are using the service reluctantly, is unsustainable, and especially in the current economic climate.

As part of the joined up family services advocated in this report, in the context of post-separation parenting it is anticipated that assistance would be

sought through the Family Relationship Hubs, which would refer people on to the contact centres. We would hope that this would also serve to raise the profile and use of contact centres.

The group specifically wanted there to be public recognition of the very considerable volunteer work undertaken at contact centres by the very many people concerned about children and child-parental relationships.

5.2.3 SUMMARY OF RECOMMENDATIONS

- **Contact centres provide an invaluable service for short-term, and sometimes medium and longer term, contact between a child and parent. However their role is diminished, even unrecognised, in the overall services for children. This must be reversed so that they are recognised as a key element in children's services.**
- **Recent rearrangements in funding have meant that whilst start-up funding may be available, ongoing costs often cannot be met even with considerable volunteers and charitable support. Yet the costs of running many contact centres are relatively small, especially when taking account of their considerable benefit in post separation parenting and the costs saved elsewhere such as in public law proceedings and ongoing private law disputes. These relatively modest costs should in future be funded.**
- **There should be a partnership of funding between central government, local government, CAFCASS and the centres themselves, recognising that the centres for their part may continue to rely on volunteer work and charitable donations.**
- **There should be an obligation on local government to ensure that geographical areas of particular need have provision of appropriate contact centres.**
- **Whilst there should be more reference to the users making a contribution, there has to be recognition that they are seldom in a financial position to make any material payment.**
- **The services provided by contact centres should be linked with Family Relationship Hubs as part of the combined provision of services for families and children.**

5.3 Relocation and international children

With many international families, there are of course correspondingly very many international children. In this respect there has been some very good international progress. The United Nations Convention on the Rights of the Child (UNCROC) has had a dramatic benefit across the world. Its influence is

felt in many laws, national and international. The Hague Conference has also made good progress, particularly in child abduction and child adoption. Nevertheless, there is still a lot to be done.

At the time of separation, when one parent may have come from another country, she may wish to return home and take the child with her. At the time of separation or subsequently, one parent may seek employment abroad for financial reasons or career prospects or be posted abroad, and want to take the child. At the time of separation or more often subsequently, one parent may want to move abroad to be with a new spouse or other partner or simply because of a preferred life in another country and would want to take the child. In these situations, permission of the other parent to relocate abroad is invariably required. If permission is not given, the court can be asked to give permission.

England is probably the world's most liberal jurisdiction in making relocation orders. Provided the primary carer is able to put forward good, practical, well-prepared and considered plans and especially if able to demonstrate emotional and other unhappiness at having to remain, then permission to relocate will usually be given. Lifestyle choices of one parent are an acceptable reason for the family courts in allowing a parent to move to the other side of the world, despite being perceived by the other parent and grandparents, etc. as putting the future of the primary carer parent above the interests of the child and allow them to have a geographically close, ongoing relationship with both parents and wider families.

English child relocation law has not significantly changed for over 30 years.²⁸ However, as shown elsewhere in this report, patterns of parenting have changed dramatically in the past 10 years.

Whilst child abduction has two major international conventions, child relocation has none. Specifically, the jurisprudential rationales for permission to relocate differ significantly around the world, whilst being notionally in the best interests of the child. Some countries put much weight on the importance of the child having an ongoing close relationship with both parents, even if that requires inhibiting one parent from an international move. Other countries at the other extreme, such as England, allow relocation provided a good case is presented by the primary carer on the plans for the proposed move. Relocation applications may be one of the most common instances of the national family lawyer dealing with international aspects, as they are so frequent.

Yet within England, our law is very often criticised. Fathers are usually the parent left behind when the other parent, the primary caring parent, decides to relocate abroad. This is often very harsh. The practical reality is that on

28 *Poel* [1970] 1 WLR 1469 and *Payne* [2001] EWCA Civ 166

parental separation in most cases, the mother becomes the primary carer because she has undertaken this role at birth and often continued, whilst the father has (usually) been the primary bread winner. On separation these roles simply continue. Indeed, fathers are sometimes criticised by the courts if on separation they indicate they would like to give up work and become the primary carer. Consequently it is usually the father who sees the children for contact visits and is not the primary carer. He continues to earn and provide financial support for the child and often for the mother. Yet if the mother then decides to relocate, perhaps for work or perhaps for personal reasons, the application is stacked in her favour under the present law because of the simple convenience of the role arrangements on and after separation. This is not necessarily right for the child or for the family.

Whilst of course the best interests of the child are paramount, there are much wider interests at the time of relocation than there may be at the time of separation, when it may simply be which parent in a single geographical location is better able to be the primary carer. In circumstances of relocation, it is not only the continuation of roles from the past which should inform the child's best interests. It is the severance from schools, perhaps an entire educational system, perhaps from a language, from a particular culture, from peer age friends, from grandparents, from other wider family and many other severances. This is as great and sometimes much greater than the impact of parental separation, when often other infrastructure elements of the child's life continues, such as schooling and friendships. The continuity of the relationship with one parent (the primary carer), should be set against the discontinuity not only with the other parent but with many other stabilising and important features of the child's life. English case law has seemed to place too great a reliance on the sole question of the past arrangements with the primary carer and too little weight on the whole impact on the child of relocation.

Whatever decision is taken, to permit or refuse relocation, is harsh on one parent and may have an adverse impact on the child. Simply refusing relocation applications is not the answer. It is a balance and has to be in the best interests of the child. At present the balance is too far in the direction of the parent wanting to relocate. An imminent change in case law is very unlikely. In this situation Parliamentary intervention is required.

The above principles in the changes to Section 11 of the *Children Act 1989* could be the starting point and provide guidance where it is currently lacking, as to how the non-resident parent can be factored into the decision-making process in regards to relocation. Currently the resident parent has disproportionate 'rights' in this area, with their desire to move away being the sole or primary consideration. Provided they have put together a good case for the education, accommodation and other interests of the child in the new location, and the application is not motivated by opposition to the other spouse, relocation will be allowed. This accords with what many see as the outdated notion that the child has one psychological parent, and the continuation of living with them best

serves the interests of the child. Using the same line of argument outlined above, there should not be a blanket policy of ‘no relocation’ applied through the law. Instead the principles which judges will be using when deciding contact arrangements, as above, should also be considered, for example when applications for changes in geographical location are made.

Internationally, there is no consensus and no movement towards reaching one approach. It is a difficult issue which, unlike the relocating child, will not go away. We strongly encourage international dialogue and the creation of consensus about when child relocation is and is not appropriate. We strongly urge government to press this forward. We suspect it requires a convention to create and bring together international consensus.

5.3.1 SUMMARY OF RECOMMENDATIONS

- **A change in the law regarding relocation such that an amendment to the Children Act as proposed above (see section 5.1.3.2), would apply in such cases, to take better account of the changed patterns of parenting, the considerable impact on the child of relocation away from home and other home environment features and wider family members, yet taking account of the increased movement of families.;**
- **A call for an international Convention to establish international consensus on child relocation.**

5.4 Rights of extended family

5.4.1 THE ROLES OF GRANDPARENTS AND EXTENDED FAMILY MEMBERS

Most people acknowledge the importance of mothers and fathers to their children, but there is a growing recognition of the important role played by other family members, especially grandparents, within the family framework.

Recent Economic and Social Research Council (ESRC) research found strong evidence of the value of grandparental involvement in the lives of adolescents in reducing adjustment difficulties, especially amongst adolescents from non-intact families.³⁰ Speaking to Grandparents Plus at the Young Foundation about this research, Professor Ann Buchanan reported that most adolescents have at least one grandparent involved in their lives, and that while most lived within 10 miles of their grandchildren, grandparents at a distance often used phone-calls and emails to keep in touch.³¹

“65 per cent of people still live close to relatives (within an hour’s journey) and many grandparents have frequent contact with their grandchildren.”²⁹

29 The Cabinet Office Strategy Unit paper for the Department for Children, Schools And Families – The Cabinet Office, December 2008, *Families in Britain*, p 48. It cites as source for this information, the NatCenBSA 16th report 1999.

30 Buchanan, A., et al, 2008, *National study on Involved Grandparenting and Child Well-being*. ESRC.

31 Lecture, Young Foundation, London, 20th Jan 2009.

More than three quarters of the young people questioned said that their grandparent was the most important person in their lives outside the immediate family. Of a sample of 1,569 young people, it was found that grandparental involvement in schooling and education was linked to lower maladjustment scores and fewer conduct problems, and that being able to talk to a grandparent was linked to fewer emotional and behaviour problems.

While ignoring the potential role of grandparents has social and financial costs for their grandchildren, it also has implications for the grandparents themselves, as another research group has pointed out:

Public welfare has itself helped to create its own implicit, administrative definition of families as parents living with dependent children... Once children reach adulthood, parents tend to be seen as having performed their useful role and to be labelled 'senior citizens.'³²



“60 per cent of childcare provision (i.e. by non-parents,) is provided by grandparents.”³⁵

In practice however, as *Fractured Families* found, 60 per cent of childcare provision (i.e. by non-parents) is provided by grandparents, and one in every hundred children is living with a grandparent.³³ It is estimated that there are over 13.5 million grandparents in the UK, and according to Age Concern, grandparents save the economy £3.9 billion per annum.³⁴ It is important to bear this broader picture in mind when considering how best to care for children when the bond between the parents either breaks down or has never existed. In these circumstances, evidence shows that grandparents, and particularly the maternal grandmother, often take on an important role in caring for grandchildren, and in many circumstances there is a deep bond of affection and trust between the generations.

It may not be the business of the law to preserve warm relationships, which are subject to change and fluctuation over time, but the case for protecting close biological relationships – the contribution of the child’s natural family, particularly for vulnerable children or where the alternative for the child is institutional care, is strong. Research by the Centre for Social Justice has shown that children experiencing frequent changes in family structure are especially vulnerable to abuse. Those who had grown up in lone parent or broken families were between three to six times

32 ICS Working Paper 7, May 2004, *The Grandmother Project – towards a new partnership between family and state*, p.3

33 Social Justice Policy Group, 2006, ‘Fractured Families’ Volume 2 of *Breakdown Britain*, Centre for Social Justice, p64

34 Age Concern Policy Unit, February 2004, *The Economy and Older People*, http://www.ageconcern.org.uk/AgeConcern/Documents/0758_economy_and_older_people.pdf

35 According to research conducted by the Grandparents’ Association, www.grandparents-association.org.uk [accessed 6 July 2009].

more likely to have suffered serious abuse. Children on the ‘at-risk’ register are eight times more likely to be living with a natural mother and ‘father substitute’ compared with the national distribution for similar social classes.³⁶ This point provides added importance in a situation in which recent changes in law and social policy have given status and power in family and child-care matters to individuals who are not biologically related to children.³⁷

Our concern for this vulnerability of children leads us to prefer a narrow legal definition of grandparent, as mother’s mother or father, or father’s mother or father. Where a child has been adopted, adoptive parents are for all legal purposes treated as the legal parents. This means that their own parents become the child’s legal grandparents. The term ‘grandparents’ in this section of our report is therefore intended to include adoptive as well as biological grandparents, although we recognise that in some situations, where biological grandparents have been closely involved with a grandchild, this could produce a conflict of interest between biological and adoptive grandparents. In such cases, the claims of the natural grandparents should also be considered.

This is not to diminish the contribution that unrelated close adults can make in a child’s life, but it is to acknowledge that a child’s natural grandparents, provided that they are willing and able to play a part in their lives, have special status in relation to their grandchildren.

“Grandparents are a link to the past and a bridge to the future, for family history and medical details. To give a child a sense of belonging from the roots of their family.”³⁸

5.4.2 GENDER ASPECTS OF GRANDCHILDREN CARE

While both grandfathers and grandmothers may be deeply involved in the lives of their adult children and those children’s offspring, particularly at times of crisis, it would be misleading to ignore the fact that there is a gender aspect here. In relation to day-to-day care, the evidence is that this is overwhelmingly undertaken by grandmothers. Research by the Institute of Community Studies builds on findings that go back to London’s East End in the 1950s when, they say, grandmother’s house was the hub of her offspring’s lives.³⁹ Their recent research found that, despite changes in living arrangements and housing policy that have made such close contact more difficult, grandmothers continue to play a central role today. The importance of grandparents, and especially the maternal grandparents, in the lives of children whose parents are separating, was stressed by the developmental psychologist Professor Judy Dunn, who has conducted several longitudinal studies in the UK and the USA on children’s relationships with siblings and grandparents.⁴⁰ The report *Families in Britain*

36 Social Justice Policy Group, 2006, ‘Fractured Families’ Volume 2 of *Breakdown Britain*, Centre for Social Justice, p47

37 Research conducted by the Grandparents’ Association shows that 20 per cent of grandparents under 60 are also step-grandparents today. www.grandparents-association.org.uk [accessed 6 July 2009].

38 Pam Wilson, Grandparents Action Group UK

39 ICS Working Paper 7, May 2004, *The Grandmother Project – towards a new partnership between family and state*, p 4

also stressed the specific importance of maternal grandparents when parents separate.⁴¹

Our concern now is that pressure to remove gender identification from legal and social (Local Authority) documents in the area of family law is liable to lead to misunderstanding and misinterpretation of research findings.⁴² It flies in the face of obvious factual differences in the role played by grandmothers, and specifically the maternal grandmother, and would create an unreliable basis for any proposals for policy change. It would also ignore changes in the role of men, whether fathers or grandfathers, and the acknowledged need to find out why it is that in some inner-city areas there are now communities in which many households have no adult men living in them.⁴³ This results in children missing out not only on contact with their father, but also contact with the father's family, including paternal grandparents.⁴⁴

In general even where there has been involvement by the father, it is paternal grandparents who are most likely to be excluded from contact to their grandchildren and feel upset at lack of contact and have to devote time and effort to obtaining contact, whether direct or indirect.⁴⁵

5.4.3 PROBLEMS AND POSSIBILITIES

Contact may be difficult, however, for purely practical reasons. Increased geographical mobility means that many people live at a distance from their extended family. Family breakdown, too, can mean that children lose contact with one set of grandparents, particularly those on the paternal side. Nevertheless, there are many cases in which family members do remain close by and can and do assist with (usually informal) childcare. Grandparents in particular are often called upon to provide emotional, practical and sometimes financial support during transitions in their adult children's lives, particularly in caring for grandchildren. They can act as anchors during and after family breakdown, and are often the people to whom a child can turn for explanations of change.⁴⁶ However there is evidence of a developing polarisation of situations: those where there is either no contact with grandchildren –

40 London, House of Commons, 21st November, 2007. Professor Dunn is co-author with Richard Layard of the *Landmark Report for the Children's Society – A Good Childhood*, London, Penguin, February 2009. See also Dunn, J., 2003, 'Outcomes for children of separated parents: children's perspectives on their relationships with their grandparents', *Grandparents Review*, 13(2), 13-15

41 The Cabinet Office Strategy Unit paper for the Department for Children, Schools And Families, December 2008, *Families in Britain*, p 48. It refers back for this information to its earlier publication *Realising Britain's Potential: Future Strategic Challenges for Britain*, February 2008

42 For example, The President's Gender Recognition Direction of 5 April 2005 – (see [2005] 2 FLR 122) provides (amongst other things) that 'in any decree, order or notice . . . titles such as Mr, Mrs, Miss etc should be omitted' and explains that the purpose of this is to avoid terms such as 'husband' and 'wife' which it considered a clear breach of the Practice Direction family lawyers are circulated with.

43 *Fractured Families* noted that the absence of fathers in households has an impact on many low-income communities. As Dench et al found, it is not now uncommon to have three generations of women living in one household. In many of these households no one will be working and men will be absent. *Fractured Families*, p61

44 Some researchers see the reason for this as the fact that that even when they become parents, they are not drawn into a family setting by a need to provide for their children.

45 ICS Working Paper 7, May 2004, *The Grandmother Project – towards a new partnership between family and state*, p 8

46 Social Justice Policy Group, 2006, 'Fractured Families' Volume 2 of *Breakdown Britain*, Centre for Social Justice, p57

something that can be painful and damaging for all parties – or those when a substantial burden of care is placed upon grandparents who are themselves getting older and some of whom may be infirm or have limited financial resources. It should also be recorded that some grandparents are being called upon to give childcare assistance for their grandchildren at the very time in their lives when their own parents are still alive and themselves needing time, resources and family care.

Case study: loss of contact through separation⁴⁷

The birth of our first grandson filled us with joy and delight. His father, our son, was still studying, whilst his mother had relinquished her studies completely, two years earlier. We supported their plans to marry whilst still students, providing financial support both prior to, and for several years following, our grandson's birth. Our son completed his studies, and started work but sadly, shortly after the birth of a second son, the marriage had broken down.

Initially our relationship with our daughter-in-law remained good, and we gave as much practical help as possible, making regular visits, and taking her and our grandsons on holiday, with our other children and their families. However our daughter-in-law suddenly terminated all contact with our son and his extended family, and despite strenuous efforts we have had no contact since that time. Our son has only managed one short meeting with the family and the marriage was finally dissolved.

We waited for more than a year after contact was terminated but eventually decided to seek grand-parental contact. We were advised by our solicitor that grandparents did not have any rights of contact, and that any effort to establish contact was likely to be prolonged, tedious and expensive. We gained 'leave to apply' but the eventual outcome of our application was that we were told we would not be able to see our grand-children again and were advised that our grandsons, one of whom was, at that stage, only 3 years old, had informed the officer that they did not wish to see us again. At our next hearing this was reported to the judge, who proceeded to implement the recommendation that there be no contact order. After pleas by our barrister, we were eventually granted an indirect contact order. However this is of minimal value, since none of our correspondence, or our birthday and Christmas gifts are ever acknowledged in any way. The situation shows no potential for any progress towards direct contact, leaving us with deep feelings of concern and loss. We do not think that it could be harmful to the children's interests for them to be encouraged to maintain contact with their father and his extended family.

47 Anonymous submission to Family Law Review

5.4.4 CURRENT LEGAL POSITION

Some organisations campaigning on behalf of easier grandparental involvement, approach this from the point of view of the grandparents themselves, seeing the issue as a matter of *their* rights, but it is possible and probably better to see it also as something involving the rights and benefits of the child. Since international law already recognises the rights of children, it would be possible, and may well be more effective, to bypass questions about the validity of grandparental claims to contact rights (questions which have proved contentious in other jurisdictions) and to base the case for facilitating grandparent involvement more strongly on the rights of the child rather than grandparents' rights. In the USA, for example, legal argument about visitation rights for grandparents has not produced very clear guidelines. On the contrary, it has led to very different decisions in different states. The criteria applied have differed and there is no uniform visitation law making provision consistent from state to state. Some cases have been settled on the basis that a 'fit' parent has the right to decide whether grandparents can have access to their grandchild.⁴⁸ In others, the principle that has been adopted is that the court can order grandparents' access on the basis of properly balancing the wishes of parents and the best interests of a child,⁴⁹ or on proof that no harm is likely to result from it.⁵⁰

Family law within the UK prioritises the welfare of the child and gives no automatic rights to grandparents. The current legal position is that a grandparent, prior to making any application for contact with a grandchild, needs to obtain leave of the court under Section 10(9) of the Children Act (unless exempt under Section 10(4) or 10(5)). Those who do not need leave under s10(4) or (5) are in summary:

- Any parent, guardian or special guardian of the child;
- Any person who has parental responsibility for the child;
- Any person in whose favour a residence order is in force in respect of the child;
- Any party to a marriage in relation to whom the child is a child of the family;
- Any person with whom the child has lived for a period of at least three years.

There is also an exemption when consent is given:

- By every person in whose favour a residence order has been made in respect of the child;
- By the Local Authority when the child is in care;
- In any other case, by each of those who have parental responsibility.

⁴⁸ *Troxel v Granville*, 530 U.S.57 [2000]

⁴⁹ Ohio, October 11, 2005

⁵⁰ California, August 2004

The criteria to be established, in order to obtain leave, are (s9):

- (a) The nature of the proposed application for a Section 8 Order;
- (b) The applicant's connection with the child;
- (c) Any risk that the proposed application might disrupt the child's life to such an extent that he/she would be harmed by it;
- (d) In cases where the child is being looked after by the Local Authority, the Local Authority's plan for the child's future and the wishes and feelings of the child's parents.

5.4.5 GETTING THE BALANCE RIGHT

While lawyers working in this area report that leave generally tends to be given, making the grandparent free to apply for contact in the usual way, practitioners and grandparents also report that some contact applications tend to be long, acrimonious and expensive for the individual or, if the applicant is publicly funded, for the state. They can be even longer and more difficult if both parents are opposed to an application by the grandparent, when it is unlikely to be successful.

Moreover, such law as it exists on the subject of grandparent's rights, is contested by a number of lobby groups, who hold strong views about what they see as current injustices in the system. For example, the Grandparents' Association told us that over a million children are in fact denied contact with their grandparents. We also heard that the two stage approach involved in first seeking leave of the court to apply, can cause delay and upset many grandparents, some of whom will have been very actively involved in their grandchildren's lives.

However, while we have found considerable evidence of the positive value of maintaining contact between grandparents and their grandchildren, with children benefiting from their commitment to them and their experience of life, we recognise that if the law is to be changed to benefit both children and members of their extended family, account must also be taken of some less positive factors which might feature in some situations.

For example, contact applications by grandparents may be used inappropriately as a back-door application to obtain contact for an absent parent who has been refused it. Another practical problem with grandparents' contact applications is that there are only so many free weekends for children, particularly once they get to a certain age, and if the parent without residence is having adequate, perhaps generous, contact, then there may be little additional time available. Other factors that researchers have identified as relevant, include any pre-existing family dysfunction and its potential impact on the relatives who have taken on the care of the child.⁵¹ This could include physical and behavioural problems on the part of the children themselves, as a result of their own troubled history.



Grandparents play an invaluable role in the lives of their grandchildren.

⁵¹ See Barnard, M., 'Between a rock and a hard place: the role of relatives in protecting children from the effects of parental drug problems,' *Child and Family Social Work*, 2003, Vol. 8, pp. 291-299, p 292

Case study: loss of contact through separation⁵²

A few years ago our daughter fled the marital home in a state of extreme distress having discovered that her husband was involved in an extra-marital affair. A few hundred yards from the house she had a car crash and died. A few weeks later our son-in-law terminated contact with us, saying that he wished our three young grandchildren to prepare for a 'new woman' in his life. With the children now motherless, and their father travelling worldwide for his employer, and planning to leave the children in the full-time care of a nanny, we applied for grandparental contact as a matter of urgency.

We experienced difficulties in the court system. We sought 'permission to apply', we attended court, we met a CAFCASS officer, we had our home inspected. We did not see the same judge twice in this process, despite assurances that the case would be reserved for a named judge, to avoid repetition. Finally after more than a year we achieved a judgement of '3-day staying contacts' five times a year and a two-week travelling holiday each summer.

This arrangement has been operating for more than four years, allowing the grandchildren to develop comfortable and secure relationships with grandparents, uncles, aunts and their five cousins. We will always be grateful to the fifth and final judge who recognised the significance of what we were trying to do, and the importance of maternal relatives to children in such cases. Using section 8 of the 1989 Children Act the Judge advised the children's father that he was minded to grant a staying contact order on the basis of our proposals, and advised him to negotiate a mutually agreeable contact arrangement. This was finalised in discussions and approved by the Judge. The process lasted more than 18 months and was very expensive. Such costs could not be met by the vast majority of grandparents placed in such a situation. This has been further exacerbated in recent years through the deterioration in access to legal aid.

5.4.6 KEY ISSUES

We heard from a number of groups with special interests in the role of grandparents, as a result of which we identified some key questions in our interim report:

- Is the law as it currently stands too harsh on grandparents?
- Does it serve the best interests of the child?
- Should the automatic rights to apply for contact provided in the *Children Act 1989* for some parties be extended to include some members of the extended family, including grandparents?

52 Submission to the Family Law Review

- How effective would a mediative and collaborative approach be in reducing animosity and reducing the emotional and financial costs of long legal battles in the context of grandparents and extended family members?

As regards the first two issues above, we heard evidence from FNF (Families Need Fathers) about the importance of grandparents and other family members and about the distress felt, particularly by grandparents, who felt excluded from their grandchildren's lives, and we considered the case they made for enshrining rights of access in law.

Indeed, we observed a court hearing in which the parenting role and the long-term care provided by one grandmother protected her grandchild from being placed in care or moved to a different part of the country. We heard the view of Peter Harris, Official Solicitor and now of the Grandparents' Association, in relation to the question of legal change. He considered that it should be possible for a grandparent to make an application for contact without first obtaining leave to do so. We note, however, that he considered the extension of this to other kin to be more doubtful. Given the level of support for curbing or removing the two-stage process, our recommendation is that grandparents should not be placed in the same legal position as other family members who need leave to apply to the court.

“Grandparents are known to provide care for grandchildren more extensively than other relatives, and we believe that this puts them in a special category.”⁵³

We were impressed by evidence that kinship care is important in its own right and has clear advantages for children where foster-care is at issue.⁵⁴ It is reasonable to assume that this finding is also relevant where the issue is grandparents' contact with their grandchildren. We believe, therefore, that while there could still be some justification in a minority of cases for requiring grandparents to go through the two stage process of seeking permission to apply for contact, these circumstances should be limited. Accordingly we consider instead that there should be a single straightforward application without the necessity for leave where the application is for contact. Any application other than for contact should continue to require leave as now.

When looking at the appropriate outcomes in applications by grandparents, relevant factors to be taken into account include, in particular, a prior grandparent/grandchild relationship, and the potential effect on the relationship between parent and child. Other factors that might in some cases be relevant and that have featured in decisions made in other jurisdictions, particularly in the USA, include the relationship between the parents, for

⁵³ Peter Harris, formerly Official Solicitor, Grandparents Association.

⁵⁴ Research reported by Paul Nixon, Assistant Director of Children's Social Care, North Yorkshire County Council and others at a conference on Kinship Care, 25 November 2008, Newcastle upon Tyne, under the auspices of Research in Practice. Research in Practice is the largest children and families research implementation project in England and Wales.
http://www.rip.org.uk/learningevents/Conference_Reports/kinship_care.asp

example whether together or separated. The death of one parent obviously affects the relationship with the relevant grandparents and more contact is normally then appropriate. In some cases, the intention of one parent to start a new relationship creates particular tensions for the grandparents seeking to maintain ties broken by a parent's death or by a parent's separation. Grandparents Apart have told us of the difficulties experienced by grandparents and parents in such situations. However, it should be said that absolute refusal of contact is unusual, and that evidence from the United States is that there is seldom a need for the courts to intervene where a parent is not refusing all contact.

Grandparents are particularly affected by applications by a parent who want to permanently relocate abroad with a child. The family court considering the application should take careful cognizance of the loss to the child, not only of the geographically close relationship with the left behind parent, but also of the considerable benefits brought by grandparents and other members of the wider family. Unlike the parent who may be able to travel abroad for contact, the grandparents and other family members are less likely to be in a position to maintain physical contact with the child. Relocation permission does not simply move a child from one geographical location to another. Very often it significantly destroys the ties between the child and one side of the wider family with the many issues of heritage, connectedness and roots. Too often relocation applications have seemed to ignore the benefits for the child of retaining relationships with the left behind wider family.

Our evidence suggested that the parties who seem to manage contact issues more amicably are those who were directed towards compromise at an early stage. We concluded that an approach that supports and encourages *early* mediation between the grandparent and the parent with residence (like that facilitated in Australian Family Relationship Centres) may have a real prospect of producing better outcomes for the family. This might also relieve pressure and the financial burden upon the court service. We support the proposal elsewhere in this report for mandatory attempts at dispute resolution before the issue of proceedings (see section 4.2).

Breakthrough Britain referred to the question of payment for grandparents and other carers;⁵⁵ an issue on which there is divided opinion amongst grandparents and organisations representing grandparents. Around 30 per cent of grandparents are of working age yet they are often disadvantaged in various ways especially if they have primary or secondary caring responsibilities. At present parents cannot claim childcare tax credits for care by grandparents. We believe that there should be a reduction in the current bias in the tax credit system against informal care, which may be less disruptive for small children because it can be located in their own or their grandparent's home.

55 Social Justice Policy Group, 2007, 'Family Breakdown' Volume 1 of *Breakthrough Britain*, Centre for Social Justice,, pp 54, 79

We envisage this as an extension of the scope of the childcare element of the Working Tax credit to grandparents who are not themselves registered child minders, on the same terms as those applying to 'registered' or 'approved' childcare arrangement. The amount payable would be a proportion of that given to those applying in formal care arrangements, to take account of the lower costs of caring in the child's or grandparents' own home.

The most interesting element of *Breakthrough Britain* in relation to childcare is the proposal to allow parents to use the childcare tax credit to pay close relatives to care for their children even if those relatives are not registered childcare providers. This would have several technical advantages over the current system, but it would also be superior in terms of relationship goods. Not only would it potentially strengthen the relationships between grandparents and grandchildren and enable parents and grandparents to share experiences and display mutual trust towards one another, it would also almost certainly have a redistributive effect, since lower income grandparents are those who would most likely take advantages of such a scheme. Many already perform this work for free but would be paid for it under these proposals.⁵⁶

Therefore in our Interim Report we questioned whether the extent of financial assistance given to grandparents should be regularised to reduce unpredictability in this arena. We wanted to know whether the irregularity had an impact on the availability of suitable carers for children and we were told in evidence given to the Family Law Review, that many people regard it as unfair to compensate unrelated adults for caring while not doing so for grandparents who may themselves be needy. We recognise that some grandparents would not wish to be paid directly for caring for their grandchildren, and might see it as affecting the relationship they have with them. However, it seems to us that the arguments for supporting grandparental care in this way, where families choose to seek it outweigh such possible reservations.

We welcome the adoption of proposals to allow grandparents who care for their young grandchildren to be able to gain National Insurance credits toward the basic State Pension from April 2011 and we recommend that specific ways be found in the tax and benefits system to recognise the value of grandparental care. We therefore recommend allowing the use of child care credits to be paid to grandparents who are not themselves registered child minders, when this would enable a parent to take up employment or training. The rate should be set at 70 per cent of the rate of the Carers' Allowance to reflect the lower overheads involved in looking after children either in their own home or in

56 Brighouse, H. and Swift, A., 2007, 'The end of the Tory war on single parents?' *Public Policy Research* Sept-Nov: 186-192; cited in The Centre for Social Justice, September 2008, *The Next Generation*, p145

that of the grandparent. While aware of the importance of curbing public expenditure at a difficult time, we believe that a scheme such as this, which would have the effect of reducing dependency on benefit payments, might well be low, even if hard to quantify in advance of implementation. Some savings would also emerge if existing claimants were able to switch from higher cost group childcare to lower cost childcare by relatives.⁵⁷

Finally, we noted the report of *Families in Britain* that many grandparents and their grandchildren live near to each other and have frequent contact, and also that maternal grandparents are highly involved in helping when parents separate or mothers of young children take employment.⁵⁸ We also took account of the evidence in the 'Grannyfesto' paper, which suggested that welfare state administration generally, e.g. housing allocation, should try to promote kinship contact, taking into account the benefit of children living near grandparents as a way of improving quality of life on difficult housing estates.

The CSJ Housing Poverty Report recommended that: 'the law should be changed so that local authorities are free to use new and existing social housing as it becomes vacant, as they see fit.'⁵⁹ The report concluded that local authorities should be given much more freedom to decide how to allocate social housing in their areas. Once they have this freedom, councils could then prepare their own social housing allocation plans, in consultation with local communities, setting out how they propose to use social housing stock in their area. It would be for them to balance the claims of different people on their waiting lists, and they would be free to allocate some of the social housing that comes available in their areas to sons or daughters who need to live near their parents so that they can provide them with care and support, or the parents can help with childcare.⁶⁰ We therefore support this proposal as a practical way of helping to embed parenting and marriage within the extended family.

5.4.7 SUMMARY OF RECOMMENDATIONS:

- **Grandparents should be placed in a distinctive legal position;**
- **To protect the child from multiple claims for contact, 'grandparents' should be defined for this legal purpose strictly in terms of a biological or adoptive relationship to the child;**

57 This recommendation is partly based on a broader system outlined in *Breakthrough Britain: The Next Generation*, regarding child care tax credits, which was itself based on extensive research. See The Centre for Social Justice, September 2008, *The Next Generation*, pp144-146, section 5.8<http://www.centreforsocialjustice.org.uk/client/downloads/TheNextGenerationReportFINAL.pdf>

58 The Cabinet Office Strategy Unit's paper for the Department for Children, Schools And Families, December 2008, *Families in Britain*, p.48

59 The Centre for Social Justice, December 2008, *Housing Poverty: From Social Breakdown to Social Mobility*, p68

60 The CSJ Housing Poverty Report also recommended reform of the homelessness legislation so that instead of having to provide a permanent social home for people who pass the tests set in the current legislation, or temporary accommodation until permanent social housing is available, authorities would be required to assess the housing and other social needs of homeless people, and agree an appropriate package of support to meet those needs. For many homeless people their housing needs can often be better met in the private rented sector, alongside support that addresses the underlying issues that have led them to be homeless and helps them secure worthwhile jobs and build successful lives by. This reform would free up social housing to meet other needs, such as those of families that need to live close together. See The Centre for Social Justice, December 2008, *Housing Poverty: From Social Breakdown to Social Mobility*, p73

- A single straightforward application for contact for grandparents should not require leave although other applications for S8 orders would follow existing procedure;
- Subsequent judgements regarding contact should be based on well-understood relevant criteria, which should include a grandparent's prior interest and contact with the child;
- An early approach with mandatory attempts at mediation between grandparents and parents should be encouraged before the issue of proceedings at court;⁶¹
- The use of child care credits to be paid to grandparents who are not themselves registered child minders, when this would enable a parent to take up employment or training. The rate should be set at 70 per cent of the rate of the carer's allowance;
- Authorities responsible for housing allocation should be sensitive to the importance, except when there are contra-indications, to children's well-being of maintaining contact with their kinship network, especially their grandparents.

5.5 Local Authority care and special guardianship

5.5.1 LOCAL AUTHORITY CARE

Following on from the recent Centre for Social Justice report *Couldn't Care Less*,⁶² we have heard further argument that more attention should be given to the role of the extended family when children are in the care of the Local Authority. We heard from the Grandparents' Association that 60 per cent of care is in fact already provided by grandparents and we have also heard evidence that children are sometimes placed for adoption without the knowledge of grandparents, who have been closely involved in their grandchildren's lives. Many of those we consulted believed there should be stricter implementation of the 'need to consult' requirements from the *Children and Adoption Act 2002*. The provisions given under *The Children Act 1989* Guidance and Regulations, Volume 1 Court Orders (effective as of 1 April 2008), may impact the role of the extended family within this context.

5.5.2 SPECIAL GUARDIANSHIP

Special Guardianship Orders (SGO) were introduced through the *Adoption and Children Act 2002*. Their purpose is to give the special guardian legal parental responsibility, but unlike Adoption Orders, they do not remove parental responsibility entirely from the child's birth parents, but do effectively prevent the exercise of parental responsibility by the parents save for a few exceptional circumstances. What the SGO does is that it allows the special guardian (SG) to

61 See Sir Mark Potter's evidence to the Family Law Review, Section 4.1.6

62 The Centre for Social Justice, September 2008. *Couldn't Care Less*, CSJ

exercise parental responsibility to the *exclusion* of any other person with parental responsibility save that the SG cannot cause the child to be known by a different name or to be removed from the UK, without the written consent of those with parental responsibility; or the leave of the court. Certain medical treatment, such as sterilisation/circumcision or life shortening/prolonging treatment, would also require the consent of all those with parental responsibility. A comprehensive comparison of the differences between adoption and SG was set out (in tabular form) in the Court of Appeal decision of *Re AJ (Adoption Order or Special Guardianship Order)* [2007] 1 FLR 507.

These orders enable the special guardian to be clearer about their responsibilities and to take important decisions about the upbringing of the children. Significantly, although birth parents retain their legal parental responsibility, the special guardian is only required to consult with them about these decisions in exceptional circumstances. For some situations, we were impressed with evidence from the Grandparents' Association, that 1 in a 100 children are living with a grandparent and believe that the special guardian relationship could be appropriate for some of these situations and would remove from birth parents the sense that they were being totally removed from their children's lives.⁶³ We heard, too, from District Judge Crichton, that ethnic minority families are often opposed to adoption and may, for cultural or religious reasons, prefer guardianship to having children permanently removed from their parents' care.

These views were supported by other evidence from recent research which found that outcomes are good and often better than non-kin placements, and that children placed great importance on maintaining contact with their school and their friends.⁶⁴ In practice it was found that the most common kinship placement is with grandparents; the next most common being with aunts and uncles. These researchers concluded that placement principles should be clearly enshrined in law and that kinship care should be treated as a distinct care type.⁶⁵ They also concluded that more financial support was needed. This is considered separately below.

5.5.3 FINANCIAL ASSISTANCE FOR GRANDPARENTS AND OTHER CARERS

We comment on the need for a reduction in the current bias in the tax credit system against informal care in section 5.4.6 above, and recommended that consideration be given to the use of child care credits paid to grandparents who

⁶³ www.raisinggrandchildren.com.au and www.mirabelfoundation.org.au provide useful evidence about Australian experience in this area.

⁶⁴ Nixon, P., *Making Kinship Care Work: New Approaches To Policy, Practice And Research* based on a study which he had led with Doolan and Lawrence for The Department Of Health in 2004. See footnote 54, in section 5.4.6 for further details.

⁶⁵ Local authorities are increasingly interested in this issue. For example, Hampshire has developed a kinship care policy which has helped to bring kinship care into the mainstream of care options and Brent Family Rights Group have been piloting a new kinship assessment tool which allows them to take the carer right through regulation 38 to the special guardianship order in one format. Hampshire and Brent are both part of the kinship forum in the South East.

are not themselves registered child minders, when this would enable a parent to take up employment or training.

Financial assistance given to carers may be removed at the discretion of the Local Authority if the grandparents hold a 'residence order'.⁶⁶ However, if the courts place the children within the care of the grandparents without such an order, financial assistance is automatically provided. We believe that this area of unpredictability requires regularisation and greater clarity, given that placing extra financial constraints on relatives may deter relatives from taking on care of a child.

In the case of a Special Guardianship Order, the financial inconsistency for carers could be applied differently, with payment direct to the carer.



The most common kinship placement is with grandparents.
(Photo by: McBeth)

5.5.4 THE ROLE OF EXTENDED FAMILY IN PROTECTING CHILDREN FROM THE EFFECTS OF PARENTAL DRUG PROBLEMS

We were informed by DJ Crichton that around 350,000 children are in families where there is drug abuse and it is thought that over a million children live in households where there is significant alcohol misuse.⁶⁷ 60-70 per cent of public law cases have a significant element of drug and/or alcohol use, rising to 90 per cent in some areas. We look in more detail at the new Family Drug and Alcohol court set up to help such families, where children may have to be moved into care, in section 5.6.1 following.

We heard evidence (from a number of organisations and individuals cited in section 5.4.1 above) that grandparents may be central in retaining family cohesion in difficult circumstances, lending support and being a source of advice and experience. Current research has revealed the form this can take in the special circumstances of parents affected by drug abuse and its consequences.⁶⁸

Social services report that a substantial number of children of parents with drug problems in the UK, who would otherwise enter the care system, are looked after by relatives.⁶⁹ Barnard reports a study of 62 parents, (58 women, but few drug-dependent men had responsibility for care of their children.⁷⁰)

66 Children Act 1989, s.8.

67 These figures are taken from the *Hidden Harm Report: Hidden Harm – Responding to the needs of children of problem drug users*, The Home Office, 2003, <http://drugs.homeoffice.gov.uk/publication-search/acmd/hidden-harm>

68 ICS Working Paper 7, May 2004, *The Grandmother Project – towards a new partnership between family and state*

69 Scottish Executive, 2001, *Getting our Priorities Right – Policy and Practice Guidelines for Working with Children and Families Affected by Problem Drug Use*, Scotland

70 Barnard M., 2003, 'Between a rock and a hard place: the role of relatives in protecting children from the effects of parental drug problems' *Child and Family Social Work*, Vol. 8, pp. 291-299

Almost all children in care in the study came from families where a parent had no family support network to call on: ‘the extended family was often pivotal in ameliorating the negative effects of parental drug-use on children.’⁷¹

Most of the parents in this study had used informal care arrangements in which relatives and grandparents on the mother’s side of the family were mainly involved, though a sister of the parent often helped with the care of the children as well. Family help varied from substantial to occasional. ‘As with most informal caring, the input of the extended family has at an institutional level gone formally unsupported, unremunerated and until very recently unrecognised.’⁷²

5.5.5 KEY ISSUES

Section 34 of the 1989 *Children Act* creates a presumption that local authorities should enable contact to take place between children in care and their parents and other significant family members. We welcome the positive steps being taken to enable regular contact with parents, grandparents, siblings, and other relatives, since this can have a positive influence as far as successful

rehabilitation is concerned, while lack of contact can affect crucial decisions, such as whether or not to discharge a care order or to dispense with parental agreement to adoption.

We believe that an enhanced duty to promote contact with alternative family members for children in care, should mean that close family members may be seen as potential carers before a child is placed into Local Authority care.⁷³

We believe that more attention should also be given to the potential role of the extended family when children are likely to be taken into care if family members, especially grandparents, are willing to act in a temporary role as foster carers. Since practitioners report that the need for kinship assessment and police checks often causes delay in

these situations, we would recommend that ways of speeding up these processes be explored, especially when it is a matter of assessing members of the extended family simply as suitable carers on a temporary basis.

We note that the implementation of SGO’s could be helpful to the claims of grandparents and extended family members who would like to have more say in the daily affairs of the child that they are responsible for, whilst not becoming their adoptive parents. We believe these orders can enhance the stability of many vulnerable children’s lives. Such parallel plans are needed for a variety of reasons. Sometimes, for example, grandparents delay coming

“Early intervention, in both potential private law and public law proceedings, should be considered in every case, save where emergency protection is needed by a child. The aim should be to avoid the need for proceedings, or minimise them to a consent order.”⁷⁴

71 Ibid, p 294

72 Ibid, p 298

73 Children Act 1989 Guidance and Regulation, Volume 1, Court Orders, in effect from 1 April 2008

74 Written evidence submitted to the Family Law Review from Peter Harris, formerly Official Solicitor, *Grandparents Association*

forward so as not to undermine their son/daughter. In the case of some ethnic groups, there may be opposition to adoption for cultural reasons.

We have had cases drawn to our attention in which grandparents have been refused an application to adopt their grandchildren against their own and their grandchildren's strong wishes, and we note some public concern about such cases. We recommend that the position of grandparents in adoption cases should be strengthened, and that, all other things being equal, their claims should be given priority.

5.5.6 SUMMARY OF RECOMMENDATIONS:

- **When children are in Local Authority care, positive steps should be taken to enable regular contact with parents, grandparents, siblings, and other relatives;**
- **Close family members may be seen as potential carers before a child is placed into Local Authority care;**
- **Arrangements for family members, especially grandparents, to act in a temporary role as foster carers for children who would otherwise be taken into care should be made easier and quicker;**
- **In the case of a Special Guardianship Order, payment should be made direct to the family member with care;**
- **Special Guardianship Orders should be available to grandparents and extended family members, enabling them to have more responsibility without becoming adoptive parents;**
- **The position of grandparents in adoption cases should be strengthened, and, other things being equal, their claims should be given fairer treatment and higher priority as family placements.**

5.6 Children of prisoners

Home Office research has found that 66 per cent of women prisoners had dependent children under the age of 18 (out of a sample of 567 sentenced women.⁷⁵) Each year it is estimated that more than 17,700 children are separated from their mother by imprisonment.⁷⁶ 7 per cent of children during their time at school experience the imprisonment of a father, while every year, approximately 150,000 children have a parent who enters custody.⁷⁷ 25 per cent of male young offenders are already fathers.⁷⁸

“Home Office research found that 66 per cent of women prisoners have dependent children under the age of 18.”

Prisoners' families, including their children, often experience increased financial, emotional and health problems during a sentence. 30 per cent of

⁷⁵ Hamlyn, B. and Lewis, D., 2000, *Women prisoners: a survey of their work and training experiences in custody and on release*, Home Office Research Study 208

⁷⁶ Prison Reform Trust, May 2007, *Prison Factfile*, p5

⁷⁷ Department of Education and Skills, 2003, *Every Child Matters*, London: Stationery Office, p43

⁷⁸ Social Exclusion Unit, 2002, *Reducing Re-offending by Ex-prisoners*, p19

prisoners' children suffer significant mental health problems, compared with 10 per cent of the general child population.⁷⁹ During their sentence, 45 per cent of offenders lose contact with their families, and many separate from their partners. In the longer term, there is a proven pattern of increased inter-generational offending associated with parental convictions.⁸⁰

5.6.1 THE ROLE OF FAMILY, DRUG AND ALCOHOL COURTS (FDAC)

Members of the Family Law Review went to visit the UK's first Family Drug and Alcohol Court, based at the Inner London Family Proceedings Court. The court opened at the beginning of 2008 with the aim of breaking the cycle of parents with addictions losing their children to the care system. FDAC is essentially a court initiative within the existing Family Court at Wells Street,



The FDAC provides specialist assistance for families where there are serious concerns surrounding parental drug or alcohol abuse.

(Photo by: daveblume)

Central London. The initiative is to provide specialist assistance for families where there are serious concerns surrounding parental drug or alcohol abuse. This court has been described as an 'innovative family court pilot which fast tracks support for parents'⁸¹ with these issues. It provides a focus on treatment whilst also requiring something from the parents: an openness and a willingness to engage in honest discussion with the court about their addictions.⁸² In this latter respect, it is important to note that the parents are offered a choice, the FDAC approach or conventional care proceedings.

District Judge Crichton is the driving force behind this initiative, which is being run in collaboration with Camden, Islington and Westminster boroughs. It takes its inspiration from a similar project in the Superior Court, San Jose, California.

At the moment, statute and limited local resources are preventing effort being channelled into treating the parents of children who have been removed from their care. Section 38(6) of the *Children Act 1989* only focuses on assessment of the child. The parent is left unsupported to seek treatment. So the idea behind the court is to address the *parent's* problems, with the long-term goal of keeping the parent and child together.

DJ Crichton told us that the court, together with a multi-disciplinary team of specialists, including a service manager, a clinical nurse specialist, a specialist substance worker, and social workers, are assigned to each case and address not just the problems of substance misuse but also other underlying problems such as housing, DV, employment, financial difficulties and mental health issues. A comprehensive assessment takes place which informs the court and makes recommendations, whereby the court and FDAC team can then identify the appropriate resources/treatment providers indicated. The other

79 Department of Education and Skills, 2003, *Every Child Matters*, London: Stationery Office, p43

80 Department of Education and Skills, 2003, *Every Child Matters*, London: Stationery Office, p43

81 Woods, J., 'Breaking the Cycle', *Counsel*, May 2008, p19-20

82 Ibid, p9

important feature of this process is that there are more frequent hearings than is typical with care proceedings. Within FDAC there are review hearings every 2 weeks before the same designated District Judge. This not only allows frequent review of any progress, but also it is intended that the court will offer support and encouragement where parents are engaging. The parent's solicitors and the Child's Guardian are not intended to attend all these reviews, which are intended to be relatively informal. Parents who have been through the process in the past will be used as mentors. We were told that the assessment and planning will be both rapid and flexible, and will involve close cooperation between the parent, judge and the other in-house specialists, all working together within a specified timescale. The judge takes an interventionist approach and reviews the parent's progress regularly, in order to build up a relationship of trust.

Whilst it is still early days in this initiative, and evaluation is on-going, we were highly impressed by what we saw and heard on our visit. The project in California has seen an 80 per cent success rate.

There is widespread support from the public for the introduction of more FDACs. 84 per cent of the public, when questioned in our YouGov poll on whether FDACs should be more widely available across the UK thought that it was a good idea.

Our YouGov polled found that 84 per cent of those questioned thought it would be a good idea to make FDACs more widely available across the UK.

5.6.2 SUMMARY OF RECOMMENDATIONS

We have found that new Family Drug and Alcohol Courts are pioneering the sentencing of parents in a way that takes full consideration of their children's welfare and the future integrity of the family into account. We recommend their wider implementation.

SIX

Family law and finance

6.1 Marital agreements

6.1.1 INTRODUCTION

England is unusual across the westernised family law jurisdictions in not having binding pre-marriage agreements (also known as pre-nuptial agreements or pre-nups) or other marital agreements.

The English family law courts have constantly stressed that they should not be bound by any agreement reached; whether by the parties through solicitors on separation, through arbitration or mediation, or other marital agreements. The courts argue they should be free to do what is fair and just in every case. The consequence of course is uncertainty and incentives to litigate, even after agreements previously reached through lawyers and after disclosure.

This is in stark contrast to the position across much of continental Europe where marital agreements are part of the culture of marriage and the manner of holding and owning marital regime property. Even within countries with a substantial discretionary element similar to England, such as Australia and a number of states in the US marital agreements are binding in law. Binding marital agreements are a customary feature of the life of international families.

For many years there has been pressure from family lawyers and others to introduce marital agreements in England. In 1998 the Home Office produced a paper, *Supporting Families*, which advocated introducing such agreements, set out in appendix 3. It said:

The Government is considering whether there would be advantage in allowing couples, either before or during their marriage, to make written agreements dealing with their financial affairs which would be legally binding on divorce. This could give people more choice and allow them to take more responsibility for ordering their own lives. It could help them to build a solid foundation for their marriage by encouraging them to look at the financial issues they may face as husband and wife and reach agreement before they get married.

Providing greater security on property matters in this way could make it more likely that some people would marry, rather than simply live together. It might also give couples in a shaky marriage a little greater assurance about their future than they might otherwise have had. Pre-marriage agreements could also have the effect of protecting the children of first marriages, who can often be overlooked at the time of a second marriage – or a second divorce.

Nothing further progressed at the time. Initially calls for reform were for such agreements to be taken into account in deciding the appropriate divorce financial settlement. Recently the calls have been for such agreements to be binding e.g. the resolution paper, *A More Certain Future: Recognition of pre-marital agreements in England and Wales* (2004). However there have been no Parliamentary changes.

In the past 18 months or so, perhaps accelerated by increasingly generous financial provision on divorce, there have been several reported higher court decisions in which the existence of marital agreements has been described as of ‘magnetic importance’ and ‘paramount’ importance.¹ This is likely to be a trend in judicial case law. Ultimately the position in law must now be made clear by Parliament.

Statute law presently separates marital and pre-marital agreements in a way the public and most lawyers find very artificial. Yet the Privy Council, equivalent of the House of Lords, in *McLeod* (2008)² made clear there are statutory remedies for marital agreements which do not exist with pre-marriage agreements. Whilst *MacLeod* may have been technically correct on existing statute law, it was artificial and seemed unfair in its outcome.

In looking at any reform, we return to the anvil test of supporting marriage and changing the family breakdown culture.

In 1998 the UK Government in its paper quoted above, said that giving greater security on financial outcomes on relationship breakdown may encourage some to marry rather than simply cohabit. Research shows that anxiety about possible future divorce settlements causes some, predominantly those previously divorced, to cohabit rather than remarry. This group may now be larger than past research shows, and is probably growing as divorce settlements increase both in amount and as a percentage of the overall finances. For some, especially those who have had a painful divorce experience, pre-marital agreements are likely to result in more confidence in marriage.

¹ *Crossley* [2008] 1 FLR 1467 and *W v H* [2008] EWHC 2038

² *McLeod v McLeod* [2008] UKPC 64

It is responsible to consider what would happen, and be intended by the couple, on the variety of possible circumstances which could occur during a marriage and which have a financial impact. It may be that couples may then decide not to have a pre-marriage agreement. Nevertheless the very act of considering the issues is a responsible step to take before getting married. Considering pre-marriage agreements whilst considering other matters before getting married fits into our proposals elsewhere in this report for information before marriage (see section 3.1), which we hope and expect will become the cultural norm.

Moreover, as the Government also stated in its paper, a marital agreement may help some couples going through difficult times in the relationship by giving comfort, confidence and security in financial aspects for the future. Although we do not suggest it will be a panacea or a solution to all relationship breakdowns, it will certainly assist in some and therefore should be available.

We are aware that pre-marital agreements can be conceived as planning for failure, reflecting distrust, and may undermine the commitment of marriage. This is a view which we understand some hold very strongly. We do not counter that view in proposing pre-marriage agreements. We do not make any suggestion that agreements should be expected as a norm, nor intend any criticism of someone who does not wish to enter into one for the above reasons. Nevertheless for those couples who do want to have these agreements, English law should provide for them.

6.1.2 PRE-MARRIAGE AGREEMENTS

Many countries have pre-marriage agreements. In some countries they are a accepted cultural norm. In some countries they are a fundamental element of property ownership and holding. In some countries they are a conventional opt out from the statutory imposed property and financial outcomes and/or regimes applying on divorce and death.

Within England, there are an increasing number of pre-marriage agreements. Conventionally, these have not been entered into by couples of purely English national origin marrying for the first time. They are generally required by those marrying after having previously had a divorce (usually an unhappy divorce experience), those from abroad for whom pre-marriage agreements are the conventional norm and those with particular assets that they wish to protect from claims on divorce e.g. family inherited assets or business assets. These couples are advised that English law will take pre-marriage agreements into account, especially if there has been disclosure, separate legal representation and a lack of duress or misrepresentation. However they are also advised that ultimately the court may well ignore altogether the terms of the agreement or follow just some of the terms of the agreement, cherry-picking those which are considered most fair and appropriate at the time of the divorce. We believe that these couples are entitled to more certainty and predictability.

We are also conscious that with the proposed greater emphasis on pre-marriage information, as set out elsewhere in this report, the consideration prior to the marriage of the marital finances and the consideration of a pre-marriage agreement may, in some instances, be complementary.

Moreover we are further conscious that the more certain the financial provision law on divorce becomes, as proposed elsewhere in this report, with reduced opportunity for fairness interventions, the greater need there will be for these agreements.

With experience of advising clients on pre-marriage agreements, we do record that they are fraught with dangers and difficulties due to the unpredictability of life during marriage. There are intervening factors such as physical or mental ill health, changes in work and income earning, unexpected inheritances and other receipts, changes in geographical location and changes in family structure. For lawyers it is an incredibly difficult, often impossible, task to advise the client on the appropriate terms to take into account these possible eventualities throughout either a short or long marriage. Nevertheless this in itself should not prevent those couples, separately advised, who wish to have the benefit and security of a binding pre-marriage agreement.

For some, perhaps many, there will be a very considerable reluctance, even an anathema and distaste about the whole concept of pre-marriage agreements. As stated above, there is no suggestion that they should become mandatory and compulsory for all or indeed even an expectation that they should become the norm for married life in England. They are an opportunity of legal status for those who want them.

6.1.3 ADVANTAGES AND DISADVANTAGES

We set them out in summary only:

Advantages:

- Provides an opportunity to assume responsibility for the future at the outset of a domestic relationship, and to discuss and work through various eventualities;
- Certainty and predictability of outcomes;
- Predictability of outcomes on divorce;
- Encourage marriage for those who, with past unhappy divorce experiences, may otherwise be less than likely to marry;
- Fewer legal costs and delays;
- The public increasingly want and expect such agreements to be binding;³
- International expectations;
- Public frustration at lack of clear rules on present status of marital agreements in law, with courts formerly giving them little regard, more

3 60 per cent agreed with it in a recent YouGov survey. See following section.

recently giving them some weight, resulting in uncertainty as to their merit;

- If there is more certain ancillary relief law, then there needs to be more opportunity for opt-outs by marital agreements;
- It is wrong in policy that cohabitants can enter into a binding agreement whereas married and civil partners cannot;
- Private ordering principle for couples and families.

Disadvantages:

- Concern that it weakens the marriage vow of life long commitment and marital sacrifices;
- Perception of planning to fail;
- Lack of trust in the long term relationship;
- Difficult to predict future events so they are by their nature unsatisfactory;
- Issue of how much discretion should be allowed to the courts to open up these agreements and so not treat them as binding in particular cases;
- Fear of floodgates of litigation concerning discretionary overruling of agreements;
- Agreements should not be able to oust the jurisdiction of the court as the opportunity for individual and discretionary fairness at the point of divorce is so crucial;
- Vulnerable, weaker party (or the one keener to marry!) may feel obliged to sign it, despite possible disadvantages to them.

Our conclusion of these advantages and disadvantages is that as such agreements are not to be compulsory, but the benefits justify their introduction. They would be for those couples who wish to enter into such an agreement after appropriate safeguards and preconditions.

6.1.4 BINDING OR SIMPLY A FACTOR?

Should a pre-marriage agreement be binding or simply taken into account as a factor e.g. S25 MCA factor? About 10 years or so ago, the prevailing feeling in the family law profession was that our society was not yet ready to go to binding pre-marriage agreements; they should just be a factor in the discretionary exercise to determine the appropriate divorce settlement. Subsequently we consider the consensus now (as evidenced by the Resolution report referred to above) is that we should go to binding agreements. They are almost always binding abroad. Making them just one of many discretionary factors makes them too weak for any real account to be taken. Put simply, binding is what the public now expect. It is what international families already have. Provided we are clear on the preconditions and the possibility of court intervention, we recommend that they be binding.

The Resolution paper also debated the issue, as we have done, as to whether it should still remain just a factor or whether it should be something more. It concluded:

On balance, we felt that pre-marital agreements should become legally binding subject to an overriding safeguard of significant injustice and also be added as a separate section 25 Matrimonial Causes Act 1973 factor. We considered the satellite litigation that might flow to define what was 'significant injustice', but concluded that it was a small price to pay for the certainty of legally binding pre-marital agreements. Thus it was proposed that s 25 be amended so that the court is directed to have regard to: 'any agreement entered into between the parties to the marriage, in contemplation of or after the marriage for the purpose of regulating their affairs on the breakdown of their marriage, which shall be considered binding upon them unless to do so will cause significant injustice to either party or to any [such] minor child of the family.'⁴

We recognise that there is currently little argument about whether to offer the opportunity of binding pre-marriage agreements. We have heard this from the respondents in our review. Our YouGov polling found that 60 per cent of respondents considered that 'Prenuptial agreements are a good idea for some people and should be legally binding if a couple do divorce'. Whilst Philip Moor QC told the review, 'the time has come to introduce binding pre-marital agreements, subject to safeguards.' He added that the safeguards he had in mind were '(a) legal advice (b) full disclosure (c) no manifest injustice and (d) cooling off period.'

As the Government said in 1998 in *Supporting Families*, set out in appendix 3, it would not be intended to be mandatory for all. It is nevertheless an opportunity for those couples who wish to do so to take responsibility toward their financial affairs privately.

It seems to us that the two remaining key issues are the preconditions and the ambit of court discretion to oust the agreement, to which we now turn.

“Our YouGov polling found that 60 per cent of respondents thought ‘Prenuptial agreements are a good idea for some people and should be legally binding if a couple do divorce.’”

6.1.5 PRECONDITIONS TO A PRE-MARITAL AGREEMENT

What are the prerequisites for the court to place any import on a pre-marriage agreement? The UK Government paper in 1998 set out a number of pre-conditions, recorded in appendix 3. We endorse most of them but a few are outdated. Specifically the idea that pre-marital agreements would be only valid for a period of years and then have to be renewed is no longer considered beneficial; it would result in couples in a long marriage having to go back to

⁴ Resolution, 2004, *A More Certain Future: Recognition of pre-marital agreements in England and Wales*, p4

lawyers many times to obtain a renewal. It should no longer be included. However many of the other conditions recommended by the Government are uncontentious, based on existing good principles of agreements in the family law context and protect the weaker, more vulnerable party. We repeat them and endorse them as follows:

- Enforceable under the general law of contract;
- Both should have received independent legal advice before entering into it;⁵
- Both should have provided financial and all other relevant disclosure before entering into it;
- There must be no mistake, misrepresentation or duress;
- There must be a minimum period before the wedding as the initial evidence of lack of duress in the case of pre-marriage agreements.

In respect of the last factor, the 1998 Government paper proposed 21 days. We would be sympathetic to 28 days. It is still close to the date of the marriage and long after the financial and contractual commitments to the wedding have normally been made. However we consider that any longer than 28 days is too long. The couple can still sign a marital agreement after the wedding day, when a different relationship dynamic prevails.

We refer below to the importance of independent legal advice and disclosure – an essential element upholding the British sense of fairness and justice – in the context of international agreements.

The 1998 Home Office paper included an additional provision that an agreement would not be binding if there was a child of the family, whether or not that child was alive at the time the agreement was made. A child makes such a fundamental difference to marriage, marriage commitments and marital finances that we consider that if a marital agreement fails to make any reference to or takes no account of a child being born to, adopted into, etc. the relationship, and yet there is a child of the relationship, then the agreement should fail as a fundamental precondition. However unlike the 1998 Home Office paper, we consider that if the agreement has clearly taken into account what would happen if there were a child of the relationship, then this particular precondition would have been satisfied.

5 In Australia, Section 90G of the Family Law Act 1975 provides when financial agreements are binding:

- (1) A financial agreement is binding on the parties to the agreement if, and only if:
 - (a) the agreement is signed by all parties; and
 - (b) the agreement contains, in relation to each spouse party to the agreement, a statement to the effect that the party to whom the statement relates has been provided, before the agreement was signed by him or her, as certified in an annexure to the agreement, with independent legal advice from a legal practitioner as to the following matters:
 - (i) the effect of the agreement on the rights of that party;
 - (ii) the advantages and disadvantages, at the time that the advice was provided, to the party of making the agreement; and
 - (c) the annexure to the agreement contains a certificate signed by the person providing the independent legal advice stating that the advice was provided; and
 - (d) the agreement has not been terminated and has not been set aside by a court; and
 - (e) after the agreement is signed, the original agreement is given to one of the spouse parties and a copy is given to each of the other parties.

It is our expectation that many pre-marriage agreements would then be formulated in a twofold fashion on what would happen if there were no children, and the very different arrangements which would occur if there were children. Moreover the residual jurisdiction of the court, to which we refer below, would be particularly relevant for the financial arrangements for children.

6.1.6 RESIDUAL DISCRETION OF THE COURT

Under what circumstances should the court be able to depart from the agreement? When would it not be binding? This factor is fundamental. When and why should the family court be able to intervene and set aside the agreement in whole or in part?

We have concluded that it would be unjust to have legislation for binding pre-marital agreements without the courts having some discretionary opt-out to allow justice and fairness in exceptional circumstances. The question therefore is how much discretion? The more the discretion, the greater the opportunity for fairness and justice in changed or unexpected marital circumstances, allowing the opportunity to intervene and even set aside the agreement to produce a conventional fairness outcome. Yet the more discretionary opportunity which is permitted to the courts to change or even ignore such agreements, the more such agreements are at risk of not being followed. This devalues their status, and provokes discontent among those who have signed an agreement with the way the courts and the English family law system have treated their agreement. The lesser the discretion, the more 'unfair' outcomes there will be, even though there is 'fairness' found in upholding agreements.



Courts have some discretionary opt out in exceptional circumstances.

The Government permitted a narrow discretionary factor in the 1988 paper on the basis of 'significant injustice'. Lord Justice Thorpe has been adamant over many years about the importance of the court retaining its discretionary powers, yet he has supported these proposals. In October 2002 he described the 1998 proposals as 'well pitched', adding that there should be 'more emphasis placed on self ordering by elevating the effect of pre-marital contracts'.⁶

Sir Mark Potter, President of the Family Division, told the review that he preferred the term 'manifest unfairness or unreasonableness'. We have continued throughout to refer to significant injustice however we would be content with either terminology.

Our conclusion, after much reflection, is to retain the wording proposed by the Government in 1998 for the discretionary opportunity to open up an agreement namely significant injustice. We believe this is the correct balance. We

⁶ Resolution, 2004, *A More Certain Future: Recognition of pre-marital agreements in England and Wales*, pp3-4

are then content to rely on judge made law to elaborate on the circumstances in which significant injustice may be found, given that we believe that many judges now recognise the importance of couples knowing that agreements will, in almost all circumstances, be binding and upheld.

6.1.7 AGREEMENT OPTIONS

Agreements may provide, by way of example, for the following:

- For the entire outcome if there were a separation or divorce;
- A schedule of what are the non-marital assets at the date of the marriage, an issue of considerable importance under our proposed new ancillary relief laws, below;
- Overriding provisions regarding the couple's own preferred definitions of marital and non-marital assets;
- Specific intentions regarding provision for any children;
- Specific intentions regarding provision for major ill health, mental or physical;
- Specific intentions regarding provision for existing children or grandchildren;
- Specific intentions regarding specific assets e.g. family businesses;
- Agreements about preferred jurisdiction.

6.1.8 EXTENDING THIS PROVISION TO OTHER RELATIONSHIP AGREEMENTS

A further issue we considered is whether any new law should be extended to all family agreements such as marital agreements and separation agreements rather than just pre-marriage agreements. This is the position in Australia which has binding financial agreements, including pre-marriage or post separation. Should it be extended to civil partners and cohabitants?

Undoubtedly, the above provisions in respect of pre-marriage agreements should apply to agreements in advance of a civil partnership.

We believe there is good reason to extend this provision to all marital agreements. Some are in effect pre-marriage agreements, entered into soon after the marriage when the pressures and frenzy of wedding planning have subsided, allowing more time for reflection and consideration. Whilst we would of course encourage couples to consider these issues well in advance of marriage, if they have not done so they ought to have the opportunity to do so after the wedding. The almost shot gun nature of some pre-marriage agreements is very unsatisfactory; often they are entered into preciously close to the wedding when in reality the financial commitments of the wedding have already been made. Much better that it be reflected upon soon after the wedding if time has not properly permitted before. Such agreements should have the same status. Agreements regarding finances, entered into during the marriage, may sometimes have the benefit of creating stability and improved

relationships, as the Government pointed out: '[marital agreements] might also give couples in a shaky marriage a little greater assurance about their future than they might otherwise have had.'⁷ Thus we have concluded that marital agreements should be given the same status as pre-marriage agreements, with the same preconditions, apart from timing in advance of the wedding.

Separation agreements are final financial settlements drawn up by parties and their lawyers on separation and where the parties expect the terms of the settlement to be made into a court order on a subsequent (non-fault-based) divorce, perhaps after two years of separation. They had previously been much encouraged on the basis that the parties would not use the fault basis for divorce. They are now used less, primarily because of the fear that one party on divorce a couple of years later may seek greater financial provision. The normal legal advice is to issue for a divorce immediately and thereby obtain an immediate financial order which is certain and final and much less susceptible of overturning than is an agreement. There is no doubt in our opinion that separation agreements should not be treated as inferior to pre-marriage agreements made many years earlier. They should be included in this reform. It should also mean fewer fault-based divorces if the parties have greater confidence in the binding nature of the separation agreement and are therefore prepared to wait for the two-year period of separation.

Australia introduced binding financial agreements for domestic relationships a few years ago. There were similar preconditions as we propose above.⁸ There was a narrow discretionary opportunity to review. The agreements have the same status as a final financial order on divorce and have proved very successful. They have brought about a change in professional practice whereby, on separation, the parties often have a binding financial agreement instead of a divorce court order. We are not proposing such a provision here at this time i.e. that the agreement has the same status in law as a court order, although we anticipate that this may be appropriate in years to come when binding marital and domestic relationship agreements are more commonplace and established.

Cohabitants in a sexual and domestic relationship can now enter into a *cohabitation agreement*, often in the form of a deed of trust of real property. We see no good reason not to include them within the marital agreements regime if they wish to opt in. There would be no discretionary opportunities and therefore it would be purely contractual. We do not see this as blurring any distinction with marriage. Instead it should strengthen the (statistically) precarious nature of cohabitation relationships to the benefit of any children.

England has some fundamental differences with marital agreements as practised in parts of continental Europe and elsewhere in the world. It is conventional elsewhere for the agreement, including pre-marriage agreements, to be prepared by a notary or similar lawyer who acts for both parties. There is

⁷ Para 4.22 of their 1998 report 'Supporting Families', set out in appendix 3

⁸ See footnote 5, in section 6.1.5 above

no separate representation. There is no opportunity for discussion of the different positions of each party put forward skilfully and with the benefit of experience of separate representative lawyers. Whilst undoubtedly notaries endeavour to allow each party to have their say, ultimately they are underrepresented, with anxieties that the stronger party may have their position favoured in the agreement. English law however has a fundamental criterion of *separate* representation. It is fundamental to any agreement in the family law context, as set out in this report. Under English law, one lawyer cannot act for both parties. In mediation, the parties are recommended to take legal advice before and after the mediation. English lawyers have seen countless cases of continental marital agreements being thoroughly unfair on the financially weaker party, yet concluded by notaries. Sometimes one spouse has not even understood what the terms of the agreement were, its purpose or its impact. Therefore whilst there must be respect for other legal traditions, and whilst England should recognise marital agreements which comply with the conditions set out herein e.g. Australian binding financial agreements, there should be no requirement or expectation that agreements reached without separate representation should have recognition as binding. This is fundamental to the basic concepts in English culture of fairness and justice.

In continental Europe, marital agreements usually cover both divorce and death. There is no intention that this should be the position in England. It would be very unwise to attempt to make a marital agreement comply with the requirements of the Wills Acts. Nevertheless it will be good evidence of intentions in applications against the estate of a spouse or other family member under the *Inheritance (Provision for Family and Dependants) Act 1975*. Moreover marital agreements are already used relatively extensively amongst those marrying in later years to record agreements that their prospective children and grandchildren shall receive their estates with only life interests in perhaps the family home to the survivor spouse.

We recommend that there should be a statutory law on agreements in marital and other domestic relationships. Australia has enacted this to considerably good effect. Features such as duress may arise more with pre-marriage agreements but they can be encompassed in the general features of all marital and other family agreements.

6.1.9 SUMMARY OF RECOMMENDATIONS:

- **Couples should have the opportunity to enter into pre-marriage and other domestic relationship agreements.**
- **These agreements should be binding provided they comply with certain preconditions, as specifically set out in the summary of proposals for reform of financial provision on divorce.**
- **The family court should have a narrow discretion to override such agreements namely if the outcome of the agreement would cause *significant injustice*.**

- **Marital agreements, entered into during marriage and dealing with financial issues, should also be binding provided they comply with similar preconditions with similar discretionary opportunity to override.**
- **Civil partnership agreements should be treated the same as marital agreements.**
- **Separation agreements, entered into at a time of a breakdown of a domestic relationship, should be treated the same as marital agreements.**

6.2 Financial provision on divorce

6.2.1 INTRODUCTION

We consider very strongly that financial provision on divorce is of paramount and fundamental importance in the perception of the justice and fairness of the family law system.

What happens (or is publicly believed to happen) on the outcome of divorce affects the commitment and sacrifice people will make for the marriage and for the other spouse. It affects willingness to commit to marriage itself. It has an impact on the respect for and status of marriage in our society. The perceptions of financial outcomes on divorce (especially a few high profile cases perhaps unrepresentative of the normal outcomes in most cases) may perversely contribute to our relationship breakdown culture. Financial provision on divorce has an importance well beyond the law and the legal fairness and justice of individual outcomes.

Do our current divorce laws on financial provision meet the main aim and objectives of encouraging and promoting stability and commitment of marriage? Do they help to avoid the high costs and wider impact on society and community of relationship breakdown? If they do not, we need to address many questions, irrespective of the present law which are unpopular among the judiciary. We need also to consider if we should now move towards creating financial settlements with greater certainty and predictability, even if these produce some unfair, unjust and ‘hard’ outcomes. This idea of predictability at the cost of discretion goes, in practice, against the whole direction of English financial provision law and the preferred approach of the higher judiciary, but it is an important one for the public and their advisers.

Judges’ powerful discretion to decide on the outcome of cases has its advantages, but its biggest drawback is the failure (in practice, especially proven through experience over the past 10 years) to provide clear rules of

predictability, certainty or clarity. This discretion was provided by Parliament in 1969 and has not been reviewed by Parliament over 40 years.

Crucially we want to be able to send a positive message to the public by finding a model able to provide greater certainty to couples, a fair and equal sharing of the 'fruits of the marriage' which reflects the commitment, sacrifices and contributions made during a marriage from the outset, during and at the end of marriage. We need to look at models of financial provision abroad.

Compensation recognises the prejudicial sacrifices and commitments made in marriage, yet rarely finds an outlet in divorce outcomes. Ironically it has more weight in the Law Commissions proposals (2007) for cohabitants of unjust enrichment and/or economic disadvantage which begs the question, should these be borrowed for divorce?

Should there be a more mathematical process, with opportunities for web-based solutions and a computer based formula for outcomes? This might then be overlaid with narrow judicial discretion based on a starting point of equality. In many areas of life, outcomes to complex requirements are compiled in computer programmes. The detailed impact of the Budget is shown for a myriad of individuals and families. Could one part of future resolution be via web/computer-based programmes, creating an outcome, or a starting point outcome, dependent upon particular situations or circumstances? Might 'electronic judges' be more predictable and also fairer?

Should we move to spousal maintenance being very short term, perhaps a couple of years as with Scotland and Scandinavia and elsewhere (contrary to our current family law on spousal maintenance)? This is good for self-sufficiency and 'moving on' but makes no recognition of the commitments and prejudices inherent in marriage. It may impact adversely on childcare if a mother with young children is under financial pressure to return to work the father is in a financial position to support her, and she would not have returned to work if the marriage had continued.

6.2.2 HISTORY OF OUR LAW

Our present law derives from the *Matrimonial Causes Act 1973* (MCA), itself a codification of the law from the *Divorce Reform Act 1969*. It set out a number of factors (section 25) which a court must consider before making a financial settlement. On the dissolution of marriage, the courts have a wide discretion to adjust a couple's worldwide assets by way of property adjustment orders, lump sum orders, pension sharing orders and periodical payments. The 1973 Act had a short-lived and unachievable objective of putting the parties in the position as if the marriage had not broken down. This ended in 1984 with no replacement of the objective of the law. In the early 1980s, guidance was given from the higher courts⁹ that settlements should look primarily to needs, which

9 e.g. *Preston v Preston* [1982] 1 AER 41

in middle-class cases was converted to reasonable requirements, and invariably the requirements of the mother with primary care of the children. From 1984, there was a legislative imperative to produce a clean break wherever possible, with maintenance orders for a term of years and with capitalisation of maintenance where possible and appropriate.

In the 1990s, there was increasing dissatisfaction with the operation of the law. In the lower income and lower middle income cases, men were being kept out of their capital for many years, perhaps for life, in order to produce housing for the children for their minority and thereafter for the maritally disadvantaged former wife. In the higher income cases, wives were receiving a miniscule proportion of the overall marital assets, notwithstanding their reasonable requirements being fulsomely satisfied. Both were unjust.

The House of Lords decision in 2000 in *White v White* has transformed family law across the world in many ways. It introduced the requirement of a check against equality to avoid gender discrimination. It expressed unhappiness with reasonable requirements as a basis in law for outcomes. It started the shift towards equality of outcome on capital, perhaps income. It provided a better sense of fairness and justice.

Legal practitioners on the ground quickly absorbed this groundbreaking decision and set about settling their cases for their clients on this basis. However a period of great uncertainty (even chaos) in the law followed, due to lack of clear, consistent guidance (and with contradictory judgements) from the higher courts between 2001-2006. In part the problem is that the higher court judges were almost always dealing with 'big money' divorces, the only cases able to afford to reach the higher courts, and the judicial guidance and principles in law for those cases had little relevance, and often were entirely inappropriate, for the vast majority of cases across the country, yet this was the only judicial guidance handed down. The House of Lords cases of *Miller* and *McFarlane* helped with additional principles of equality sharing but unfortunately the judgements contained more inconsistent, contradictory and academic comments (see appendix 4, para 120).

Instead clear and practical guidance has come from the Court of Appeal in *Charman v Charman* in May 2007; three very senior family court judges combining together and analysing a number of the problems in practice including openly saying how unhelpful in parts the House of Lords had been in *Miller* and *McFarlane*.¹⁰ It was a very welcome judgement; it was one unanimous judgement given in the name of the President of the Family Division, England's most senior family court judge. It was, and is, a seminal judgement, stating and defining the law taking account of the mandatory Section 25 factors.



There was a period of great uncertainty in family law, due to the fact the higher court judges were almost always dealing with big money divorces.

(Photo by- Joe Gratz)

10 E.g. in differential legal language, paras 63, 85 and 120 of the judgement

Further High Court decisions followed in the next 24 months seeking to redefine and even alter the *Charman* guidance, compounding the judicial uncertainty. Lawyers, mediators and parties to family law proceedings are once again in some doubt and uncertainty about what is the law and therefore how to reach an outcome without a final court hearing. There is increasing acceptance that there must be Parliamentary intervention and reform. There was considerable support for this from members of the judiciary and senior members of the family law professions whom we met.

Karen Mackay, CEO of Resolution commented that 'the difficulty with advising clients now is that you don't know what the likely outcome is and so more people litigate. It has knock on effects for the courts and legal aid funds. It is costly not having some kind of framework.'

Baroness Butler-Sloss told the Review 'we need greater certainty and clarity of outcome.'

6.2.3 THE PRESENT LAW

All assets and financial resources of the spouses are brought into account, including assets worldwide before the date of the marriage, inherited and gifted assets and assets acquired after the date of separation. It also includes assets held in the name of third parties and assets which could be acquired e.g. mortgage earning capacity. The disclosure and valuation process is of considerable importance.

The requirement in law is to produce a fair settlement.¹¹ Fairness comprises needs, sharing and compensation. The principle of English financial provision on divorce is equal sharing of all assets unless there is a 'good reason to depart from equality'.¹²

All financial resources of a couple on divorce, at the time of the final settlement, are categorised into matrimonial resources (sometimes known as marital acquest assets) and non-matrimonial resources.¹³ Where all the assets of the couple are only sufficient to provide for basic needs, as is often the case,

11 Fairness itself is difficult to define and set as an objective. In *White* [2000] UKHL 54, Lord Nicholls said 'fairness, like beauty, is in the eye of the beholder'. In *Miller*, [2006] UKHL 24, he said 'Fairness is an elusive concept. It is an instinctive response to a given set of facts. Ultimately it is grounded in social and moral values. These values, or attitudes, can be stated. But they cannot be justified, or refuted, by any objective process of logical reasoning. Moreover, they change from one generation to the next. It is not surprising therefore that in the present context there can be different views on the requirements of fairness in any particular case.' (para 4).

12 Para 65 of *Charman* Judgement

13 All are available for distribution to produce a fair outcome. Non-matrimonial resources are pre-marriage assets, inheritances and gifts, and some post separation assets. Matrimonial assets are all other assets, and are conventionally those acquired during the marriage, both active acquisition and passive growth through market forces.

then needs overrides equality sharing and compensation i.e. good reasons to depart from equality.¹⁴

In almost all non needs cases, the matrimonial resources are divided equally. Non matrimonial resources start with equality division again subject to needs but it will be easier to find good reasons to depart from equality, which might be relatively minor departure, perhaps 10 per cent, or quite substantial or total departure.

Compensation particularly for a spouse who, for example, gave up her career to look after the children, may also be a reason to depart from equal division. However since this compensation factor was explicitly introduced by the House of Lords in *McFarlane*, judges have limited these compensatory claims in decisions, which create public policy rather than application of existing statute law. Their decisions have been contrary to some people's expectations of fairness after marital commitments and prejudices.

The court has power to award a lump sum, transfer real and personal property and to share pensions. It can set aside transfers made to defeat divorce claims.

Spousal maintenance¹⁵ is available. It is primarily directed to deal with needs of one spouse post separation and divorce, taking account of different earning capacity and the standard of the marriage.¹⁶ Alimony may often continue for a number of years whilst the children are growing up. It is always open to variation dependent upon changes in circumstances.¹⁷

Child support is almost always dealt with by C-MEC, the successor to the Child Support Agency and consists of a formula. Even if a couple reach an agreement made in a consent court order, either party can apply a year later to the agency. The court has no power to make a child support order unless quantum is agreed.

Following guidance by the House of Lords in *Miller*, the length of the marriage is now of much less significance. The shorter the marriage, generally the lesser assets which would have been acquired during the marriage. The longer the marriage, the more likely it is that pre-marital assets will have been mixed and mingled with marital assets, thus becoming marital assets.

This is only a very brief summary, and therefore in itself has unreliability. Moreover, it is set against a backdrop of contradictory and confusing higher

14 These needs can often only be accommodation for the primary resident parent, albeit only for the child's minority (known as a *Mesher*- an arrangement where the wife (primary residence parent) and children stay in the family home or other property until the children are 17 or leave secondary education etc whereupon the property is sold and the proceeds divided in agreed shares, at which point the husband only then receives his interest in the property), and accommodation for the other parent by stretching and straining the available resources. Compensation may be a reason also to depart from equality.

15 Sometimes known as alimony.

16 There is, in theory at least, an imperative for applicant spouses, usually wives, to seek to retrain and become self-sufficient post marital breakdown. In reality this is not often possible, for example for some wives in their 50s and older without employment skills and opportunities.

17 For example, it may last for life, or it can be for a term of years. It can be capitalised. It ends on remarriage. It may be significantly reduced on cohabitation. It can be increased to take account of any compensation element.

court guidance. It will be noticed immediately that this is a long way from the 1973 MCA statute, builds dramatically upon the 2000 *White* development and brings us much closer to some community of property regimes found in continental Europe and parts of America.

6.2.4 THE NEED FOR REFORM

This present law has little resemblance to the statutory Parliament-made law: in reality England has almost entirely judge-made law on financial provision on divorce. This has the acknowledged benefit of being able to change with social mores and relationship trends, as manifest in *White*.

One of the greatest features of the English system is the discretionary element. Outcomes can be tailor-made for the particular case and the particular circumstances. The wide range of powers given to the family court, coupled with the diversity of factors to be taken into account in deciding a fair outcome mean that each case is highly individual. With every set of circumstances, there is a broad range of outcomes which may be considered fair and just. Maximum flexibility creates a 'Rolls-Royce' system, giving maximum opportunity for a fair outcome.

However this advantageous discretionary system has a significant disadvantage in that it is very difficult to predict with any certainty what the outcome of a particular case will be, if it were to go before a court for adjudication. Given that, in the vast majority of cases, parties can neither afford to go to court nor want to go to court, what is required is better and clearer knowledge of outcomes. Couples want to know what would happen if their case went to court so that they, their advisers and mediators, can then settle on this basis without having to go to court. The House of Lords in *Miller* explicitly identified the importance of this feature.¹⁸ Yet the very discretionary flexibility prevents it. Indeed, Alan Miller is taking the UK Government to the European Court of Human Rights claiming English divorce law is so uncertain and unpredictable as to infringe his human rights. If couples had a greater certainty of what the outcome would be, more cases would settle and/or settle more quickly and with fewer costs.¹⁹

Therefore lawyers, mediators and others trying to guide couples on divorce to help settle a financial dispute have two major problems. First, the wide discretionary system, however excellent for individual case, as explained above, has an inherent disadvantage in that it cannot provide certainty and

¹⁸ E.g. per Baroness Hale at para 122

¹⁹ The certainty versus discretion debate is not new. In 1615 Lord Ellesmere C said in a celebrated case that 'men's actions are so diverse and infinite that it is impossible to make a general law which may aptly meet with every particular and not fail in some circumstances. The office of the Chancellor is to correct men's consciences for frauds, breaches of trust, wrongs and oppressions of whatsoever nature they be, and to soften and mollify the extremity of the law'. (Earl of Oxford's case [1615] 1 Rep. Ch 1 at 601). In 1818 Lord Eldon LC said: 'The doctrines of this Court ought to be as well settled and made as uniform almost as those of the common law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case... Nothing would inflict on me greater pain, in quitting this place, than the recollection that I had done anything to justify the reproach that the equity of this Court varies like the Chancellor's foot.' (*Gee v Pritchard* [1818] 2 Swan. 402 at 414.

predictability. Secondly, even when the higher courts have tried to give indications and illustrations of fair and just outcomes, their combined guidance has at times been contradictory, unclear and inconsistent, adding only more difficulties to the task faced in reaching an out-of-court settlement.

Yet England has a multi-billion pound divorce industry. The public and private costs of resolving divorce financial disputes, whether by litigation or earlier settlement, are huge. It affects employment, health and related issues for everyone involved. England, and especially the divorcing public, cannot afford this cost. It has to end. This unfettered discretion, without accompanying clear and certain guidance on the law and outcomes, cannot continue.

Moreover the uncertainties and delays in reaching a financial settlement add more to the distress of the relationship breakdown, and impacts on children by often creating children disputes, ancillary to the friction between their divorcing parents, whilst the ancillary relief dispute is continuing. Invariably, the quicker the financial dispute is resolved, the quicker the parenting arrangements for the children settle into a workable pattern.

In pursuing the equality division, there have (in the perception of some members of the public) been massive payouts on divorce. England is regarded as the world's most generous divorce jurisdiction.²⁰ Headline cases,²¹ especially after short marriages, are perceived by some to be unfair, a disincentive to marriage especially in circumstances where it has not been possible to enter into a binding pre-marriage agreement to make other provision on divorce. We are concerned that the public perception of some outcomes of financial provision on divorce may well discourage some from marrying.

The converse is that, in some cases, marital commitments and sacrifices are recognised in England. Unlike some continental European countries, wives who have by marital agreement given up work and careers to look after the home and raise children are not expected immediately to go back to work and are allowed to continue with childcare responsibilities. England is a good jurisdiction for recognising and allowing compensation for marital commitment and sacrifice. This must continue and be strengthened. However in a series of cases in the past 12 months, the higher judiciary have seemed to reduce the opportunity for compensation provision rather than strengthen it. This is unacceptable.

Parliament's failure to engage in this area of law since 1973 (despite significant changes in family life such as parenting patterns, gender roles within marriage, stages of life when wealth is acquired, and changes in

“The uncertainties and delays in reaching a financial settlement add to the distress of the relationship breakdown and impacts on the children.”

²⁰ See paragraph 116 in postscript to *Charman* (2007), appendix 4

²¹ For example, Mrs Miller received £5 million after a three-year childless marriage when she and her husband were in their 30s. Heather Mills received £24 million after a four-year marriage.

“We believe the time has come after 40 years, for Parliament to step in.”

expectations of outcomes on divorce, etc.) has meant that the judges have had to fill the gap left by Parliament, creating and adapting the law to fit changing social circumstances. Our present law is not directly influenced by any public debate. In some ways, the judge-made law has been highly satisfactory (for example in *White*), and has adapted in line with social changes. However, the higher judiciary are unelected and there is no opportunity for public debate in advance of a judgement. Rarely has public condemnation after a judgement had any immediate effect. The higher judiciary are frequently making social policy decisions which affect divorce and marriage, gender roles and expectations. Arguably, because of the small pool from which they are drawn, their perspective on social changes and expectations may be limited. There is only a certain period of time during which Parliament should leave judges to make and change the law. We believe the time has come after 40 years for Parliament to step in.

The considerable majority of cases which reach the High Court and Court of Appeal concern unusual facts, complex circumstances and often substantial assets. If this were not the case, Otherwise they would not reach such courts! The judgements of the higher courts inevitably therefore have to be directed to these particular facts. The judiciary themselves have recognised that their decisions, primarily in big-money cases, have only a direct relevance for a minute proportion of family law cases across the country, yet this is the only source of guidance about the law from the higher courts.

Senior judges have called for a review of family law financial provision on a number of occasions (see for example the postscript to the *Charman* judgement in appendix 4, written in the name of the President of the Family Division Sir Mark Potter). It highlights the implications for the law of dramatic demographic changes in England, the high level of wealth, the social and gender changes and the influence from Europe.

The present law and system has many disadvantages, including:

- It is judge-made and not based on any public debate or Parliamentary discussion;
- It bears almost no resemblance to the 1973 legislation, and indeed that legislation was made at a time of very different social and family way of life;
- The implicit mores are arguably more rooted in the judiciary’s background than that of wider society;
- Judges change the law (they have created) for public policy reasons which are not set to public debate;
- Wide opportunities for discretion leads to unpredictability and uncertainty (and therefore less opportunity for settlements);
- Uncertainty over what will happen if a case were to go to a final hearing makes it more difficult to settle out of court including in mediation;

- Some judicial decisions conflict with each other, causing confusions, uncertainties and lower rates of settlement;
- Development of the law is determined by the issues in the cases before the higher courts. This means that some issues, for example in ‘small’ and modest money cases, are not adjudicated; in contrast, in ‘big’ money cases micro-issues are exhaustively examined with little wider relevance;
- Groups in society dissatisfied with the direction of judge-made law have limited democratic redress;
- The current system rarely leads to practical guidance to the profession and litigants on application of the law;
- Explaining the law is not easy, especially as it often changes;
- Adapting the law to any computerised, electronic model is impossible.

Nevertheless judge-made law has, in many respects, served us well over these four decades. Our discretionary law is much admired abroad. It does offer remarkable opportunity for a wide variety of flexible outcomes. To lose discretion altogether would, we decided at an early stage in our deliberations, be a big mistake. Moreover the overall costs of resolving a case must be distinguished from the costs of obtaining disclosure, which under English legal processes is exhaustive and consequently expensive as explored in section 6.2.8. The proposals we make in that section for quicker and still reliable disclosure should help produce quicker and less costly settlements.

Any reform must take account of the distinctive English culture, traditions, community life, political landscape, relationship expectations and aspirations. This has inevitably made the reform process difficult. We have been conscious that there are many different factors to bring into account and that we must not lose many good elements of the present system.

There is a strong consensus that reform of ancillary relief law is needed.²² Some argue for dramatic reform. This reform now needs to come from Parliament, not from the judiciary. Karen Mackay, (Resolution) commented, ‘The will of Parliament does not have a view in this area. Judges make judgements on issues decided by parliament 35 years ago.’

The major problem is ascertaining what that reform should be. To this end, we have reviewed some models of reform abroad and various models elsewhere in the English legal system and society.

“The time has come where Parliament must deal with financial provision on divorce....The public is very dissatisfied with family law and this must be addressed.”

Baroness Butler-Sloss, in evidence to the Family Law Review.

6.2.5 MODELS OF REFORM ABROAD

The most obvious starting place is the continental European community of property model where, in simplistic terms, the assets acquired during the

22 See for example the appendix to the *Charman* Judgement in appendix 4

marriage are automatically divided equally with each party keeping pre-marital, post separation and inherited assets. Some countries allow the opportunity of a discretionary rearrangement to produce a more equitable outcome. In reality, the amount of the rearrangement, certainly in contrast to the overall level of the assets, is fairly small and limited. Some countries allow maintenance for a number of years although often much shorter than in England. Marital agreements allow parties to opt out and/or opt into another arrangement or regime.

We have seen this operate in a number of cases. Whilst in some cases it may produce a fair outcome, and a more certain and clear outcome for the parties than in England, the greatest anxiety is that it does not adequately provide for



The greatest anxiety about the European Community of Property model is that it may not adequately provide for the housing needs of the parent with primary caring responsibilities of the children.

the housing needs of the parent with primary caring responsibilities of the children where those housing needs are greater than one half of the marital acquest assets. In these circumstances very little discretion is exercised, in practice, to provide adequate housing. This often works considerable injustice to the parent with primary responsibility for the children, who is perhaps making future sacrifices to her own career because of ongoing child raising responsibilities. The other injustice situation is where one spouse has made sacrifices to her career or perhaps other aspects of financial life, for the sake of the

marriage, the other spouse, marital commitment and child raising etc which is not then reflected in any equitable redistribution. Again the outcome is that marital commitments and sacrifices, during the marriage and sometimes continuing after divorce, are not recognised. Undoubtedly this continental European marital regime arrangement provides certainty and clarity for the parties. It provides predictability for the lawyers. It allows transportability between jurisdictions. However, crucially and fundamentally for us in this report, we consider that it is not fair in the English perception of marriage and marital commitment in a good number of cases, especially when there are dependent children and/or there have been particular commitments and sacrifices made by one to the benefit of the other or children.

One attraction of the European community of property model is its predictability of outcome. However, we have concluded that the considerable unfairness and adverse impact on marriage and marital commitments that would accompany it simply cannot compensate for the predictability.

Another obvious attraction is that it would bring England more into line with the European Union. Nevertheless we hear recognition by continental European family lawyers of an awareness that in a number of cases their model does not produce a fair outcome for the primary residential parent or the spouse prejudiced as a consequence of marital commitments. We conclude that the answer is not to fall into line with continental European models but to explore further a model based on the existing flexible English model of seeking fairness on divorce, albeit with increased certainty and predictability.

Recently **New Zealand** introduced provision whereby after three years of marriage, there is automatic division of assets.²³ This has certainty and predictability. The law does nevertheless allow the court to make an exception in particular cases and herein lies a problem. We are concerned that if this New Zealand model were to be introduced with the culture and background in English family law of the past 30 years of undertaking ancillary relief, discretionary and fairness settlements, the whole panoply of the family law profession would be devoted on the first day of this new statutory regime to finding exceptions! However this should be a short-term issue only, and should not detract from its benefits. We are very attracted by some of the more methodical and structured provisions relating to calculating marital property and compensation, which we consider we could usefully borrow, as set out below.

We have reviewed **Australian** law yet, in this regard, we felt there was little usefully to borrow. It is discretionary as is England's, yet has not followed the fairness sharing model based on equality.

We have looked at the provision in **New York** and some other US states whereby there is real and meaningful recognition to contributions made by one spouse to the other spouse during the marriage, an important feature in our own considerations. The contribution is quantified and is then payable by the spouse over a period of years.²⁴ We are attracted to this proposition as a matter of principle. It seems to us to give proper recognition to a feature which is too often ignored within England. Nevertheless, through our knowledge of how particular laws can impact in practice, it has worked serious injustice. It has meant that the paying spouse (usually the husband/father) can then be saddled with a significant obligation, in financial terms, often for the remainder of their working career. It has not allowed the paying spouse to take lesser income employment. It also ignores adverse future employment changes and has created some major hardships.

Clearly this is a difficult balance. We support proper recompense for the benefit of the marital sacrifices and recompense for prejudice suffered. Nevertheless we also support as much as possible the clean break provisions. We do not think it is right that, for instance, one spouse should be forced to continue in their particular line of work throughout the remainder of their career simply to pay off a capital sum to their former spouse of perhaps a decade or more earlier. This has remained a distinctly American concept. We do not seek its introduction as a future capital sum over the long-term future because we think it would be a step too far. Nevertheless where the marital and non-marital assets at the time of the divorce and/or ongoing maintenance allow this sort of compensatory provision, then we think it

23 Including the family home whenever acquired, family chattels, all property jointly owned by either spouse, pre-marital property if in contemplation of the marriage and for common use and any property acquired after the marriage if deriving from pre-marital assets and used to the benefit of the spouses and the marriage.

24 It is invariably a lump sum paid by instalments and often not variable.

should be brought fully into account. It supports marriage and marital commitment.

In the **Scandinavian countries, Scotland, several other European Union countries** and elsewhere, there is an increasing tendency for spousal maintenance to end on divorce, or within a few years of divorce. This was originally based on the expectation that the country's generous welfare benefits provision would provide for the financially needy divorced spouse.²⁵ It has also found favour with the expectation of independence post divorce. However, we regard it as an alarming development because it provides no recognition for the inevitable financial disparity post divorce. There is often an economic disadvantage post-marriage for women. Short-term spousal maintenance simply ignores the fact that many women, often as mothers, after a medium or long marriage, are simply ill-equipped to move into the workplace quickly or to become self-sufficient. This can create hardship in the household in which the children are primarily living. We are committed to the 1984 legislation promoting clean breaks, but we strongly believe that the answer is not short-term maintenance imposed by statute. There may need to be additional provisions about greater reviews of maintenance by the courts at regular periods, and perhaps greater imposition of term orders giving a requirement for the recipient of maintenance to justify its continuation when the child is (perhaps) 8, 13, 16, etc. This, however, is as far as we would recommend going. We deprecate the apparent expansion of the short-term maintenance provision from northern Europe outwards. It does not recognise the realities of post divorce life for many women. It also fails to recognise the commitment, purpose and impact of marriage.

In our review of foreign models, and apart from some elements of the New Zealand law, we have been unable to find any significant assistance to help us in our quest for a significantly superior model to that in England. Certainly we have much to learn from ancillary relief laws and procedures abroad, but we have not found a model from which we would want to borrow extensively in creating a model for England and Wales. For all its very many faults, our system does have certain benefits and advantages compared to other countries around the world. We repeat that family law, based on family life, is deeply rooted in the mores, values and expectations of national communities and countries. We respect the family laws of other jurisdictions but do not regard those laws as satisfactory or appropriate for what is fair and reasonable and just in England now and for the future.

6.2.6 OTHER POSSIBLE MODELS

Curiously, the models we have found attractive lie not within divorce law but in other aspects of English political, legal and social life. It is from these that we think we should be borrowing and learning lessons.

²⁵ This highlights the dangers of transporting laws between countries. Countries such as Sweden, with minimal alimony provision have much higher levels of employment of women, higher welfare benefits and child care allowances and different taxation so making the social context very different.

Every year after a Budget, tables are produced by HM Treasury setting out the impact of the Budget on a wide variety of families. They are illustrative only and many families do not fit into any of the tables. Nevertheless, they offer an informative guide to the Budget impact on a wide variety of families. No doubt HM Treasury could produce many more tables giving closer and more precise outcomes for a wider variety of families. About 10 years ago the Lord Chancellor's Department²⁶ contacted a few family law solicitors to come up with their own list of outcomes, the purpose being that one could produce tables these produced at the time of a Budget, and illustrate for a particular family, with particular characteristics, what would be a particular outcome on divorce. Although a very attractive and good idea in principle, the problem was that there was too great a variety of family situations. The amount of paperwork to show the variety of outcomes would be immense. Nevertheless we considered that the intention was essentially the right one.

In the intervening years we now have the benefit of computers. Although still only for illustrative and guidance purposes, we consider that it should be possible to create something similar to the Budget tables for divorce and thereby help very many families. We emphasise this would not be determinative. Assistance from lawyers would still be required. Nevertheless, we believe that this option should be actively explored and we suspect members of the public would benefit from this.

The second model follows the fact that many purchases now take place online. Whilst some online shopping methods are simple, others have highly complex series of questions and data input fields. Analogous situations are completion of online tax returns. This online experience is now commonplace.²⁷ We therefore believe that there are many in our society who would welcome ancillary relief outcomes on divorce to be available in such a way. Some may then find their situation or their finances leads them to an off-line enquiry, as the online programme simply could not deal with the complexities. However for many, perhaps most, this programme may lead to an outcome which would be a closer starting point to the final settlement than the present experience. It may well be that legal assistance, perhaps even some interim settlement or adjudication, may be needed before some data and information can be initially inputted, including certain 'needs' figures etc. The final computer outcome may also require some legal assistance, even adjudication. Nevertheless these will be either the exceptional cases, and the assistance would likely be with regard to narrower or more discrete issues than dealing with the whole case. We recommend that this be actively pursued.

The third model derives from other areas of law, especially criminal, including sentencing. One of the major problems within family law ancillary relief is the plethora of reported decisions of the High Court and Court of Appeal which are often contradictory and create confusion amongst

26 The Lord Chancellor's Department was replaced by the Department of Constitutional Affairs in 2003 and later renamed the Ministry of Justice in 2007.

27 Sometimes these online purchases and input of data reaches a level of complexity where it becomes necessary to telephone or consult off-line. Nevertheless it is sufficient for most users.

practitioners. This is openly accepted by the judiciary themselves. It means that as soon as there is a clear and constructive statement of the law, such as by the Court of Appeal in *Charman*, there are within weeks judges who redefine, narrowly distinguish or in other ways try to impose their stamp upon judicial pronouncements. Thus, through judicial independence and individual decision-making on a particular case, with little regard for the impact on the billion pound divorce industry, confusion and lacking certainty seep in.

We understand that within areas such as criminal law, there are what are known as 'red letter' cases, where there have been specific pronouncements by the very senior courts and judiciary on what is the law on a certain area, incorporating guidance for practitioners. Then there are reported cases, perhaps even at the same level of court as the 'red letter' cases, but which are accepted for illustrative purposes only.²⁸ They do not carry the same weight and should not be followed so closely. We propose such a situation is introduced within English family law. It will require administration within the senior judiciary in English family law. With openness of the family courts and more use of the Internet, and therefore more available reported decisions, the problem for layers of conflicting decisions will otherwise only get worse. This situation must be remedied now.

There would be little point in a public debate, Parliamentary action and then legislation on ancillary relief reform if, within days of its introduction, the same confusions and contradictions are created by the judiciary in their subsequent individualistic reported judgements. This problem is systemic and needs radical resolution.

The fourth model is within family law. Should divorce financial provision embrace the concepts put forward by the Law Commission in its cohabitation reform proposals of July 2007, namely redistribution of resources if it is proven that there has been unjust enrichment and/or economic disadvantage? We found them very attractive in the context of fair criteria on divorce financial outcomes.

6.2.7 LENGTH OF MARRIAGE

The House of Lords in *Miller* indicated in terms that very little weight should now be given to the length of the marriage. What mattered, they said, was sharing the fruits of the marriage, long or short. This has met with considerable public and professional condemnation. Whilst marriage is marriage whatever the length, there is inevitably a different weight which must be given to a marriage of three years compared to a marriage of 23 years. Equally the age of the parties has relevance.

²⁸ For many years, the Court of Appeal has delivered guideline judgements. A good example of how these are kept up to date can be seen in the line of cases on sentencing for domestic burglary: *R v Brewster* [1998] 1 Cr. App R. (S) 181 led to *R v McInerney* [2002] EWCA Crim 3003 and which was in turn reviewed in January 2009 in *R v Saw* [2009] EWCA Crim 1. Secondly, judges are now under a statutory duty to have regard to the guidelines prepared by the Sentencing Guidelines Council (SGC), set up under s 167 Criminal Justice Act 2003 and chaired by Lord Chief Justice. These set out a number of aggravating and mitigating features and offer a range of penalties with a particular starting point identified. The judge is then expected to go higher or lower according to his assessment of the competing aggravating and mitigating factors.

Where the marriage has been relatively short, perhaps up to three years, and without children, we consider that the court should start with an expectation of putting the parties in the position as if they had never married. This is completely different to the 1973 objective of putting the parties in the position as if the marriage had not broken down. That was rightly described as unworkable. Occasionally putting the parties in the position as if they had not married may also be unworkable. Nevertheless, with some adjustment for commitments already made to the marriage, where there can be a reinstatement to the pre-marriage position, this should be a primary objective. Assets acquired as a result of joint endeavours should be shared. Pre-marital assets should not be shared in most circumstances. We consider that it is wrong that a spouse of a short marriage (which may also happen to be the best earning years of the other spouse) should enjoy one half of those earnings automatically. It is not fair on the other spouse, as it impacts the remainder of his life. We are also anxious that the law as it stands gives some encouragement to the gold digging mentality. This does nothing for the perception of marriage.

With longer marriages, the public expectation is that the pre-marital assets should become increasingly marital assets to be shared automatically. In practice this will occur where they are used for the benefit of the family such as buying the family home. Even outside these circumstances, we find support for the marital commitment by the pre-marital assets becoming increasingly the subject of the marital sharing.

6.2.8 WHAT ARE THE ASSETS?

It is often said by lawyers that resolution of financial provision on divorce would be easier if it were not for the process of ascertaining what are the overall financial resources, including those before the marriage and after the separation, and including those held in the name of third parties. Criticism of the time and costs of ancillary relief resolution has to be separated from the disclosure process. The simple reality is that a number of spouses make it exceedingly difficult to get to a point of settlement because of a refusal or unwillingness to give early and complete corroborated disclosure. It takes months of questionnaires, valuations and sometimes other lines of investigation. England may be one of the most comprehensive jurisdictions in the world in its search for disclosure. In essence, there cannot be a fair settlement without knowledge of the facts. However simplified and improved the process is of reaching a settlement by our proposed reforms, there will still be the front-ended process of getting to disclosure.

We consider there should be more direct access to tax returns and other official records. There needs to be stronger judicial case management, to avoid unnecessary



There is inevitably a different weight that must be given, upon divorce, to a marriage lasting many years and a very short one.
(Photo by: Mirko Macari)

lines of investigation and costs. We would like more immediate access to third-party corroborative records by court orders, as happens as a matter of course in Australia. There needs to be greater penalties for those failing to give disclosure. Without penalties, the process becomes a derisory game of hide and seek. We also propose for consideration that the court have a specific power to order transfer of assets (up to a certain percentage of the overall assets), as a matter of fairness distribution, where there has been clear non-disclosure, as occurs in some case law in Australia. The court should be more willing to look at the true nature and extent of resources available to each party.

We consider the courts should take more affirmative action in issuing cost penalties against non-disclosure, and more often and more quickly within a case to make it clear that they will infer the existence of assets and make orders accordingly.

6.2.9 CATEGORISATION OF ASSETS

In order to conduct its fairness exercise, the English family court looks at all of the assets worldwide of the spouses, whensoever and howsoever acquired. This should continue. It then starts with equality of division. The present law is that subject to needs, compensation etc, the marital acquired assets will invariably be divided equally unless there is a good reason to depart from equality. However, in respect of the non-marital acquired assets i.e. pre-marital assets, inheritances and gifts and some post separation assets, and again subject to needs, compensation, etc. it can be easier to show good reasons to depart from equality.

Therefore there is already in English family law a distinction between two categories of assets. Although this distinction has been most explicit since *Miller* and *Charman*, it was found in previous case law. We consider that it meets the expectations of most people getting married, and indeed on separation and divorce. We believe that the distinction in the overall assets should be greater and incorporated into statute law. We consider that there should be different criteria for the division of marital acquired assets, which we refer to simply as marital assets, and the other assets which we refer to as non-marital assets.

This shift in the expectation of categorisation of assets is in part a reflection of the internationalisation of our communities, with influences from continental Europe. This shift shows greater independence and separateness within some marriages arising from pre-marital cohabitation patterns of behaviour and finances.²⁹ This shift marks an awareness that for

29 Popenoe, D., & Whitehead, B.D., 2002, *Should we live together? What young adults need to know about cohabitation before marriage: A comprehensive review of recent research*, 2nd Edition, The National Marriage Project, Rutgers, The State University of New Jersey, states that 'Although cohabiting relationships are like marriages in many ways—shared dwelling, economic union (at least in part), sexual intimacy, often even children—they typically differ in the levels of commitment and autonomy involved. According to recent studies, cohabitants tend not to be as committed as married couples in their dedication to the continuation of the relationship and reluctance to terminate it, and they are more oriented toward their own personal autonomy. It is reasonable to speculate, based on these studies, that once this low-commitment, high-autonomy pattern of relating is learned, it becomes hard to unlearn.' They cite here Nock, S. L., 1995, 'A Comparison of Marriages and Cohabiting Relationships', *Journal of Family Issues* 16-1: 53-76; Schoen, R. and Weinick, R. M., 1993, 'Partner Choice in Marriages and Cohabitations', *Journal of Marriage and the Family* 55: 408-414; and Stanley, S., Whitton, S. and Markman, H. 2000, 'Maybe I Do: Interpersonal Commitment and Premarital and Non-Marital Cohabitation,' unpublished manuscript, University of Denver

some marriages, typically those in middle years onwards, there are sometimes quite material pre-marital assets. This shift is in part recognition of the substantial inheritances and family gifts, arising from the increase in personal wealth in the '70s and '80s and now passed down the generations, and which is sometimes fully and necessarily mixed and mingled with marital assets but sometimes kept fully separate. For a wide variety of reasons, we are satisfied that there should now be a distinction in the law between separate categories of assets

With couples marrying later than a generation ago, and with more inherited and gifted wealth being received earlier in life, it is now much more common for one spouse to a marriage to have materially greater resources than the other spouse. Dependent on how these non-marital assets have been treated and on the particular circumstances at the time of the divorce, there is a greater expectation that these non-marital assets should not be automatically divided but should wholly or substantially be retained by the relevant spouse, always subject to needs, compensation etc. We believe this should be incorporated in law.

We are very conscious that this categorisation is controversial, especially in respect of pre-marital assets. The conventional view on marriage has been the sharing of all worldly goods, however and whenever acquired.³⁰ We consider that the fair solution is for pre-marital assets to start as separate and become increasingly categorised as marital assets as the marriage progresses and/or as they are used for marital purposes. In some cases they may be wholly or partly used e.g. to purchase the family home. They may be used to purchase business assets to produce an income for the family. They may become mixed and mingled with marital assets. In any event, they would be available for the priority calls on all of the assets as set out below.

We make two recommendations. The first is purely mathematical and has the benefit of certainty, the recognition of commitment through a longer marriage but the disadvantage of inflexibility on the particular facts. For each year of the marriage, 5 per cent of the pre-marital assets of either spouse be brought into the marital pot up to a total of 20 years marriage whereupon all pre-marital assets would be brought into the category of marital assets and be subject to automatic equal division, provided needs etc are covered.

The second is the New Zealand model where pre-marital assets are brought into account as marital assets if they are in marital common use or common benefit, or if they are used to purchase other assets which, in turn are for marital common use or common benefit. This could be widened to incorporate pre-marital assets which are mixed and mingled with marital assets, although sometimes this is a simple matter of economic convenience and might have an unfairness. Perhaps the solution is a variation and widening of the New Zealand model alongside the mathematical provision above.

30 Some spouses bring financial resources to a marriage whereas other spouses bring character, connections, attributes and resourcefulness. How can they be distinguished?

A contentious issue for many years has been the treatment on divorce of inheritances received during marriage. Previously, the law was unfair in that if one spouse had had the misfortune of their parents dying and receiving an inheritance during the marriage, this was brought fully into account whereas the other spouse may have their parents both alive whereupon their inheritance received well after separation was ignored for divorce capital provision purposes. This caused much resentment. More recently post *White* and especially post *Miller and Charman*, an inheritance as a non-matrimonial asset can be a good reason to depart from equality. Nevertheless it has still been very *ad hoc* and unsatisfactory for those spouses seeing family inheritances used to fund a divorce settlement for the other spouse.

We consider that inherited assets should also be within the category of non-marital assets and treated differently from marital assets, irrespective of when received during the marriage. Moreover if treated either as marital asset or required for needs purposes and the other has yet to receive their inheritance, there should be more use of *Meshers*.³¹

In some marriages, gifts are made to one spouse, including from family members for example to help the purchase of property, perhaps the first family home, or for other reasons. They also should be non-marital assets.

Finally, whereas the continuation of work or employment during the marriage into the period after separation should count as the acquisition of marital assets, there are some instances in which one spouse engages in a very different enterprise post separation, normally sometime after separation, so that there is a direct causal break. In these circumstances, this category of post separation assets should be non-marital assets.

In like manner, some spouses engage in excessive expenditure post separation thereby reducing the marital assets for equality division. We endorse the 'add back' series of cases so that the true level of the marital assets can be established and then divided. This meets with public expectation.

We deal below with how these separate categories of assets should be divided.

6.2.10 MARRIAGE ONLY?

This report, especially in the context of reform of ancillary relief law on divorce, refers throughout to marriage and marital commitments. Cohabitation is distinctly not the same as marriage. Whilst some long cohabitations may have some similarities to marriage, very many do not. Some are distinctively cohabiting out of personal opinions about marriage, specific choice not to commit to marriage perhaps after a previous marital experience or for other reasons. We do not support the Private Members' Bill to reform cohabitation law for reasons expressed in section 2.4. However, as we looked at reform of divorce financial provision, some of the group were very attracted to the reasoning of the Law Commission in respect to their

³¹ See section 6.2.14, footnote 36 for full explanation of *Meshers*.

criteria for financial provision for cohabitation. We have borrowed from this for divorce.

At the time of preparation of this report, we do not know what will happen to Lord Lester's Private Members' Bill in respect of cohabitation law reform. Nevertheless we are absolutely certain that at a time when there is acknowledged need to have Parliamentary reform of divorce ancillary relief and when this is being actively considered, it is both wrong and inappropriate to bring in piecemeal family law legislation. It would hinder, perhaps even prevent, an introduction of ancillary relief law on divorce. The perverse situation may arise whereby cohabitation law as a consequence of the Private Members' Bill might mean greater financial settlements for cohabitants than divorcing couples under our proposed reform. This would be wrong. In the present context of active discussion about much-needed reform of ancillary relief on divorce, which on any basis requires a much greater involvement of lawyers and courts than does cohabitation, prior Private Members' Bill debate about provision for cohabitants is inappropriate.

“The perverse situation may arise whereby cohabitation law as a consequence of the Private Members' Bill might mean greater financial settlements for cohabitants than divorcing couples under our proposed reform. This would be wrong.”

6.2.11 SPOUSAL MAINTENANCE

Spousal support ends on remarriage as a matter of statute law. The consequence has been many recipients, in new relationships post divorce, have cohabited to make sure their maintenance continued. For many years, the courts refused to make any variation to maintenance in these circumstances, creating much ill feeling as husbands continued to pay maintenance to their former wives now in a new long-term cohabiting relationship. Of late, there is now judicial authority that long-term cohabitation should cause a review of maintenance, perhaps a downward variation including to a nominal amount. However still there has been reference to the recipient in a cohabitation relationship needing to continue to receive spousal maintenance for a transitional period. The consequence is still that recipients of maintenance cohabit rather than re-marry. There is a very considerable financial pressure on recipients of spousal maintenance not to re-marry.

We are cognisant of the argument that a cohabitation relationship does not create any entitlement to ongoing maintenance and therefore the spousal maintenance should not end.

We propose that spousal maintenance should continue to end automatically on remarriage and should be reduced to a nominal order after cohabitation for periods of six months.³²

32 The Law Commission reviewed the issue of the definition of 'cohabitants' and proposed that new legislation should base it upon a couple who share a household, but with a non-exhaustive checklist of factors to which the court should have regard, in identifying those relationships. See – The Law Commission, July 2007, *Cohabitation: The Financial Consequences of Relationship Breakdown* (LC307), http://www.lawcom.gov.uk/lc_reports.htm

Spousal maintenance is always subject to review. This is on changes in circumstances. However it is also to reflect the fact that one spouse should have taken steps to become self-sufficient. This often arises in the context of child care responsibilities. How long should a wife expect not to work and instead look after the children? This varies from case to case, on the level of wealth available, the pattern with other children of the relationship and other factors. Where there are dependent children, the court will usually make a lifelong order expecting the paying party, normally the husband, to instigate a review with the burden of showing the court why the wife should now seek employment. We have considered whether this is a commendable state of affairs. We think the present uncertainty about periodic reviews does not help. Dependent upon the ages of the children at the date of separation, we think it is appropriate for there to be a review of spousal maintenance at the following stages of a child's life: 8, 13, and of course when leaving secondary education. However we are not yet convinced this should be incorporated into primary legislation, as this would not allow for the flexibility needed to take individual circumstances into account.

We consider that to reduce the number of variations of maintenance, court orders should incorporate automatic variations based on the Retail Price Index. These may not always be appropriate or suitable however we consider that they are a better starting point than any other. This should reduce litigation and costs.

6.2.12 CHILD SUPPORT

The Child Support Agency has been thoroughly unsuccessful, exorbitantly and disproportionately expensive for the state and has failed many of the most needy parents. We believe that where neither party is in receipt of welfare benefits and when the family court is making any other orders for income or capital, child support should come back within the court system. The court should then have power to make child maintenance orders. Moreover where there is no involvement of welfare benefits, a couple should be able to reach an agreement, recorded in writing and after legal advice, on child support which can be lodged at the agency and take effect as an assessment. This is the position in some other jurisdictions for example Australia.



The Child Support Agency has failed many of the most needy parents.

(Photo by: Sean Dreilinger)

We consider that the family court should also have power to deal with child support issues where the relevant agency had failed to collect proper child support for a period of, say, six months. A senior member of the judiciary highlighted the very considerable powers and experience of the family courts in discovering the true underlying financial resources.³³

³³ These reforms would also give the new Agency time to catch up with the backlog of arrears of child support and outstanding claims.

6.2.13 PRINCIPLES OF PROPOSED REFORM

There is an inherent reluctance in English family law to state any principles as being of more importance than others in looking at the discretionary fairness exercise. Nevertheless in a review of ancillary relief law, there are inevitably certain elements which must be of paramount consideration. They are important in our reform proposals.

We are satisfied that we should retain the Section 25(1) MCA first consideration to the welfare of any dependent child (in reality the child's reasonable financial needs). In practice, it rarely makes a practical effect on outcomes, save as to accommodation needs and we deal with this separately below.

We are satisfied that the objective of the law should be to produce a fair settlement. We have had no statutory objective since 1984. The House of Lords made it clear in *Miller* that fairness was the objective and we recommend it is incorporated into statute law.

The Court of Appeal in *Charman*, building on what the House of Lords said in *White* and *Miller*, said that the principle of English financial provision law on divorce is equality of division of all assets and resources, whensoever and howsoever acquired and wheresoever situated and in whose name in law they may presently be. They said this is the only right and proper way to recognise the marital relationship. It was a proper exercise of what was fair. Again we support this as a principle, subject to the following considerations.

The Court of Appeal proceeded to say, helpfully in our opinion, that apart from needs and perhaps other high priority criteria such as compensation, the so-called 'marital acquest' assets should be divided equally unless there was a very good reason to depart from equality. With other assets (i.e. pre-marital, especially if they have stayed separate from marital assets, inheritances and gifts and some post-separation assets), it would be easier to show good reasons to depart from equality.³⁴ We consider that these perceptive remarks by the three very experienced Court of Appeal judges have mostly met a significant shift in thinking over the past couple of decades about marital relationships, finances and obligations. In formulating our proposals below, we have been influenced by the reasoning and judgements handed down by the Court of Appeal in *Charman* which very much meets many present day expectations. We have attempted to build on this in setting out our reform proposals to be incorporated into statute law.

In summary, our proposal is that there should be binding marital agreements and if none, marital assets should be divided equally, subject to overriding calls on all assets, and the non-marital assets should stay with the relevant spouse, again subject to overriding calls on all assets and any good

³⁴ They said that the principle of equal sharing applies to all assets 'but, to the extent that their property is non-matrimonial, there is likely to be better reason to depart from equality' (para 66 of the *Charman* Judgement).

reason to make any distributive orders. The court would have power to make different orders if there is significant injustice, then taking account of the conventional section 25 factors.³⁵ The overriding calls would be, in order, first, reasonable provision for accommodation of any dependent children with each parent for their minority, secondly, payment for compensation for marital disadvantage of one spouse or retained benefit of the other spouse and, thirdly, provision for basic needs of each spouse.

This is deliberately not continental European community of property, although it has similarities and in some cases may produce identical outcomes. It is also not unfettered discretion, although the court will have an ultimate discretion if there is found to be significant injustice and there will be some discretionary elements in deciding the overriding calls on the assets. This is not a rigid inflexible system, although it allows the opportunity for conversion into a computer-based programme. This is not a gold-diggers charter nor an opportunity to divorce after a long, committed marriage without an appropriate compensation settlement.

Our proposals give priority to the accommodation for children, priority to reflect marital commitments and sacrifices and recognise pre-marital and inherited assets as separate from marital assets.

We have deliberately not proposed dramatic and radical reform because we consider that some of the essential elements of the existing law are of fundamental importance and should be retained. It is fettered discretion whilst acknowledging that marriage creates obligations and commitments which should be properly recognised.

6.2.14 OVERRIDING CALLS ON ALL ASSETS

The reality in the majority of divorce cases with any material financial resources is that there are dependent children needing accommodation. The change over the past decade in parenting patterns post separation is that the so-called contact parent often now has the children for quite significant periods, often every other weekend and sometimes one night a week as well as half of holidays. Children therefore need a good home with the contact parent as well as with the primary residential parent. However even where there is a good level of contact, the children normally still need more room and space during the school week with the primary residential parent, where resources permit, by way of a bigger bedroom, garden, etc. Nevertheless this may often be an uplift of no more than about 10 per cent to 30 per cent above the basic housing needs of the other parent.

³⁵ *Matrimonial Causes Act 1973*

Such is the importance of the post-separation welfare of children including their stability, safety, maintenance of a general standard of living, the need to avoid too great a disparity in the standards of accommodation of the parents and related matters that we consider the first call on all assets, marital and then on non-marital, is to provide accommodation for the children with both parents. Although it happens in practice, we believe it should be clearly set out in law as an overriding first call.

Sometimes it will be impossible to make adequate outright provision for the housing needs of the primary residential parent from one half of the marital assets. He/she may need more than half, occasionally all the assets for this accommodation with the children. In these circumstances, it is not right that the other spouse, (the husband in most circumstances), should be kept out of his assets for ever. Clearly there are some cases where there is simply not enough money to go round from all of the assets, marital and non-marital, for housing both, and sometimes no money can be released by moving downmarket or remortgaging. In these types of cases, painful ones where the assets have to be stretched and strained as much as possible and very resourcefully, the only outcome may be an order in Mesher terms.³⁶ Where housing needs of both require use of non-marital assets, then again it is appropriate for there to be a Mesher arrangement.³⁷ We are very alert to the problems with Mesher orders, nevertheless they have much to commend them with the balance of enabling the children to stay in reasonable accommodation yet allowing the other spouse return of their assets when no longer needed for the priority of the children's accommodation.

There may be other capital needs of children in this first priority call.

Our stricter division of marital and non-marital assets makes it more likely that there will be greater use of Meshers. However we strongly believe that it is the only way to balance needs, often arising from joint marital commitments and child raising, and entitlements to capital on divorce.

One stumbling block of Meshers has often been the incidence of capital gains tax (CGT). We call for CGT in the Mesher situation to be withdrawn.³⁸ It is not a tax on a capital gain; it is a tax on one spouse not having their assets until many years later for the purposes of enabling there to be a fair settlement and for the benefit of the accommodation of the children. It is wrong for one spouse then to be taxed many years later. We consider that if we had no CGT there would probably be more use of Mesher orders. We recommend that CGT on Meshers should be withdrawn in the interests of fairness and justice in a family law settlement on divorce in the best interests of the children.

36 A Mesher is an arrangement where the wife (primary residence parent) and children stay in the family home or other property until the children are 17 or leave secondary education etc whereupon the property is sold and the proceeds divided in agreed shares, at which point the husband only then receives his interest in the property.

37 We deprecate the use of Martin orders, in which the husband is kept out of his interest in the family home during the lifetime of the wife, not just during the children's minority.

38 For more on this matter see: Resolution Law Reform Committee, January 2006, *CGT: fairness for marriage and divorcing couples*

Secondly in priority of overriding calls on assets, we are convinced of the importance of making sure that sacrifices, commitments, prejudices, etc. made to the marital relationship, the other spouse or for the benefit of the children should be recognised.³⁹ The wording ‘unjust enrichment’ and ‘retained benefit’ (from the Law Commissions proposals on cohabitants) seems to us to be helpful, deserving of support and should be high in the priority of the review of financial provision on divorce.

Unlike the element for the accommodation of the children, which may be appropriate for a Mesher, we believe this ‘unjust enrichment/retained benefit’ should be an outright payment. We do not think it should be necessarily made a quantified lump sum to be paid over many coming years, as referred to above in the New York model. Nevertheless we have no difficulties with the evidence based quantification process in itself if it can be paid from existing capital assets on divorce including from non-marital assets, of whatever form or from maintenance. We do not agree with the judicial condemnation of formulae, formulations or calculations of compensation. Such prejudice is often capable of precise calculation which should then be brought into account.

Thereafter as the third overriding call on assets, there may be other needs, perhaps based on the standard of living of the marriage and as then appropriate. This may be for a second property, car or contents, and other elements. The House of Lords in *Miller* indicated that these should be basic although subsequent decisions have reintroduced the element of reasonableness, ‘needs generously interpreted.’ There should be a burden on one spouse to show why their needs are necessarily greater than the other spouse given that the parental element would have been covered by the accommodation for the children and any prejudice to the marital relationship covered by the second overriding call on assets. Marriage is not intended to provide for all needs of life especially if a short or medium marriage and self-sufficiency is possible. Whilst needs is a third call on the assets, it will be for each to justify in the context of the marriage and especially if it would be from non-marital assets.

Once this exercise has been undertaken, we see no reason why the exercise anticipated by the Court of Appeal in *Charman* should not be carefully followed, namely automatic division of marital assets. It meets the general feeling of what is fair on divorce. If the accommodation needs of each parent can be met from the marital assets, this will be fair although it may require some Mesher arrangement if either spouse requires some element from the other spouse’s one half marital assets or non-marital assets. Otherwise the marital assets would be divided equally. The marital commitment/compensation payment would be made to the one spouse either from the other’s one half marital assets or non-marital assets, if the resources permit. It

³⁹ We are reluctant to use the word compensation as it is now loaded with ‘post-McFarlane’ expectations. In fact, we find ourselves closely aligned to the Law Commission in its own thinking about the basis of financial provision for cohabitants, which has been largely ignored by the Private Members’ Bill which has tried to create a similar situation to marriage.

would not be a Mesher. Otherwise marital assets would be divided equally. Any needs payments would be expected to be met out of marital assets, or from non-marital assets if this can be justified in the circumstances. This is mostly unlikely to be on a Mesher basis.

However, subject to these overriding calls, we believe the burden of showing any distribution of the non marital assets should be on the party seeking the distribution. It should not, as with the present law, be on the party showing why there should be any good reason to depart from equality division of non-matrimonial assets. We believe this meets much more the general feeling now of what is fair on divorce. The question therefore becomes: why does fairness require non-matrimonial assets to be shared, or to be shared in particular proportions? In the greatest majority of cases, there will either be no non-marital assets or they will be fully taken up by needs. However where there is any surplus, the burden should be on showing why they should be shared.

Accordingly, we recommend that there should be certain overriding calls on assets and categorisation of assets with distinctly different criteria for division within the overall framework of limited discretion as set out above. We consider that this will significantly improve clarity, certainty and predictability. We recommend that it is incorporated into a computerised programme.

6.2.15 CONCLUSION

As stated, we quickly reached the conclusion, along with many of our consultees, that our present system of unfettered discretion, contradictory and confusing judicial pronouncements and other disadvantageous elements in family law demanded an early review and Parliamentary reform of ancillary relief law. We have been comforted that our conclusions meet many others within the family law system and elsewhere. There is no doubt about the need for reform. Parliament has not ventured into this area since 1973.

A primary problem has been the difficulty of an alternative to the present model. As shown, we have analysed the various models abroad and believe that apart from New Zealand, they have little to compel upon us. Instead we have found various models in other elements of our national life which we believe can help inform us in a way which we believe will be attractive to the public. We believe the primary call on all assets should be to provide good accommodation for the children with each parent during the children's minority. We believe the second call should be to recognise and respect and make good as necessary the prejudices and sacrifices and commitments made to the marriage, the spouse and children. Marriage is a very important institution and it is still the public perception that sacrifices can and should be made for marriage and within marriage. We regard it as fundamental to the future of marriage and fundamental for those who make these commitments that they should be recognised. There are other needs which need to be met as a third call. In this regard, we are satisfied

that there should still be a strong needs basis in English Law. It is fair and recognises what is the reality of marriage and wedding vows.

However the unfettered discretion cannot continue. By setting out overarching calls upon the overall assets, the public will be assisted in working towards a settlement. Short marriages should be considered distinctively. We are attracted to a categorisation of how assets were acquired, specifically those acquired within the marriage and those separately acquired. Nevertheless this distinction must be a servant of the needs and recognition of marital commitments as above.

Discretion will not end. There should still be a specific discretion if the result of the exercise is to produce significant injustice, again with reference to the Section 25 factors. At several other stages there will need to be reflection on reasonableness, inevitably a discretionary exercise. Nevertheless discretion will be significantly subservient to the primary calls upon the marital resources and asset categorisation. Moreover greater control and delineation of judicial pronouncements will make it less likely that previous confusions and contradictions will find their way into the daily experience of lawmaking, therefore making it much easier and quicker to settle cases.

Some relatively minor changes e.g. introduction of interim lump sums for legal costs, could make a dramatic difference in the opportunities for equal representation and thereby lead to fairer outcomes, as set out in more detail on the section on legal aid (section 4.3.8). Sir Mark Potter, President of the Family Division, in his evidence to us, supported the power to grant interim lump sums including for costs.

We believe that, in this way, we will retain the present considerable beneficial aspects of our flexible system yet limit the discretionary excesses and create greater certainty and predictability. It will then be a fair law both in its content and in its application. It should reduce costs and delays and help more couples more quickly reach a more satisfactory outcome. It will support marriage and marital commitments. We have set out our proposals for a new model of ancillary relief on divorce.

Relationship separation is a painful experience. Too many couples and families have found that sorting out the financial consequences has been an even more painful experience. This must end. To this end, we commend our proposals.

6.2.16 SUMMARY OF RECOMMENDATIONS FOR ANCILLARY RELIEF REFORM

Objectives

- **There should be a statutory objective of fairness;**
- **Fairness is found in the agreements of the parties, in the overriding calls on the overall resources of the parties and in the equal sharing of the marital assets; with first consideration given to the financial needs**

- of dependent children and taking account of the section 25 Matrimonial Causes Act 1973 criteria where required;
- There shall be an incorporation of the 1984 legislation of attempting a clean break in all cases.

Marital agreements

- The court must follow as binding any marital agreements provided they comply with certain conditions as follows:
 - after legal advice, certified on the marital agreement as having been received, and;
 - after financial and other relevant disclosure, and;
 - without misrepresentation, duress, mistake, fraud and similar contractual elements, and;
 - in the case of pre-marriage agreements, at least 28 days before the wedding ceremony, and;
 - there is no significant injustice.
- Significant injustice shall be in the discretion of the court. Significant injustice will include failure to make reasonable provision for any children of the relationship during their minority in which circumstances the court has power to depart from the agreement to the extent of making such provision. Significant injustice may include failure to have reasonable provision in exceptional unexpected circumstances e.g. health, in which circumstances the court has power to depart from the agreement to the extent of making reasonable provision. Significant injustice may relate to provision as to income or capital or both.
- If any of the conditions above are not complied with or there is significant injustice, the court shall follow financial provision as set out herein but may nevertheless take into account the existence of the agreement in any discretionary elements.
- Marital agreements may provide by way of example:
 - for the entire outcome if there were a separation or divorce;
 - a schedule of what are the non-marital assets at the date of the marriage, an issue of considerable importance under our proposed new ancillary relief laws, below;
 - overriding provisions regarding the couple's own preferred definitions of marital and non-marital assets;
 - specific intentions regarding provision for any children;
 - specific intentions regarding provision of major ill health, mental or physical;
 - specific intentions regarding provision for existing children or grandchildren;
 - specific intentions regarding specific assets e.g. family businesses;
 - agreements about preferred jurisdiction.

Definitions of property

- All resources of the parties at the date of the final settlement are to be categorised as marital assets and non-marital assets.
- Marital assets are all assets acquired by the parties solely or jointly during the marriage and any pre-marital cohabitation whether through passive growth or active acquisition. It includes non-marital assets which by the definition below become marital assets.
- Non-marital assets are:
 - pre-marital, pre cohabitation assets;
 - inheritances;
 - sole gifts;
 - post separation assets if as a consequence of new enterprises and new initiatives by one spouse post separation.
- Non-marital assets become marital assets in the following manner:
 - they are used for the purchase or acquisition of the primary residential property for the family;
 - they are used for the purchase or acquisition of the contents of the family home, motor vehicles, chattels, household expenditure and all other elements of family life;
 - they are used for the purchase, acquisition, investment or other involvement in family and/or jointly run businesses or enterprises or run by the other spouse;
 - they are used for the common benefit of the family;
 - in other circumstances where it is clear from the actions of the spouses that the assets were intended to be marital (following New Zealand's provisions in which separate property becomes relationship property);
 - in any event pre-marital assets become marital assets as to 5 per cent per annum up to becoming 10 per cent marital asset after 20 years.

Overriding calls on assets

- In conducting its fairness exercise on distribution of marital assets and non-marital assets, the court shall follow as binding any marital agreement of the parties as set out above.
- If there is no marital agreement, the following applies:
 - The first priority call is a residential home for the children during their minority with the primary carer and the secondary carer, with a presumption of equal basic housing needs of each parent with the children taking account of their ages, gender and similar, and then, if needs so require, providing an uplift, perhaps between 10 per cent to 30 per cent dependent on circumstances, for the primary residential parent. Reasonable accommodation needs of the child with each parent would take account of the standard of the marriage, available resources and

Section 25. The first priority call would include other reasonable capital needs of the children.

- The second priority call is quantified recognition of the prejudice created to either party by commitments, sacrifices or other steps that one spouse has taken for the benefit of the children or the other spouse during the marriage and ongoing, including retained benefit or relationship generated disadvantage. It will be similar to section 18 *New Zealand Property (Relationships) Act 1976* as amended.
- The third priority call would be provision for the reasonable needs of each spouse, with justification being required by either spouse to show why their needs should be greater than the other post separation.

Division of assets

- The marital assets, including illiquid assets, shall be divided equally between the spouses unless there is a good reason not to do so which is the 3 priority calls set out above. If there is a disparity in the provision between the spouses in the liquid marital assets, this should be compensated by appropriate disparity in the division of the illiquid assets, with appropriate provision taken of the element of illiquidity and risk.
- The non marital assets should be used to provide for the priority calls set out above only in so far as they cannot be utilised by the marital assets. Thereafter in respect of the (remaining) non-marital assets, there should be good reasons shown to justify any redistribution, taking account of the Section 25 factors.
- The first priority call, primarily the housing needs of each spouse as carers, should first be met out of their one half share of marital assets together with their own non-marital assets. If however it is necessary to use any of the one half share of the marital assets or the non-marital assets of the other party, this should be in the form of a Mesher (charge-back) for the child's minority. The second priority call, 'compensation', should be payment of an outright lump sum, from one half of the marital assets or non-marital assets of the paying spouse if necessary, otherwise ongoing maintenance. The third priority call, reasonable needs, should be an outright payment or Mesher dependent upon the nature of the provision of the needs.
- Where there is a short marriage of less than three years without any children the parties should be put in the position as if they had not been married unless this will cause significant injustice taking account of features such as age, health and Section 25 factors. There should nevertheless be equal sharing of the marital assets. However conversion of non-marital assets into marital assets, as above, would not then apply.
- The court shall retain a narrow discretion to review the overall final division of overall assets to make sure that there was no significant

injustice, taking account of the Section 25 principles. This discretion will specifically include where one party's parental/family inheritances have become marital assets in accordance with the above and the other party has yet to receive any parental/family inheritance.

Child support

- The family courts shall have power to make child maintenance orders where both parties are not in receipt of or claiming welfare benefits and the court is making other orders between them concerning income or capital and in any event where there are arrears of more than 6 months.
- Written agreements after legal advice by parents regarding child support, when neither is in receipt of welfare benefits, shall count as child-support assessments.

Spousal maintenance

- Spousal maintenance shall continue to end automatically on remarriage but should be reduced to a nominal maintenance order after periods of six months' cohabitation.
- Maintenance should be varied in accordance with the retail price indexation on an automatic basis unless otherwise agreed or ordered.

Case reporting

- The President of the Family Division shall be charged with the responsibility of overseeing judicial reported decisions, making clear those judgements or parts of judgements which are specifically intended to define, change or vary the law or give guidance to practitioners and the public about the law, 'red letter cases', and those decisions which are intended merely to be illustrative of an application of the law in a particular case.

Application of the law

- This financial provision law is very susceptible to being converted into a web based electronic, computer programme. This should be piloted so that it is available at the time of the introduction of the new law. Legal assistance may be needed, for example on quantification of the priority calls, before data is inputted. Further legal assistance may be needed on the outcome. There will be a number of cases which will be unsuitable. Nevertheless many ancillary relief disputes will have considerable assistance from a web based computer model based on this law.

Applicable law

- England should only ever apply English law in financial provision disputes appearing before the English family courts.

Miscellaneous

- Capital gains tax on Mesher payments, including existing Mesher orders, shall be abolished.
- The court shall have the power to grant interim lump sums for costs, which will assist many more parties to have better opportunities for funding their cases and so more just outcomes.
- To assist the disclosure process, there shall be much more and easier access to tax returns and other official records.
- In the case of clear failure to give disclosure, the court shall not only have power to make costs orders including at an interim stage with forthwith payment from existing assets, but to adjust the percentage in favour of the other party by up to 10 per cent of the overall marital and non-marital assets known to the court.

6.3 Taxation

6.3.1 INTRODUCTION

There is strong public backing for the provision of more support for marriage through the tax system. Our own YouGov polling of 1000 people found that 85 per cent of respondents agreed with giving extra financial incentives to married couples through the tax system. Three quarters thought that changes to the tax system have decreased the benefits of marriage over the past twenty years.

“85 per cent of those we polled agreed that extra financial incentives should be given to married couples through the tax system.”

Both *Breakdown Britain* and *Breakthrough Britain* described how, for the most disadvantaged 20 per cent of society, the current tax and benefits system discourages openly ‘living together as husband and wife’, which is surely affecting partnership formation. The reports also claimed that the tax and benefit system is incoherent and different parts operate according to radically different principles.⁴⁰

The present tax and benefit system may impose a substantial penalty on couples who are married or openly cohabit.⁴² According to information in the official tax and benefit tables, taking into account housing benefit, many low-income couples would be thousands of pounds a year better off if they split up than if they live together. These may not be princely sums by the standards of highly-paid professionals, but they are large in comparison with the income of those at the bottom of the income scale. In

“The tax system does not recognise the benefits which marriage brings to society and the tax credits system disincentivises adults from openly living together and encourages fraud.”⁴¹

40 Social Justice Policy Group, 2007, ‘Family Breakdown’ Volume 1 of *Breakthrough Britain*, Centre for Social Justice, p18

41 For example, the Government is paying tax credits and benefits to 200,000 more lone parents than live in the UK. See: IFS, Press Release, 12 March 2006, *Government paying tax credits and benefits to 200,000 more lone parents than live in the UK*, http://www.ifs.org.uk/pr/lone_parents_credits.pdf

42 See Draper, D. & Beighton, L., 2006, *The need to restructure tax credits*, CARE Policy Paper; Institute of Fiscal Studies, 2007, *The IFS Green Budget 2007*

some cases, the penalty can be as high as £8,500 for a family with an income of only £20,000.⁴³

It is essential that the provision of state support should be done in a way that ultimately encourages family networks to be self-supporting.

6.3.2 BACKGROUND

Historically, UK fiscal arrangements for personal taxation simply distinguished between those who were married and those who were single.

There were no other relationships recognised. The husband and wife were taxed together and then the tax was treated as that of the husband. The wife, if working, had her own allowance. The couple could choose to be taxed individually and there were complicated calculations about when this was worthwhile.

Independent taxation of the husband and wife only began in April 1990. In financial terms it really only benefited wives with investment income. However its greater importance was the separating out of the married couple into separately taxed individuals. Married allowance was still then available and transferable. In the

1960s and 1970s, a husband and wife received tax allowances of 2½ times that of a single person, i.e. they received as a consequence of being married an additional 50 per cent of the personal allowance. Various forms of relief for children were also available.

Recent years have seen governments of both political parties reduce the marital element. The trend began in 1988 budget of Nigel Lawson and has accelerated under the present Labour administration. Neither political party can claim an unblemished record on pro-marriage support through the fiscal system. We approach the subject on this basis.

Specifically, over the past decade fiscal policy has moved away from any support or endorsement of any particular form of domestic relationship, so that there is now no fiscal benefit within income tax in being married. Fiscal policy has moved towards caring for children and for those responsible for children: thus allowances, reliefs and benefits are child-directed. Whilst this has been significantly beneficial for the carer, it has allowed little or no recognition for the two couple household in which a decision is taken for one parent not to work in order to look after the children and household. Tax credits acknowledge the financial needs of children and of one parent.



The present tax and benefit system imposes a substantial penalty on couples who are married or openly cohabit.
(Photograph by: a.drian.)

“In many other countries, the income tax system explicitly recognises marriage and takes into account family responsibilities towards both children and dependent spouses.”

⁴³ Beighton, L. and Draper, D., 2008, *Taxation of Married Families: How the UK compares Internationally*, CARE

6.3.3 THE TAXATION OF FAMILIES 2007/2008⁴⁴

We have read the 2009 report of CARE, *The Taxation of Families 2007/2008* which assesses the UK tax burden on families, and draws international comparisons. We adopt some of their findings in this report. They state that the tax burden (the proportion of income paid in tax) on many types of household in the UK is similar to that elsewhere but with one major exception. In 2008, the tax burden on a one-earner married couple with children on an average wage in the UK, was 44 per cent higher than in most other OECD countries⁴⁵ and 25 per cent higher than in other EU countries.⁴⁶

The UK income tax system is unusual in that it takes virtually no account of either marriage or of a taxpayer's family responsibilities. Most other countries' systems do. OECD data reveal that in this country there has been a steady increase in the proportion of income taken in tax from one-earner families (both married couples and lone parents) with two children and an average wage. In 2007⁴⁷ the tax burden was 13 per cent higher than in 2001.⁴⁸ It has been rising even faster for one-earner families on two-thirds average income – the proportion of income taken in tax net of tax credits and child benefits has risen from 4.5 per cent in 2001 to 7.2 per cent in 2007.⁴⁹

OECD data does not allow direct comparisons to be made for one-earner married couples at other than an average wage. However, it seems likely that at two-thirds of an average wage and below, the tax burden on such families is no greater in the UK than it is elsewhere. The OECD data also indicates that the tax burden on two-earner couples and single adults, with or without children, is similar in the UK to the average in other countries. So the tax burden on the majority of families and individuals in the UK is not out of line with that in other countries. However, one-earner married couples with children are the

44 We refer in this section to a report published by CARE in 2009, Beighton, L. and Draper, D., 2009, *The Taxation of Families 2007/2008*, CARE which builds on previous work by Beighton and Draper on the taxation of families both in the UK and internationally.

45 Compared with 37 per cent in 2006/07. It rose from 20.4 per cent to 20.6 per cent in the UK whereas in other OECD countries it decreased from 14.9 per cent to 14.3 per cent. Data extracted from OECD, 2007, *Taxing Wages*, Table II 5.c, cited in Beighton, L. and Draper, D., 2009, *The Taxation of Families 2007/2008*, p9

46 OECD data is not available to enable systematic comparisons to be made with those on lower incomes. Beighton, L. and Draper, D., 2009, *The Taxation of Families 2007/2008*, p8 and p32

47 A number of changes to the tax system took effect in 2008. These changes will affect next year's OECD figures, but they do not affect the OECD 2007 figures. One of the more important of these changes was an increase in the child element of CTC coupled with, an increase in the WTC threshold and a rise in the withdrawal rate to 39 per cent. Draper and Beighton estimate that the cumulative effect of these changes may be to reduce the rate of tax on a one-earner married couple on an average full-time male wage. However, the tax burden on a one-earner married couple with two children and either a 75 per cent average or 100 per cent average wage, will still be more than double what this type of family would have paid in the mid-1960s. Beighton, L. and Draper, D., 2009, *The Taxation of Families 2007/2008*, CARE, p15

48 Beighton, L. and Draper, D., 2009, *The Taxation of Families 2007/2008*, CARE, p8

49 OECD, *Taxing Wages 2007*, Table II.4.c It is not only married couples who appear to have a higher tax burden than they would in other countries. The UK figure for a single adult with two children on two thirds of an average wage compared with a single adult on two-thirds of an adult wage is 30 per cent. The OECD average is 18 per cent. The position of one parent families on lower incomes (which is far more typical) is however considerably more favourable. For a lone parent with two children on 50 per cent of an average wage the 'tax burden' was negative. Tax credits and child benefit exceeded tax and national insurance contributions by £56.59 per week.

major exception. If their earnings are £25,000 (75 per cent of the average wage) or more, their tax burden is heavier in this country than in other countries, both as a percentage of income and as a percentage of the tax paid by single people without dependants but with the same income.⁵⁰

They are also worse off compared with single taxpayers without dependants.⁵¹ In other countries the tax burden on these families is not only much lower than in the UK but the gap between the UK and other countries, it seems, has been getting wider.

CARE has for many years been pointing out that the failure of tax credits to take account of the financial needs of a second parent is making it difficult to reduce child poverty. It is also damaging family life by discouraging couples with children from marrying or living together. Their analysis raises important questions about the direction which tax policy has taken under successive governments. Tax policy has seen taxpayers as individuals and not as part of a family. This has resulted in many one-earner couples on an average and somewhat below average wage bearing a bigger and increasing share of the tax burden than other taxpayers. OECD figures show that this burden has been increasing each year since 2001. It is difficult to see the fiscal case for placing a disproportionately heavy tax burden on these families.

Draper and Beighton suggest that rebalancing the tax system to remove this unfairness need not involve abandoning an independent tax system. Many other countries with independent taxation allow married couples the option of pooling their allowances or being taxed jointly. The introduction of transferable allowances for married couples would be in line with the practice in many other countries.⁵² *Breakthrough Britain* also proposed that more support should be provided for couple families, as is the case in the vast majority of European countries. This would reduce the incentive for unpartnered child-bearing and family breakdown and would also help to relieve the widespread poverty and stress in low-income couple families.⁵³

Importantly it would also achieve a greater measure of equity between one taxpayer and another.

6.3.4 CONCLUSION

The income tax benefits of marriage have been dramatically reduced (in reality, abolished), over recent years. Whilst some fiscal benefits remain in the realm of capital gains tax and inheritance tax, there are minimal distinctions within income tax, at least outside the elderly. The impact has been that government through fiscal policy has given a message that the form of relationships does

50 Beighton, L. and Draper, D., 2009, *The Taxation of Families 2007/2008*, CARE, p9

51 In 2006/07 these families paid 75 per cent of the tax paid by a single taxpayer on an average wage. This rose to 76 per cent in 2007/08 – the highest figure for seven years. Meanwhile in OECD countries this figure dropped from 56.2 per cent to 54.5 per cent.

52 Beighton, L. and Draper, D., 2009, *The Taxation of Families 2007/2008*, CARE, p9

53 For example, a reduction in the couple penalty by enhancing the couple element in Working Tax Credit and a transferable tax allowance for all married couples. Social Justice Policy Group, 2007, 'Family Breakdown' Volume 1 of *Breakthrough Britain*, Centre for Social Justice, pp 69-71

not matter. Specifically, there has been no encouragement or endorsement through fiscal policy of marriage, despite the very considerable merits and benefits of marriage for children, for those who are married and the wider family, for the community and for the country.

It has specifically had an impact on families where, by choice and agreement by the couple, one taxpayer has not been in employment because of child care and household responsibilities. These families have suffered from the change in fiscal policy. They are worse off than previously and compared to other EU and similar countries.

This abandonment of fiscal benefits towards marriage has been at a time of increasing relationship breakdown within our country, including marriage breakdown. Undoubtedly many factors have created the relationship breakdown culture. Critics claim that an extra £20 a week will not save a marriage which is in difficulty. However we, and others, are not arguing that it will, or even that it should. The point is that the tax and tax credit rules actually discourage couples from coming together in the first place where one of them has children. The Institute for Fiscal Studies has estimated that the Government is paying tax credits, or out-of-work benefits, to around 200,000 more lone parents than actually live in the UK, not just from overpayment errors but from fraud.⁵⁴ This strongly suggests that couples are well aware of, and are deliberately avoiding, the fiscal disincentives for living together openly as couple.

As part of a joined up holistic message and endorsement by government of the importance of marriage to children, families and the country, there should be some benefit from the fiscal provision to those who are married. To do otherwise and simply ignore marriage and the substantial commitments made in childcare and the other marital advantages is to give an inconsistent message at best and detract from the other policies and proposals. We therefore consider that future fiscal policy should contain an endorsement of, and suitable provision for, marriage but the implementation of that endorsement, and consequential costs to the Revenue, should follow a number of the other reforms proposed by us in this report.

“That the tax structure in the UK is out of line with the large majority of comparable countries is not in itself a reason for making a change. But it should make policy makers ask themselves whether there are good reasons for our being out of step...It suggests that we should be looking afresh at how we tax families and, in particular, married couples.”⁵⁵

6.3.5 SUMMARY OF RECOMMENDATIONS

We consider that there should be a government endorsement of the importance of marriage through fiscal policy, along the lines proposed in *Breakthrough Britain*.

⁵⁴ Institute for Fiscal Studies, Press Release, 12 March 2006, *Government paying tax credits and benefits to 200,000 more lone parents than live in the UK*, http://www.ifs.org.uk/pr/lone_parents_credits.pdf

⁵⁵ Beighton, L., and Draper, D., 2009, *The Taxation of Families 2007/2008*, CARE, p35

SEVEN

Family law and alternative family structures

7.1 The Human Fertilisation and Embryology Act

In the UK, the law on embryology and assisted reproduction has been primarily governed by the *Human Fertilisation and Embryology Act 1990 (HFE)*, which regulates the way in which fertility treatment is provided. This Act was recently revised, and a number of changes were made in a new *Human Fertilisation and Embryology Act 2008*.

Since aspects of this were of central concern to the Family Law Review, a specialist division of the Family Law Review group, the Assisted Reproduction Working Group, was asked to address some the issues it raised on family and parenting, as well as to highlight other related issues to which we intended to give ongoing consideration. The resulting report, *Fathers Not Included*, was published in May 2008, prior to key Parliamentary debates.¹

7.2 ‘Fathers Not Included’

This report was an attempt to open up a necessary debate on how best to safeguard the interests of children born with the help of donor-assisted reproduction. We accessed a wide range of views at evidence-gathering hearings, through polling and from the academic literature. In this report, we summarise the main recommendations from *Fathers Not Included* that we consider will necessitate on-going consideration in the light of evidence that may emerge about the impact of the recent legislative changes on families and children.

The Assisted Reproduction Working Group concluded in its interim report that proposals in the HFE Bill, as it was presented to Parliament, disproportionately represented the needs of adults over those of children, and that in calling for a redefinition of parenthood, it challenged the need for, and nature of, fatherhood. Experience from adoption has taught us that children

¹ The Centre for Social Justice, May 2008, *Fathers Not Included: A Response to the Human Fertilisation and Embryology Bill*, <http://www.centreforsocialjustice.org.uk/client/downloads/FathersNotIncluded.pdf>

benefit from knowing about both parts of their genetic origins, and from the engagement in their upbringing of parents of both sexes. Whilst the law has to take cognizance of the implications of new assisted reproduction technology, we were anxious that nothing should be codified which would diminish or discount the importance of biological parenthood, of motherhood and of fatherhood.

We concluded that the provisions in the proposed HFE Bill would signal fundamental changes in the meaning of parenthood – motherhood as well as fatherhood, and we are not persuaded that sufficient attention was given in the ensuing legislation to the risks involved in changing the legal framework surrounding parentage which allow parental status to be recognised on the sole basis of adults' intentions. We regard it as essential that unresolved confusions introduced in the Act be revisited. These affect our understanding of motherhood, and also downgrade the importance of fatherhood, even though a wealth of social research has established the importance of engaged fathers for families and communities. We remain concerned to ensure that the interests of adults are not elevated over those of children in a way that is sharply at odds with other aspects of government policy and that has profound implications for society. In particular, then, as a group especially concerned with family law, we must object to the falsification of the birth certificate, which has always been intended to be a true record of a person's birth origins and genetic parentage as far as that is known.

Whilst the timing of our report was intended to address issues arising in the Parliamentary debates, and some of its recommendations were specific to this, other recommendations are of on-going relevance and a summary of what we now consider to be key recommendations in this area is detailed as we set out below.



Nothing should diminish the importance of biological parenthood, of motherhood and fatherhood

7.3 Key recommendations

We recommend there be a thorough public investigation of the implications and applications of the broader welfare principle to assisted reproduction.

The difficulties of implementing the welfare principle (not providing treatment services 'unless account has been taken of the welfare of any child who may be born...') are widely acknowledged. Clinicians are particularly concerned that they are not effective in ensuring future children's welfare. If clinic staff refuse treatment, on the grounds that they are concerned about clients' prospective suitability as parents, the prospective parents will obtain treatment elsewhere and records of refusal cannot follow them. Many doctors want better training to implement what they acknowledge is an important consideration.

Continuing research should be carried out to compare outcomes for children born in alternative household structures, both in their early years and later in life.

Very little research has been done comparing children born by donor conception and raised by same-sex couples, with children raised in heterosexual families by their own two natural parents. There are no research findings on the relevance of the ‘absent’ biological parent or answers to questions such as: Is knowledge of or contact with this ‘absent’ parent beneficial? What are the implications of having knowledge and contact for the integrity of the same-sex couple family? Samples are small and while there is well-known research focussed on female couples, there is very little on parenting by male couples.

Whilst robust, the behavioural psychology studies that have tended to predominate, would not have shown up the emotional and identity issues many donor-conceived adults experience.² We, however, received powerful testimony from adults about the impact in their own lives of their donor-conceived status. We accept that there are complexities here affecting the future rights and well-being of this sizable minority of people – those who have been conceived using donor gametes. We doubt that these can be adequately dealt with simply by the Human Fertilisation and Embryology Act codes of practice and must in the end be addressed by Parliament. Meanwhile, qualitative research is required to reveal the complexity of relational dynamics in families with donor-conceived children (where infertility may be an ongoing issue). This would complement behavioural and development studies which can only reveal some of the picture. Such research could be carried out and funded by universities, and/or with ESCR funding.

We recommend introducing an adapted ‘special guardianship’ status.

Since treating same-sex partners as legal parents severs the link between a child and one or both of its biological parents, we are concerned about the impact this will have on the life of the child. However, we recognise that social parents often have a very important role in the care of a child and that it may be necessary for their parental responsibility to be recognised, in order for them to give parental consent e.g. in matters of education and healthcare. But we reject the solution operative from April 2009 that permits a single woman undergoing fertility treatment to name any adult as ‘father’ of her child and to automatically record a civil partner as father or second parent without qualification. We believe the desired objectives could be better achieved by giving a same-sex partner special guardianship status rather than by having two females registered as parents, since this is fundamentally incompatible with the heterosexual reality of parentage. We recommend that urgent consideration be given to remedy this anomaly, by introducing a status with some of the features of ‘special guardianship’, but which

2 See for example the work of Prof Susan Golombok and her colleagues.

also allows private ordering (rather than a court order) subject to further consideration of the exact circumstances in which this would be appropriate and in accordance with the welfare of the child.

We recommend greater transparency in the birth registration system.

A large-scale study of people who are aware of their donor conception found that it is better for children conceived by donor insemination to be told of their origins at an early age. Those told during adulthood were more likely to report feeling confused, shocked, upset, numb and angry. A 30-year-old adult, who found this out at age 17 said:

I would have appreciated revelation of this information much earlier in my life. Learning of my biological identity at 17 years of age was a traumatic event.

The same study also found that children born into mother-only or same-sex parent families were much more likely to be told about their origins before the age of three than were children of heterosexual parents who had used donor-conception: 63 per cent, 56 per cent and 9 per cent respectively. The donor offspring in the study showed high levels of interest in contacting not only their donor, but also their donor siblings or half siblings.³

Prior to the introduction of the *HFE Act*, the Department of Health acknowledged a need to review the issue of birth certificates for donor-conceived individuals. Despite their right to know their biological origins, many donor-conceived individuals are unaware of their status, as currently birth records do not register it. Several related options were presented to the Working Group, giving more or less privacy to parents and donor-conceived children (in terms of how explicit their donor status is on their birth records) and more or less control over records by the Human Fertilisation and Embryology Authority. We recommend that the best means be found for birth certificates to reflect that there are some differences between those who are social/legal parents and those who are genetic parents of the child being registered. We recognise the controversial nature of this issue, but 'decisional privacy' has to be tempered by donor-conceived individuals' rights to be made aware of their biological origins not only for emotional but also for health reasons, where crucial decisions may be made on genetic grounds. We recommend removing the information functions of the Human Fertilisation and Embryology Authority to the General Register Office (GRO) at the same time.



Many donor-conceived individuals are unaware of their status, as birth records do not record it.

³ The researchers recruited a sample of 165 offspring conceived by sperm donation through the Donor Sibling Registry. Children born after donor insemination should be told sooner rather than later about their conception. Presentation to the European Society of Human Reproduction and Embryology, Dr Vasanti Jadva, University of Cambridge, 7 July 2008.

We recommend funding and long-term commitment to UK Donor Link, or a similar organisation.

The various parties involved in donor conception (donor-conceived individuals, their parents and donors themselves) need easy access to a service experienced in dealing with kinship loss, reunion advice and support, as well as genetic expertise. We recommend continuing support for current provision through UK Donor Link or otherwise, as it forms a vital social service, sending an important signal to all those involved in this aspect of assisted technology of their responsibility to assist those concerned with finding their origins and related kin.

We recommend assessing the need for mandatory information and greater availability of counselling.

We recommend continuing monitoring of the effectiveness of code of practice guidance on counselling and consider that it should be mandatory for all prospective parents using donated eggs and sperm to receive impartial and accredited advice prior to treatment. The objective should be to help prospective parents think about: a) the issues bound up in parenting a child who is not genetically related to either one or both of them, and b) the psychological wisdom of telling their children about their origins and how best to do this. Donors' need for counselling is also set to increase as more donor-conceived children reach the age where they may get in touch with the HFEA seeking information about their origins, and may have identity issues which they need help to resolve. A society that creates a legal framework for taking advantage of reproductive technology should also ensure that appropriate and sufficient 'follow up' infrastructure is also in place.

We recommend the establishment of an independent National Bioethics Committee.

Such a body would be responsible for looking into bioethical issues of concern in proposed legislation as science and ethics should go hand in hand. There are many issues of a bioethical nature contained in recent legislation. Many other countries have a National Bioethics Committee or Commission but we have been made aware that these do not necessarily operate in the kind of independent way necessary to ensure impartial bioethical input into legislation. This would have to be taken into account when terms of reference were drawn up.

7.3.1 SUMMARY OF RECOMMENDATIONS

- **We recommend a thorough public investigation of the implications and applications of the broader welfare principle to assisted reproduction.**
- **We recommend continuing, and starting new, qualitative research to compare outcomes for children born in alternative household structures, both in their early years and later in life.**

- We recommend introducing an adapted ‘special guardianship’ status.
- We recommend greater transparency in the birth registration system and moving birth certificates to the GRO.
- We recommend funding and long-term commitment to UK Donor Link, or a similar organisation.
- We recommend greater availability of counselling for prospective parents intending to use donated gametes, for parents of donor children and for donor-conceived children and adults.
- We recommend the establishment of an independent National Bioethics Committee.

EIGHT

International families

There are now very many international families. Yet international families have no constituency, no lobbying group, no uniformity and often very little interest beyond their own family affairs. They now represent a not insignificant percentage of the world population, at least in the developed world. International families and international children deserve better than the national and international family law which presently exists. Too often governments only focus on the needs of national families. We bring to the attention of national governments and international governments the real issues in practice affecting international families.



International families and children deserve better than the national and international family law which presently exists.

The Working Group's findings on international families were laid out in *European Family Law: Faster Divorce and Foreign Law* published by the Centre for Social Justice.¹

(This was published in April 2009 to highlight issues within reforms of national family law imposed by the European Union.) The issues set out in that report are based on the same principles and foundations to the matters set out in this report. We repeat here the executive summary of that paper.

8.1 The executive summary of European Family Law: Faster Divorce and Foreign Law

We make the following recommendations in the interests of encouraging international family stability, reducing antagonism in the process of family breakdown, maintaining the UK traditions of justice, fairness and support for family life, and fundamentally giving every opportunity for reconciliation and amicable resolution of matrimonial disputes. In summary:

- The principle of first to issue, *lis pendens*, in European family law directly encourages international couples to rush to the divorce court to gain personal and financial advantage over the other spouse. It must be

¹ The Centre for Social Justice, April 2009, *European Family Law: Faster Divorce and Foreign Law*, <http://www.centreforsocialjustice.org.uk/client/downloads/CSJ%20European%20Family%20Law%20Final%20Web.pdf>

- removed at the very earliest opportunity; it is thoroughly anti-family, anti-settlement and contrary to the whole ethos of family law and family life.
- A number of European countries will in certain circumstances apply not necessarily their own law, but the family law of the country with which the couple in matrimonial proceedings has a close connection (known as applicable law). England and Wales only ever apply English family law, built up over centuries to create a sense of fairness and justice in the English and Welsh courts and for English and Welsh settlements. Brussels wants to impose applicable law on the UK. It will create much injustice and unfairness, increase costs of getting a divorce settlement and decrease prospects of settlements.
 - The country with the closest connection to an international couple should be able to deal with their case and then apply its local law to their matrimonial proceedings.
 - Brussels should go more slowly in its programme of European family law reform to take account of the very different traditions of family life and family law around Europe. Some seemingly minor changes in family law can have dramatic impact on relationships, families and community life and need much care and reflection before implementation.

8.1.1 SUMMARY OF RECOMMENDATIONS

- **Endorsement of the interim proposals of our report on European family law, as set out above.**

NINE

Conclusion

A review of family law is, by necessity, a major undertaking. The areas we have reviewed, as outlined in this report, are not comprehensive. There are many other issues we could also have covered and, we consider, should subsequently be covered. However our intention is that what is covered in this Family Law Review's final report will encourage further debate as well as providing clear recommended proposals for changes to the law that will ultimately serve to strengthen commitment and stability in family life in the UK today.

The Fathers Not Included report was published in May 2008 to address the issues the HFE Bill raises, as well as to highlight other related issues to which we intend to give ongoing consideration. The *European Family Law: Faster Divorce and Foreign Law* report was published in April 2009, to highlight issues within reforms of national family law imposed by the European Union.

The areas under discussion and review have been decided by the Working Group and do not necessarily represent the views of consultees. Neither do we claim that they represent the views of other organisations with which Working Group members are associated.

We are proud of our English family law and the English family law process and system. We wish to record that English family law has incredible benefits and advantages and incredible opportunities for fairness and justice and to resolve family law disputes, to support the child, to support family members and support marriage and family life.

We are aware of what occurs in a number of other jurisdictions and see some benefits in what they are doing and which we could usefully borrow and adapt here.

Equally we are aware of many quite fundamental faults and failings in English family law, some of which are set out in this report. By reason of the Parliamentary neglect of family law for so long, a once superb building is creaking. Excellent attempts to patch it up by judges and shore it up by legal practitioners and others working with families, and even create completely

new extensions as the family life of our country has grown in various ways, can only go so far. Ultimately it is a matter for Parliament. It must now take action on the areas recommended in this report.

As shown in this report our country is in the grips of a deep-seated and deeply entrenched culture of family relationship breakdown. It is affecting everyone in this country since it touches on many areas of social life including employment, housing, health, crime and poverty. Under the cloak of a refusal or unwillingness to condemn or pass any judgement on any form of lifestyle, very little has been done by Parliament either to acknowledge this relationship breakdown culture or particularly to do anything about it in any meaningful fashion. This simply cannot continue.

Our report goes to the heart of what it means to be a country, a community, and a nation. What is the purpose of government for a country? The life of a country is not necessarily, and certainly not only, found in its wealth, its security, its ranking in the world and its trade connections. It is found in the lives of all of its nationals and all others gave about their lives within the country, and their families. Their priorities are found in many different ways: economic, national and personal security, health and wealth. Governments of recent decades have looked after these priorities for our country, often very successfully. Yet we suggest that very many people ultimately seek simple priorities of contented personal lives and family lives. In this, very many now are highly frustrated and unhappy. They are aware of the relationship breakdown culture which exists all around and is manifest in so many different ways and has such dreadful, painful and costly effects.



Parliament must now take action on the areas recommended in this report.

A major purpose of government for a country is to establish successful family life, for the benefit of individuals, families, community and the country.

Urgent and fundamental action is needed now.

We offer this report to Government, to Parliament, to the family law professions and to our community. Mostly we offer it to those who are married, considering marriage and to the families and children of our country, for an improved family life of our communities and our nation.

APPENDIX ONE

Comprehensive list of proposals and recommendations

PRINCIPLES OF FAMILY LAW REFORM

1. Section 1 of the Family Law Act 1996 should be reinstated in primary legislation for family law matters

DIVORCE LAW

2. Discussing no-fault divorce is a low priority in contrast to other family law reforms and not promoted;
3. Creation of a period of reflection and consideration at the outset of the divorce process, which would now be commenced only by a short written notice without any allegations;
4. The period of reflection and consideration should last three months and could be abridged by the court in exceptional circumstances;
5. Apart from urgent measures and protective or preservative orders, no other steps would be taken during the period of reflection and consideration;
6. At the expiry of the three months, either party could proceed with a petition for divorce whereupon the present procedure would follow;
7. Parties should be able to petition jointly under existing law;
8. Decree absolute of divorce should be capable of being applied for after four weeks from the decree nisi, instead of the present time periods;
9. Either party should be able to apply for the decree absolute irrespective of whether they are petitioner or respondent;
10. The certificate of reconciliation should be abolished;
11. Improvements to the circumstances in which either party may prevent the granting of the final decree until the final financial settlement and its implementation.

COHABITATION

12. For the different reasons set out above, we do not consider that it is appropriate to make any proposals for cohabitation law reform at this time;

13. We oppose the present Private Members' Bill on the basis that it provides very similar rights to marriage;
14. We recommend more education of couples to raise greater awareness of their rights and limitations in their relationships, and opportunities to provide certainty and planning in their financial affairs.

PRE-MARRIAGE INFORMATION

15. Before being married in England and Wales a couple should be very strongly encouraged by Government and others to attend a pre-marriage information course. A note should be made by the registrar of marriages of those who attend in order to measure effectiveness and usage;
16. The course may consist of three sessions, of which the middle one maybe undertaken at home by watching a DVD, reading a book or similar;
17. The course does not have to be undertaken at the location of the marriage nor do the couple have to attend together;
18. The course would be partly or fully publicly funded, provided by accredited services;
19. Attendance would provide a discount on the marriage fee;
20. The course would cover present marriage preparation and information, and specifically cover how to deal with crises and pressure points within marriage.

MARRIAGE SUPPORT

21. Government should reinstate Marriage Support Services funding and the Marriage Support Services Directory;
22. We particularly endorse and support the following proposals, as made by the two reports referred to above:
23. A comprehensive and coherent framework should be developed encompassing all areas of Relationship Education. However we see no reason why our proposals, above, for pre-marriage information should be delayed whilst this is being developed. Instead it will generate more interest in couple relationship education;
24. The provision of CRE should be expanded through an approach which encompasses:
 - Actively encouraging, or potentially requiring, those who naturally form 'gate-keepers' at key relationship stages (e.g. Registrars, Health Visitors, etc) to promote awareness of relationship skills, and the provision of CRE;
 - Encouraging the wide range of local social voluntary providers already in existence to expand and develop their services with an approach to regulation which is kept to a minimum level, so as to encourage, not stifle, local initiative;
 - Defining 'Minimum conditions of satisfaction' that any course must encompass – i.e. defining a minimum core curriculum, and

- minimum duration, but maximising the freedom of providers to develop those aspects appropriate for their target recipients;
 - Providing funding into the sector primarily through market-led mechanisms where the amount of funding received by providers is driven by the quantity of recognised CRE delivered;
 - Supporting local providers of CRE in the training of those involved in delivery of services by funding such training;
25. Funding for expansion of CRE should come from both central and local government, and from the voluntary sector, with a gradual shift towards direct payment by recipients who can afford it as CRE becomes more widely accepted;
 26. Details of couple relationship education to be specifically provided through the Family Relationship Hubs referred to below. This will provide consistency of service across the country, overcome patchiness of provision and yet encourage local initiatives;
 27. The PSHE curriculum is to include a specific opportunity to learn about, explore and discuss the nature of marriage, family and relationships, and encourage voluntary sector involvement in relationship education delivery.

FAMILY RELATIONSHIP HUBS

28. An extra layer of advice, assistance, support and guidance is needed in the UK for people experiencing family troubles to allow them an alternative to the polarising and adversarial route of litigation and the court service. A form of Family Relationship Centre is therefore considered a valid and viable option for the UK. We refer to them as Family Relationship Hubs, to focus on the coordinating and centralising role they will play;
29. The UK model should include, where practicable and appropriate, a comprehensive range of services that might include (and act as a referral source for) family dispute resolution, post separation services, child contact services, early intervention services, counselling services, mediation, pre-marriage information, pre issue information, and preventative & educational services;
30. These services should where possible be co-located together within Family Relationship Hubs for the benefit of clients, staff and economies of scale in funding matters. Where co-location is not possible or practicable, a formal referral process undertaken by the Hubs would guide clients to the appropriate local resources;
31. The locations should be highly visible and accessible to the public, with strong government branding to promote trust and confidence;
32. A recruitment, accreditation and continuing education scheme is likely to be required, as is a body with compliance and oversight functions;
33. It is essential to engage all stakeholders in the consultation process, including (but not limited to) Domestic Violence organisations, men's groups, the Court Service and solicitors;

34. Responsibility for funding would be between central government, local government and external agencies.

INFORMATION BEFORE THE ISSUE OF PROCEEDINGS

35. There should be information provision before the commencement of family law proceedings;
36. Receipt of this information is a precondition of issuing proceedings, evidenced by the form of a certificate or similar;
37. This applies to all family law proceedings, including divorce, children proceedings and financial proceedings, including substantive applications made in existing proceedings;
38. There would be an exception in respect of proceedings for domestic violence and in other proceedings where there are issues of urgency, for safety and similar, although in such circumstances the information provision should be received and considered within a time period after the issue of proceedings;
39. Once the information provision had been received, any number of family law proceedings could be undertaken within a period of the information provision; it does not relate to only one set of proceedings;
40. Despite past difficulties with various models of delivery, a form of information provision must be found as to its delivery, length, content, cost and manner of providing the information. Face-to-face consultations or meetings are preferable so that the information can be tailor-made to meet individual circumstances;
41. Information providers would be accredited and quality assured;
42. The information provision can take place at the same time as a mediation meeting for a party seeking legal aid;
43. The information provision is likely to be provided by or through the Family Relationship Hubs;
44. With respect to children matters there would also be a mandatory attempt at dispute resolution, organised through the Family Relationship Hubs, although this may be a second stage in the development of pre-application information and the Family Relationship Hubs.

ALTERNATIVE DISPUTE RESOLUTION

45. Sections 13 and 14 Family Law Act 1996 should be reintroduced, giving the court specific powers and obligations to adjourn cases for the purposes of mediation and other ADR with reports on what progress has been made;
46. Binding family law arbitration should be introduced;
47. The requirement on legally aided parties to attend a meeting to ascertain if mediation might be suitable should be continued and extended as below;
48. Applicants for divorce and dissolution of civil partnerships, for financial provision on relationship breakdown, for orders regarding children and

- other family court applications, and save matters of emergency or domestic abuse, must attend a pre-application information meeting which would include provision of details of mediation and other available ADR;
49. There should be mandatory attempts at resolution of children disputes before the issue of proceedings;
50. Forms of dispute resolution short of final court hearings should be regarded as primary dispute resolution, matters of first resort, and final court hearings regarded as matters of last resort.

LEGAL AID

51. Government should clearly place on record that access to justice, like education, health care and other front-line services, is an essential facet of any civilised society;
52. The legal aid system must attract and retain specialist practitioners in all areas of family law;
53. To this end, the Government must end all plans for further reductions in remuneration;
54. Also to this end, the Government must return to the original basis of 'fair remuneration for work reasonably done';
55. The Government must put an end to the erosion of eligibility for those in need of help;
56. Payments to the Legal Services Commission from the operation of the Statutory Charge should be clearly identified and ring-fenced for use by the Commission and not lost in other revenue to the Exchequer;
57. There should be proper transparency in the published cost of legal aid, so that the net cost, being gross expenditure net of VAT, after deduction of repayment of this statutory charge and interest on it is made public rather than the present opaque figure;
58. The present high rate of interest paid upon the statutory charge must be reduced immediately, linked with base rates and subject to review on an annual basis;
59. Budgets for family legal aid work should be ring-fenced from other areas such as crime;
60. Power for the court to grant interim lump sums, for costs, should be introduced immediately; and
61. There should be dialogue with the main banks and lending institutions to discuss what changes are needed to allow more family law litigation loans to be granted.

DOMESTIC VIOLENCE AND ABUSE

62. Ongoing education to create knowledge and awareness of domestic abuse for all those involved in the family law process.
63. Systematic evaluation of courses and success rates for offender intervention programmes, including community-based projects, with any shortfall in the availability of programmes to be addressed.

64. Whilst it is too early to draw conclusions on the effect of the 2004 DVCV Act, there must be an ongoing consideration and review of its impact.

CONTACT

65. An amendment to the Children Act 1989 to include explicit principles of contact and residence, incorporating equal status of those with parental responsibility and the benefit to the children of both parents having a significant involvement in their lives, with the welfare of the child remaining the paramount consideration.

CONTACT CENTRES

66. Contact centres provide an invaluable service for short-term, and sometimes medium and longer term, contact between a child and parent. However their role is diminished, even unrecognised, in the overall services for children. This must be reversed so that they are recognised as a key element in children's services;
67. Recent rearrangements in funding have meant that whilst start-up funding may be available, ongoing costs often cannot be met even with considerable volunteers and charitable support. Yet the costs of running many contact centres are relatively small, especially when taking account of their considerable benefit in post separation parenting and the costs saved elsewhere such as in public law proceedings and ongoing private law disputes. These relatively modest costs should in future be funded;
68. There should be a partnership of funding between central government, local government, CAFCASS and the centres themselves, recognising that the centres for their part may continue to rely on volunteer work and charitable donations;
69. There should be an obligation on local government to ensure that geographical areas of particular need have provision of appropriate contact centres;
70. Whilst there should be more reference to the users making a contribution, there has to be recognition that they are seldom in a financial position to make any material payment;
71. The services provided by contact centres should be linked with Family Relationship Hubs as part of the combined provision of services for families and children.

RELOCATION AND INTERNATIONAL CHILDREN

72. A change in the law regarding relocation such that an amendment to the Children Act as proposed above (see section 5.1.3.2) would apply in such cases, to take better account of the changed patterns of parenting, the considerable impact on the child of relocation away from home and other home environment features and wider family members, yet taking account of the increased movement of families;

73. A call for a international Convention to establish international consensus on child relocation.

RIGHTS OF EXTENDED FAMILY

74. Grandparents should be placed in a distinctive legal position;
75. To protect the child from multiple claims for contact, 'grandparents' should be defined for this legal purpose strictly in terms of a biological or adoptive relationship to the child;
76. A single straightforward application for contact for grandparents should not require leave although other applications for S8 orders would follow existing procedure;
77. Subsequent judgements regarding contact should be based on well-understood relevant criteria, which should include a grandparent's prior interest and contact with the child;
78. An early approach with mandatory attempts at mediation between grandparents and parents should be encouraged before the issue of proceedings at court;
79. The use of child care credits to be paid to grandparents who are not themselves registered child minders, when this would enable a parent to take up employment or training. The rate should be set at 70 per cent of the rate of the carer's allowance;
80. Authorities responsible for housing allocation should be sensitive to the importance, except when there are contra-indications, to children's well-being of maintaining contact with their kinship network, especially their grandparents.

LOCAL AUTHORITY CARE AND SPECIAL GUARDIANSHIP

81. When children are in LA care, positive steps should be taken to enable regular contact with parents, grandparents, siblings, and other relatives.
82. Close family members may be seen as potential carers *before* a child is placed into Local Authority care.
83. Arrangements for family members, especially grandparents, to act in a temporary role as foster carers for children who would otherwise be taken into care should be made easier and quicker.
84. In the case of a Special Guardianship Order, payment should be made direct to the family member with care.
85. Special Guardianship Orders should be available to grandparents and extended family members, enabling them to have more responsibility without becoming adoptive parents.
86. The position of grandparents in adoption cases should be strengthened, and, other things being equal, their claims should be given fairer treatment and higher priority as family placements.

CHILDREN OF PRISONERS

87. We have found that new Family Drug and Alcohol Courts are pioneering the sentencing of parents in a way that takes full consideration of their

children's welfare and the future integrity of the family into account. We recommend their wider implementation.

MARITAL AGREEMENTS

88. Couples should have the opportunity to enter into pre-marriage and other domestic relationship agreements;
89. These agreements should be binding provided they comply with certain preconditions, as specifically set out in the summary of proposals for reform of financial provision on divorce;
90. The family court should have a narrow discretion to override such agreements namely if the outcome of the agreement would cause *significant injustice*;
91. Marital agreements, entered into during marriage and dealing with financial issues, should also be binding provided they comply with similar preconditions with similar discretionary opportunity to override;
92. Civil partnership agreements should be treated the same as marital agreements;
93. Separation agreements, entered into at a time of a breakdown of a domestic relationship, should be treated the same as marital agreements.

FINANCIAL PROVISION ON DIVORCE

Objectives

94. There should be a statutory objective of fairness;
95. Fairness is found in the agreements of the parties, in the overriding calls on the overall resources of the parties and in the equal sharing of the marital assets; with first consideration given to the financial needs of dependent children and taking account of the section 25 Matrimonial Causes Act 1973 criteria where required;
96. There shall be an incorporation of the 1984 legislation of attempting a clean break in all cases.

Marital agreements

97. The court must follow as binding any marital agreements provided they comply with certain conditions as follows:
 - after legal advice, certified on the marital agreement as having been received, and;
 - after financial and other relevant disclosure, and;
 - without misrepresentation, duress, mistake, fraud and similar contractual elements, and;
 - in the case of pre-marriage agreements, at least 28 days before the wedding ceremony, and;
 - there is no significant injustice.
98. Significant injustice shall be in the discretion of the court. Significant injustice will include failure to make reasonable provision for any children of the relationship during their minority in which circumstances the court

has power to depart from the agreement to the extent of making such provision. Significant injustice may include failure to have reasonable provision in exceptional unexpected circumstances e.g. health, in which circumstances the court has power to depart from the agreement to the extent of making reasonable provision. Significant injustice may relate to provision as to income or capital or both.

99. If any of the conditions above are not complied with or there is significant injustice, the court shall follow financial provision as set out herein but may nevertheless take into account the existence of the agreement in any discretionary elements.

100. Marital agreements may provide by way of example:

- for the entire outcome if there were a separation or divorce;
- a schedule of what are the non-marital assets at the date of the marriage, an issue of considerable importance under our proposed new ancillary relief laws, below;
- overriding provisions regarding the couple's own preferred definitions of marital and non-marital assets;
- specific intentions regarding provision for any children;
- specific intentions regarding provision of major ill health, mental or physical;
- specific intentions regarding provision for existing children or grandchildren;
- specific intentions regarding specific assets e.g. family businesses;
- agreements about preferred jurisdiction.

Definitions of property

101. All resources of the parties at the date of the final settlement are to be categorised as marital assets and non-marital assets.

102. Marital assets are all assets acquired by the parties solely or jointly during the marriage and any pre-marital cohabitation whether through passive growth or active acquisition. It includes non-marital assets which by the definition below become marital assets.

103. Non-marital assets are:

- pre-marital, pre cohabitation assets;
- inheritances;
- sole gifts;
- post separation assets if as a consequence of new enterprises and new initiatives by one spouse post separation.

104. Non-marital assets become marital assets in the following manner:

- they are used for the purchase or acquisition of the primary residential property for the family;
- they are used for the purchase or acquisition of the contents of the family home, motor vehicles, chattels, household expenditure and all other elements of family life;

- they are used for the purchase, acquisition, investment or other involvement in family and/or jointly run businesses or enterprises or run by the other spouse;
- they are used for the common benefit of the family;
- in other circumstances where it is clear from the actions of the spouses that the assets were intended to be marital (following New Zealand's provisions in which separate property becomes relationship property);
- in any event pre-marital assets become marital assets as to 5 per cent per annum up to becoming 100 per cent marital asset after 20 years.

Overriding calls on assets

105. In conducting its fairness exercise on distribution of marital assets and non-marital assets, the court shall follow as binding any marital agreement of the parties as set out above.

106. If there is no marital agreement, the following applies:

- The first priority call is a residential home for the children during their minority with the primary carer and the secondary carer, with a presumption of equal basic housing needs of each parent with the children taking account of their ages, gender and similar, and then, if needs so require, providing an uplift, perhaps between 10 per cent to 30 per cent dependent on circumstances, for the primary residential parent. Reasonable accommodation needs of the child with each parent would take account of the standard of the marriage, available resources and Section 25. The first priority call would include other reasonable capital needs of the children.
- The second priority call is quantified recognition of the prejudice created to either party by commitments, sacrifices or other steps that one spouse has taken for the benefit of the children or the other spouse during the marriage and ongoing, including retained benefit or relationship generated disadvantage. It will be similar to section 18 *New Zealand Property (Relationships) Act 1976* as amended.
- The third priority call would be provision for the reasonable needs of each spouse, with justification being required by either spouse to show why their needs should be greater than the other post separation.

Division of assets

107. The marital assets, including illiquid assets, shall be divided equally between the spouses unless there is a good reason not to do so which is the 3 priority calls set out above. If there is a disparity in the provision between the spouses in the liquid marital assets, this should be compensated by appropriate disparity in the division of the illiquid assets, with appropriate provision taken of the element of illiquidity and risk.

108. The non marital assets should be used to provide for the priority calls set out above only in so far as they cannot be utilised by the marital assets. Thereafter in respect of the (remaining) non-marital assets, there should be good reasons shown to justify any redistribution, taking account of the Section 25 factors.
109. The first priority call, primarily the housing needs of each spouse as carers, should first be met out of their one half share of marital assets together with their own non-marital assets. If however it is necessary to use any of the one half share of the marital assets or the non-marital assets of the other party, this should be in the form of a Mesher (charge-back) for the child's minority. The second priority call, 'compensation', should be payment of an outright lump sum, from one half of the marital assets or non-marital assets of the paying spouse if necessary, otherwise ongoing maintenance. The third priority call, reasonable needs, should be an outright payment or Mesher dependent upon the nature of the provision of the needs.
110. Where there is a short marriage of less than three years without any children the parties should be put in the position as if they had not been married unless this will cause significant injustice taking account of features such as age, health and section 25 factors. There should nevertheless be equal sharing of the marital assets. However conversion of non-marital assets into marital assets, as above, would not then apply.
111. The court shall retain a narrow discretion to review the overall final division of overall assets to make sure that there was no significant injustice, taking account of the Section 25 principles. This discretion will specifically include where one party's parental/family inheritances have become marital assets in accordance with the above and the other party has yet to receive any parental/family inheritance.

Child support

112. The family courts shall have power to make child maintenance orders where both parties are not in receipt of or claiming welfare benefits and the court is making other orders between them concerning income or capital and in any event where there are arrears of more than 6 months.
113. Written agreements after legal advice by parents regarding child support, when neither is in receipt of welfare benefits, shall count as child-support assessments.

Spousal maintenance

114. Spousal maintenance shall continue to end automatically on remarriage but should be reduced to a nominal maintenance order after periods of six months' cohabitation.
115. Maintenance should be varied in accordance with the retail price indexation on an automatic basis unless otherwise agreed or ordered.

Case reporting

116. The President of the Family Division shall be charged with the responsibility of overseeing judicial reported decisions, making clear those judgements or parts of judgements which are specifically intended to define, change or vary the law or give guidance to practitioners and the public about the law, 'red letter cases', and those decisions which are intended merely to be illustrative of an application of the law in a particular case.

Application of the law

117. This financial provision law is very susceptible to being converted into a web based electronic, computer programme. This should be piloted so that it is available at the time of the introduction of the new law. Legal assistance may be needed, for example on quantification of the priority calls, before data is inputted. Further legal assistance may be needed on the outcome. There will be a number of cases which will be unsuitable. Nevertheless many ancillary relief disputes will have considerable assistance from a web based computer model based on this law.

Applicable law

118. England should only ever apply English law in financial provision disputes appearing before the English family courts.

Miscellaneous

119. Capital gains tax on Mesher payments, including existing Mesher orders, shall be abolished.

120. The court shall have the power to grant interim lump sums for costs, which will assist many more parties to have better opportunities for funding their cases and so more just outcomes.

121. To assist the disclosure process, there shall be much more and easier access to tax returns and other official records.

122. In the case of clear failure to give disclosure, the court shall not only have power to make costs orders including at an interim stage with forthwith payment from existing assets, but to adjust the percentage in favour of the other party by up to 10 per cent of the overall marital and non-marital assets known to the court.

TAXATION

123. We consider that there should be a government endorsement of the importance of marriage through fiscal policy, along the lines proposed in *Breakthrough Britain*.

THE HUMAN FERTILISATION AND EMBRYOLOGY ACT

124. We recommend a thorough public investigation of the implications and applications of the broader welfare principle to assisted reproduction;

- 125. We recommend continuing, and starting new, qualitative research to compare outcomes for children born in alternative household structures, both in their early years and later in life;
- 126. We recommend introducing an adapted 'special guardianship' status;
- 127. We recommend greater transparency in the birth registration system and moving birth certificates to the GRO;
- 128. We recommend funding and long-term commitment to UK Donor Link, or a similar organisation;
- 129. We recommend greater availability of counselling for prospective parents intending to use donated gametes, for parents of donor children and for donor-conceived children and adults;
- 130. We recommend the establishment of an independent National Bioethics Committee.

INTERNATIONAL FAMILIES

- 131. Endorsement of the interim proposals of our report on European family law, as set out above.

APPENDIX TWO

Questions put to the judiciary

DIVORCE

1. England has a part fault and part non-fault divorce law. The simple reality is that many use the fault-based provisions as they are immediate. However they are, particularly in the case of unreasonable behaviour, a legal fiction in that they have often very little relevance to the true reason for the breakdown of the relationship. Given the still relatively recent Parliamentary experience with the 1996 legislation, do you think there is now still a compelling demand for the introduction of non-fault divorce?
2. Should this be after one year of separation and if not, what period should prevail before the proceedings could be issued?
3. Is there not a danger, as discovered in some other jurisdictions, that the one-year of separation when spent under the same roof is as much a legal fiction as the present unreasonable behaviour?
4. Whether a non-fault divorce law or the present divorce law, should a period of reflection and reconciliation be introduced, perhaps three months, at the commencement of the proceedings, but specifically on the basis that the proceedings had then commenced in law?
5. The 1996 legislation anticipated that the final divorce order would often not be made until the final financial order was in place. Would you want to see this repeated in any new legislation?
6. The 1996 legislation resulted in a very long period between the commencement by the original notice and the final divorce order. At present many divorces take perhaps four months, six months at most. Do you consider the present timetable is about right and should not be changed? If it should be changed, what new timetable should be adopted and why?
7. Where within the priorities of family law reform lies the introduction of non-fault divorce?
8. Should there be any requirement that couples attend some form of reconciliation service as an addition to or as an alternative to the one year rule or in any event in all divorce cases?

CHILDREN

9. A number of organisations making representations to us have said that the Children Act 1989 is past its sell by date, that the concepts are

outmoded and it is no longer beneficial. What is your response to this please?

10. Given the opportunities for active involvement in parental responsibility by all parents after separation, what are your views on those calling for legislative reform to introduce a presumption of shared residence?
11. Are you of the opinion that the Australian legislation, creating an expectation of equal time or at least significant and substantial time of each parent with the child, is premature for England and Wales?
12. Given that it is very difficult to obtain a non-molestation order or occupation order to exclude one party from the former family home without the occurrence of actual physical violence, should the threshold be lowered to take into account emotional and psychological abuse which can be equally damaging?
13. Sir Mark Potter recently expressed concern in *The Times* newspaper, 'Women at risk, failed by domestic violence law' and District Judge Edwina Millward recently wrote in the *Law Society Gazette*, 'Despite noble intention, the Domestic Violence, Crime and Victims Act 2004 is not working.'

In view of the above, do you think consideration should be given to the repeal of the Act and the return to civil committal for breaches of civil domestic violence orders, coupled with an increase in the jurisdiction of the Circuit and District benches in sentencing for contempt?

14. In view of the dramatic cuts in legal aid and the consequential dramatic reduction in those practitioners prepared to undertake legal aid work, how do you envisage there could be any publicly funded family law representation system in the future?
15. How can we introduce a greater awareness of the wider implications of domestic abuse including violence throughout the Family Justice System?
16. There are now many international families where, after separation, one parent wants to move abroad with the child. Would legislation be of any assistance in this area to meet the concerns of the left behind parents?
17. Should there be any requirement, as in Australia, that parents attend some form of out-of-court mediation before commencing children proceedings, saving certain exceptions?

FINANCE

18. Do you support the introduction of binding family arbitration, especially for financial matters - including to maintain confidentiality?
19. It has been said that a major piece of legislation would not have produced more case law and debate than recent Court of Appeal and House of Lords decisions. What legislation should be introduced to deal with financial provision on divorce, to maintain the balance between fact specific cases of discretionary fairness and much greater certainty and clarity of outcome?

20. Should financial agreements in family law be binding, presuming certain preconditions are met such as legal advice and disclosure etc and what should be the relatively narrow circumstances when the court would retain a discretionary opportunity?
21. Pending any wholesale cohabitation law reform, do you consider there could be material short-term benefits by amendments to Schedule 1 of the Children Act?
22. In view of the strong judicial condemnation of the high level of costs in some cases, what can be done by government to reduce the cost burden for the parties? Does it only arise in a few cases that go wrong or involve very substantial assets? How can any clampdown on costs also recognise the very great difficulty that most clients have in funding the case?
23. Do you agree that the family courts should have the power to grant interim lump sums including for costs?
24. What other powers in financial aspects would you like the family courts to have?
25. There have been arguments that more issues of conduct should be brought into account, to reflect public feeling and attitudes. Do you consider that there should be any widening or extension of the present conduct law?

FAMILY COURTS

26. Under what circumstances would you like to see more openness and transparency in either family court hearings or in family court judgements?
27. Do you agree that English family law should not adopt choice of law, applicable law, as preferred in many continental European countries?
28. Should judges more frequently see and hear children in children cases?

APPENDIX THREE

Extract from Supporting Families 1998

EXTRACT FROM SUPPORTING FAMILIES 1998

4.21 The Government is considering whether there would be advantage in allowing couples, either before or during their marriage, to make written agreements dealing with their financial affairs which would be legally binding on divorce. This could give people more choice and allow them to take more responsibility for ordering their own lives. It could help them to build a solid foundation for their marriage by encouraging them to look at the financial issues they may face as husband and wife and reach agreement before they get married.

4.22 Providing greater security on property matters in this way could make it more likely that some people would marry, rather than simply live together. It might also give couples in a shaky marriage a little greater assurance about their future than they might otherwise have had. Pre-marriage agreements could also have the effect of protecting the children of first marriages, who can often be overlooked at the time of a second marriage - or a second divorce.

4.23 There would be no question of written agreements being made mandatory for couples intending to marry. Also, we would protect the interests of a party to the agreement who is economically weaker and the interests of children through six safeguards. If one or more of the following circumstances was found to apply, the written agreement would not be legally binding :

- 1. where there is a child of the family, whether or not that child was alive or a child of the family at the time the agreement was made,*
- 2. where under the general law of contract the agreement is unenforceable, including if the contract attempted to lay an obligation on a third party who had not agreed in advance,*
- 3. where one or both of the couple did not receive independent legal advice before entering into the agreement,*
- 4. where the court considers that the enforcement of the agreement would cause significant injustice (to one or both of the couple or a child of the marriage),*

5. *where one or both of the couple have failed to give full disclosure of assets and property before the agreement was made,*
6. *where the agreement is made fewer than 21 days prior to the marriage (this would prevent a nuptial agreement being forced on people shortly before their wedding day, when they may not feel able to resist).*

APPENDIX FOUR

Charman v. Charman [2007]

EWCA Civ 503

Postscript to Final Judgement: Changing the Law

106. Section 25 of the Act was not an innovation but the consolidation of section 5 of the Matrimonial Proceedings and Property Act 1970. The 1970 Act was the companion to the Divorce Reform Act 1969. As the courts came to apply the new law, the case of *Wachtel* was seen at the time, and is still seen to be, fundamentally important. It established, amongst other things, that the acrimonious disputes as to the causes of the breakdown of marriage, which had characterised the law of divorce prior to the 1969 Act, were not to be born again in the arena of financial disputes. However the judicial decisions that were more profound and far-reaching were the subsequent decisions of this court in *O'Donnell v. O'Donnell* [1976] Fam 83 and *Preston v. Preston* [1982] Fam 17. They provided trial judges and practitioners with a method for the determination of those cases in which the available assets significantly exceeded the simple needs of the family. The applicant's reasonable requirements became the focus of the case, throughout its preparation and in its final determination. This method brought predictability and clarity, characteristics that were refined by a mechanism for capitalising the applicant's future spending requirement, a mechanism inferentially sanctioned by this court in its decision in *Duxbury v. Duxbury* [1987] 1 FLR 7. The emphasis on the applicant's reasonable requirements as the yardstick of the award satisfied the anxiety of judges and others that we should not be drawn into the extravagance of some American states, particularly California, where very large awards were commonplace. This judicial preference for moderation ruled essentially for a generation from the mid 1970s to the year 2000. It suited the society of its day.
107. However the amendments introduced by the Matrimonial and Family Proceedings Act 1984 did nothing to restrict the width of the judicial

discretion, whilst north of the border the Family Law (Scotland) Act 1985 introduced a statutory structure for the determination of outcome that preferred clarity and certainty over the flexibility achieved by wide judicial discretion.

108. Dissatisfaction with the state of our law was augmented by extravagant interlocutory proceedings largely uncontrolled by the court. This led to the formation in 1992 of a group of specialist judges, practitioners and academics which, under the President's banner, proposed procedural reforms inspired by the Australian model with firm judicial control at all stages. The proposals had much in common with the civil justice reforms subsequently introduced by Lord Woolf.
109. In advancing its proposals the committee collaborated with government officials and the collaboration was sealed by the adoption of the committee by the Lord Chancellor. The committee thus adopted was available for consultation on issues in this specialist field. The introduction of the new rules was the subject of cautious piloting and evaluation by outside consultants before their general application to all ancillary relief applications.
110. Other issues brought to the committee concerned the enforcement of orders, routes of appeal and costs in ancillary relief. Thus the concentration of the committee was on practice and procedure rather than on primary law reform.
111. However in February 1998 the government announced an intention to reform section 25 of the Act as a high priority. The Lord Chancellor referred this major issue to the committee for consultation. Given its high priority the committee was asked to submit its recommendation by the end of July 1998. The committee was particularly invited to consider the possibility of adopting in this jurisdiction the Scottish model. Although the committee was united in rejecting the Scottish option there was a divergence of view as to the alternatives.
112. The report delivered by the committee undoubtedly influenced the proposals for reform that the government put out for public consultation in the White Paper, 'Supporting Families', that autumn. The proposal was for a number of prioritised aims within an overarching objective. The government also proposed to give limited statutory force to written nuptial agreements.
113. Subsequently the government published responses to the consultation which, although few, did not discourage progress. However the enthusiasm for reform apparently died after a single season without explanation. Indeed thereafter the government showed a marked disinclination to discuss the issue and proponents of reform experienced only frustration. Legislative inertia is not unusual in the reform of family law: see Dr Cretney, *Same-sex Relationships* O.U.P. 2006. Nevertheless he concludes that reforms are ultimately better achieved by Parliament than by the judges.

114. Was the need for reform met by the decision of the House in *White*? The decision deprived practitioners and judges of the old measure of reasonable requirements, offering instead the cross check of equality to ensure fairness and to banish discrimination.
115. Of course these innovations were well founded on profound social change, particularly in the recognition that marriage is a partnership of equals and that the role of man and woman within the marriage are commonly interchangeable. In the majority of cases the innovations resulting from *White* were timely and beneficial.
116. However a social change that was not perhaps recognised in that decision was the extent to which the origins and the volume of big money cases were shifting. Most of the big money cases pre *White* involved fortunes created by previous generations. The removal of exchange control restrictions in 1979, a policy that offered a favourable tax regime to very rich foreigners domiciled elsewhere, and a new financial era dominated by hedge-funds, private equity funds, derivative traders and sophisticated off-shore structures meant that very large fortunes were being made very quickly. These socio-economic developments coincided with a retreat from the preference of English judges for moderation. The present case well illustrates that shift. At trial Mr Pointer achieved for his client an award of £48 million. Before us he freely conceded that he could not have justified an award of more than £20 million on the application of the reasonable requirements principle. Thus, in very big money cases, the effect of the decision in *White* was to raise the aspirations of the claimant hugely. In big money cases the *White* factor has more than doubled the levels of award and it has been said by many that London has become the divorce capital of the world for aspiring wives. Whether this is a desirable result needs to be considered not only in the context of our society but also in the context of the European Union of which we are a singular Member State, in the sense that we are a common law jurisdiction amongst largely Civilian fellows and that in the determination of issues ancillary to divorce we apply the *lex fori* and decline to apply the law more applicable to the parties.
117. In the case of *Cowan* the need for legislative review in the aftermath of the case of *White* was articulated: see paragraphs 32, 41 and 58. Undoubtedly the decision in *White* did not resolve the problems faced by practitioners in advising clients or by clients in deciding upon what terms to compromise.
118. However this court adopted a cautious approach both in *Cowan* and in the later case of *Lambert*. In his submission Mr Singleton drew attention to an article by Joanna Miles in *International Journal of Law, Policy and the Family* 19 (2005) 242. He told us that he had incorporated the article in his argument for Mrs McFarlane in the House of Lords. The article criticises the earlier decision of this court in the conjoined appeals of

McFarlane and *Parlour* [2005] Fam 171 for having declined the opportunity to identify principles underpinning the exercise of judicial discretion under the Act of 1973. The article is particularly interesting in that it demonstrates that the principles discussed in the article (needs, entitlement and compensation), were subsequently the principles identified by the House of Lords in deciding the conjoined appeals of *Miller* and *McFarlane*.

119. The discussion in the article is founded on the statutory scheme legislated in New Zealand in the Property (Relationships) Act 1976 and the Family Proceedings Act 1980, both amended in 2001. In the article's analysis of the New Zealand experience, some emphasis is placed on the difficulty of combining needs, entitlement and compensation in one scheme.
120. It remains to be seen whether the impact of the decision of *Miller* and *McFarlane* will be as great as has been the decision of *White* in very big money cases. There is no doubt but that specialist practitioners have not received the decision in *Miller* and *McFarlane* as one that introduces the benefit of predictability and improvement of the prospect of compromise: see the leader from Andrew Greensmith, National Chair of Resolution, at [2007] Fam Law 203. If this is so, it is highly unfortunate.
121. As Lord Hope pointed out in *Miller* and *McFarlane*, at [105], the report of the Law Commission on the Financial Consequences of Divorce (Law Com No. 112), in recommending flexibility over a structured statutory scheme, added '...that any future legislation dealing with the financial consequences of divorce should be subject to continuous monitoring and periodical reports to Parliament'. Clearly that recommendation has not been heeded. The thrust of Lord Hope's speech is to identify the need for the reform of the Family Law (Scotland) Act 1985. Arguably the English statute, in its fundamental provisions fifteen years older, is in equal need of modernisation in the light of social and other changes as well as in the light of experience.
122. There is a limitation on the resources of even the judges of the House of Lords to conduct wide-ranging comparative studies as a prelude to establishing a new principle, or perhaps to abandoning an existing principle in what is essentially a social policy field. The Money and Property Sub-Committee of the Family Justice Council at its meeting on the 20 February 2007 agreed to approach the Law Commission with the request that the reform of section 25 be included in its future work programme and the request has since been articulated in a letter to the Chairman.
123. Should this request be acted upon, careful analysis will be required of the inter-relationship of our ancillary relief law with the law of other jurisdictions. Globalisation particularly affects the ultra-rich. They are unlikely to inhabit only one country. With a string of properties acquired

for diverse purposes they are likely to be subject to the jurisdiction of at least two courts when the marriage falls apart. London is increasingly likely to be one of the jurisdictions. Now that London is regularly described in the press as the 'divorce capital of the world' it is inevitable that applicants will seek to achieve a London award. If there are no international conventions applicable to the dispute there will be a *forum conveniens* battle, often at quite disproportionate cost to the parties' assets or, more importantly, the means of one of the spouses. Even if international conventions apply, expensive struggles can still escalate. Recently in this court the case of *Bentinck v. Bentinck* [2007] EWCA Civ 175 demonstrated the expenditure of £330,000 in legal costs despite the fact that the jurisdictional rules of the Lugarno Convention applied. Even more recently, in the case of *Moore v. Moore* [2007] EWCA Civ 361, approximately £1.6 million had been expended on the wife's endeavours to achieve a London award, rather than a Marbella award, despite the application of the Regulation *Brussels I*.

124. Any harmonisation within the European region is particularly difficult, given that the Regulation *Brussels I* is restricted to claims for maintenance and the Regulation *Brussels II* Revised expressly excludes from its application the property consequence of divorce. In the European context this makes sense because in Civilian systems the property consequences of divorce are dealt with by marital property regimes. Almost uniquely our jurisdiction does not have a marital property regime and it is scarcely appropriate to classify our jurisdiction as having a marital regime of separation of property. More correctly we have no regime, simply accepting that each spouse owns his or her own separate property during the marriage but subject to the court's wide distributive powers in prospect upon a decree of judicial separation, nullity or divorce. The difficulty of harmonising our law concerning the property consequences of marriage and divorce and the law of the Civilian Member States is exacerbated by the fact that our law has so far given little status to pre-nuptial contracts. If, unlike the rest of Europe, the property consequences of divorce are to be regulated by the principles of needs, compensation and sharing, should not the parties to the marriage, or the projected marriage, have at the least the opportunity to order their own affairs otherwise by a nuptial contract? The White Paper, 'Supporting Families', not only proposed specific reforms of section 25 but also to give statutory force to nuptial contracts. The government's subsequent abdication has not been accepted by specialist practitioners. In 2005 Resolution published a well argued report urging the government to give statutory force to nuptial contracts. The report was subsequently fully supported by the Money and Property Sub-Committee of the Family Justice Council.
125. The European Commission is also in search of progress in this difficult area. On 17 July 2006 it published its Green Paper on Conflict of Laws in

Matters Concerning Matrimonial Property Regimes, including the question of jurisdiction and mutual recognition. In our jurisdiction a stakeholder group prepared a response which was subsequently considered by the North Committee but the response has been complicated by the fact that the Green Paper does not seem to fully understand our law of equitable redistribution or that we do not have a matrimonial property regime as such.

126. We would wish to lend our own weight to this call for a review of these matters by the Law Commission.

APPENDIX FIVE

Speech by Mr Justice Coleridge to Resolution National Conference, April 2008 Family Life – Family Justice – Fairness

It is an honour, a privilege and above all a pleasure to be asked to talk to you all this morning. That may all sound like a most terribly clichéd start to what I have to say, and I will try and avoid them from now on, but, unusually for clichés, I really mean it.

It is genuinely a pleasure because, once upon a time, some of you made the mistake of instructing me, or were on the other side, in cases I was in, and I crossed paths for one reason or another, with a great many more. So many are still friends and I feel I am amongst friends and also kindred spirits. Thank you very much for inviting me.

It is a privilege because to be given the opportunity to speak to so many of you at once in circumstances where, for once, you cannot answer back (at least not for a few minutes) makes a change. It is an honour because, for reasons upon which I intend to expand a little in a moment, I regard this organisation as one which is currently of the greatest importance, not just to the proper administration of the family justice system but to the support of the whole fabric of our poor and increasingly fractured society.

What I have to say today, I have to emphasise, represents entirely my own views. I have not discussed this talk with the President let alone shown him a copy in advance. (I did not want to do so for fear that he might ask me to tone it down a bit). And just at the moment I am not in the mood for toning things down.

As those of you who have done FDRs in front of me will know, I have been at the coal face of family law for now a total of 37 years. I say that because I always inform the litigants at the FDRs of this fact because I think it helps them to know that when I put forward my view as to outcome it is informed by that many years experience in the field.

So I am talking from that length, 37 years, of experience.

And, I also have breadth of experience at every level of the system. I may have been properly described as a fat cat in the last few years of practise (or at least well rounded) but I can assure you that over the years there is no type of family court which I have not addressed and on many occasions. And, as with many family lawyers, clients have been drawn, over the years, from across the entire social spectrum, from billionaires to council house tenants. Aristocrats, industrialists, professionals, MPs, celebrities and hundreds from the less exotic walks of life.

I have been a judge now for seven and a half years. At present, I now look after the family courts on the western circuit (or the south west region as it is now rather boringly described in official language), as Family Division Liaison Judge. That now covers, since unified administration in 2004, all family courts from Hampshire to Cornwall, from Winchester to Truro. And at all levels, from FPC upwards. So again I do know the scene from this end of the telescope as well. But of course, I am not alone in this, most of my fellow judges could describe a similar length and depth of experience. And there are many in this room who have just as much knowledge and experience.

Now I am afraid that the time has come for family judges to speak out publicly in protest at the way in which the Family Justice system in this country has been and is being mismanaged and neglected by government. Let me emphasise that I am not here to make party political points. When I speak about government I mostly mean government with a small 'g'. That is those in government in the past, those in government now and those who would aspire to be in government. Obviously those who have been in government for the last ten years must take their fair share of any criticism. And when I say the family justice system I do not just mean the forensic process involving lawyers, judges and courts. I mean the whole range of professional expertise and experience which is routinely required and deployed in the preservation of family life and resolution of family disputes. Local Authority social workers, adult and child mental health specialists and the Child and Family Court Advice and Support Service (or CAFCASS as we more usually refer to it as). All, along with the lawyers and courts, are as important as each other and have an essential part to play.

Traditionally judges have kept their mouths shut and not entered the arena of the administration of justice. That was for two reasons; firstly, things on the whole were tolerably well managed, resources were adequate and the work load was manageable. Secondly, judges did not really involve themselves nor were they required to involve themselves much in the administration of the system. But that has all changed beyond recognition in the last ten years and especially since the recent constitutional changes. The workload increases year by year and a great number of us are now fully involved directly or indirectly in the actual admin of the courts and in devising systems for the increased efficiency of the courts and the throughput of cases. Now, during a family judge's career

he or she can expect to have a direct responsibility for a court or a circuit for a lengthy period. Thus, it follows, it seems to me, that in these new circumstances, we are not only entitled to have a view, gained from direct daily experience, but a duty to speak out and express it publicly and, if necessary forcefully, when circumstances demand it.

And in my judgement the circumstances do now demand it. Indeed we could and should be criticised for remaining silent or being mealy mouthed, for far too long. For there is a depth of frustration and despondency amongst all those involved in the family justice system at all levels, and the family judiciary in particular which is, in my experience, unprecedented and palpable.

Consider for a moment what the circumstances of our society are about which I now speak. The circumstances are none other than the state of family life in our land, the very backdrop for the work of all those involved in the Family justice system. It's very stock in trade. For as long as history has recorded these things, stable family life has been co-extensive and co-terminus with a stable and balanced society. Families are the cells which make up the body of society. If the cells are reasonably healthy, the body can function reasonably well and properly. But if the cells are unhealthy and undernourished, or at worse cancerous, and growing haphazard and out of control, in the end the body succumbs. The disease may be hidden from view until very late in its progress. And this may make the situation when it is discovered that much more difficult to control and treat. But it is there even if invisible.

Put it another way, if the house is riddled with dry rot, the effects may not become apparent for a long time but in time the whole, interior, walls and wood will crumble to dust and one is left with a useless shell. And if the rot affects the bulk of houses in the town in the end the town is destroyed.

These may sound like dramatic images. And those who would shut their eyes and minds to the obvious will say they are the product of a professional who has spent too long involved in the business of family breakdown. But I suggest they are apt for the situation large tracts of society now finds itself in. The disease and the rot are spreading and are out of control,

In some of the more heavily populated urban areas of the country Family life is, quite frankly, in meltdown or completely unrecognisable. Many of us in this room know it from our own knowledge and from our experience directly or indirectly through our work. It is on an epidemic scale. In some areas of the country even including the more urban parts of the sleepy west in which I operate, family life in the old sense no longer exists. I am not talking about some halcyon picture of husband, wife and 2.4 children once recognised as the national paradigm for families. I am talking about simple, ordinary family life where children are brought up with a normal daily routine of getting up, eating, going to school and returning to reasonably ordered home, presided over by a reasonably secure relationship. An environment of two parents who stay together if not for all then at least for most of their minority.

I am not knocking single families. Single parents often do a fantastic job but a great many, perhaps, through no-fault of their own, do not. A large number of families now consist of children being brought up by mothers who have children by a number of different fathers none of whom take any part in their children's lives or support or upbringing. These are not isolated, one off cases they are part of the stock in trade of the family courts. Day in and day out, we see these families in the proceedings brought by local authorities for care and or adoption orders.

But it is not just the overcrowded urban environment which manifests these problems on a huge scale and which often results in intervention by the Local Authority. The increasing incidence of family breakdown is at all levels of society. Every level of society from the Royal family downwards is now affected.

So I suggest the general collapse of ordinary family life, because of the breakdown of families, in this country is on a scale, depth and breadth which few of us could have imagined even a decade ago.

I am not going to bandy statistics because they are either unavailable or notoriously misleading and, if recent government statistical data is a guide, probably inaccurate and so unreliable. In any event the real data from broken families is not available because it does not exist. Obviously I am not just talking about divorcing couples because marriage is increasingly not the norm. We have those statistics ...and they show that levels of divorce remain at a constantly high level.

No, I am talking about the wholesale breakdown of ordinary family life in households of our land. Parents (whether married or not) providing no consistent parental influence or authority over their children's daily lives and separating as a matter of course and as part of the ordinary experience of children as they grow up. It is a depressing but, I suggest accurate picture.

And I am talking, am I not, about the ordinary experience of everyone in this room in their private, their family and in their professional lives especially over last 20 years. We may not have experienced the terrible trauma and stress of family breakdown directly ourselves, but I am happy to bet that there is not a single person in this room who has not experienced it at second hand either with other members of their family or close friends or work mates.

And, of course, as a direct result and reflection of that social phenomenon, consider the increase in the workload of the family courts in last two decades. The family courts used to be the minority occupation of the courts, FPC, county court and High Court. Indeed when the family high court judge went on circuit he finished the family work and then helped out with the civil or criminal work. Those days have long since gone. The family lists never even begin dry up. Instead more and more cases have to be pushed further and further down the system to ensure that all, what used to be thought of as the High Court work, gets done.

Fortunately we have a cadre of specialist family judges at all levels who do the work with exceptional skill, care and dedication so the system is not suffering through lack of skill. That is not where the problem lies.

So, along with crime, family cases now dominate the picture. And this is hardly surprising as they are, no more or less than, two sides of the same coin. Up and down the land, day in and day out, thousands of families are trooping through hundreds of courts in front of hundreds of judges seeking their assistance to resolve family disputes. High Court. County Court, Family proceedings court. High Court judges, Circuit judges, District judges and magistrates. All are inundated with cases. Thousands upon thousands of children are involved. Both in the public law care system because their parents cannot cope (or worse are guilty of abusing their own or their step children) and in the private law system because their parents cannot sort out their disputes when they separate, without some help from the system.

It is a never ending carnival of human misery. A ceaseless river of human distress. For those of us involved in it on a daily basis it is very demanding and at times stressful work.

And the effect of family breakdown on the psychological health of the parents and, even more importantly the children, both in short and long term is well researched and documented.

What the long term effects of family breakdown on the present huge scale, on the health and functioning of the nation, will be within the next 20 years is impossible to predict. But it is inevitably a downward spiral so far as the maintenance and prolongation of family life is concerned.

Surely, we all know this and surely it is time we all faced up to it and more importantly did something about it before it is too late.

Without being in any way over dramatic or alarmist my prediction would be, looking back and seeing where we have come from and projecting forward on the present trajectory, that the effects of family breakdown on the life of the nation and ordinary people in this country will, within the next 20 yrs be as marked and as destructive as the effects of global warming.

We are experiencing a period of family meltdown whose effects will be as catastrophic as the meltdown of the ice caps. For what is the point of pouring resources into the physical protection of society if its mental health is so damaged and undermined that life for many is so miserably unhappy that it is hardly worth living anyway.

It is, I suggest, as big a threat to the future of our society as terrorism, street crime or drugs.

But far more insidious. It will be more destructive than any economic decline caused by international market or financial movements triggered by mismanagement by financial institutions.

What is certain is that almost all of society's social ills can be traced directly to the collapse of the family life. We all know it. Examines the background of almost every child involved in the public law care system or the youth justice

system and you will discover a broken family. Ditto the drug addict. Ditto the binge drinker. Ditto those children who are truanting or cannot behave at school. Or indeed any of the other ills which are so regularly trumpeted by the media as the examples of national collapse. It always come back to a broken family or the complete lack of any stability within the family. Scratch the surface of these cases and you invariably find a miserable family, overseen by a dysfunctional and fractured parental relationship or none at all. I am not saying every broken family produces dysfunctional children but I am saying that almost every dysfunctional child is the product of a broken family.

So, at the risk of sounding too Jeremiah like, I suggest that family life in our society is on a steep downward trajectory and urgent and comprehensive action is required.

And what, I ask, is worse, from the child's point of view, than family breakdown? Badly managed family breakdown. There is universal acceptance nowadays, and tons of pages of research which support it, that if family breakdown and parental separation cannot be avoided then the better it is managed and handled the less the emotional, and psychological fallout on the individuals concerned especially the children. Behind every contact dispute is mismanaged parental separation. One or other of the parties feels aggrieved at the financial or other effects of the separation, war breaks out, the children get caught in the crossfire. Both sides blame the other.

And what is government doing to recognise and face up to the emerging situation? What is it doing to halt the decline or even reverse it. The answer is; very little and nothing like enough. It is fiddling whilst Rome burns. Sure Start is a start but no more. High sounding declarations about taking children out of poverty are all well and good but where are the necessary investments in research and support for family life. I am not talking about tinkering with tax rates for married couples. That is irrelevant and ineffectual window dressing. I am talking about imaginative experiments and well funded programmes.

And in the shorter term, far from helping people to go through the process in a civilised way, it is allowing the whole family justice system to be starved to death. And this system is all that stands at present between the present dire situation and social anarchy. The government's treatment of the system is nothing less than death by a thousand cuts.

At present the family justice system is not looked upon by the government as one large whole and vital social resource and so given a proper priority in the allocation of resources. Instead, so far as the Ministry of Justice is concerned, it seems to be treated as little more than a rather irritating item of 'any other business'. Way below the building of prisons or the criminal justice system.

It is surely that attitude which has led to the recent administrative fiasco involving the closure of the Queens Building in London. That building, as you all know, is the heart of the Family Division of the High Court where 16 of most important family courts in the land are situated i.e. in the Royal Courts of Justice.

It was shut down last year without proper planning and without proper supervision so that London is presently critically short of family courts. They have been shut now for 9 months and are predicted to remain shut for at least another 18 months whilst nothing by way of serious work is expected to start for another 6 months. And all at a time when family courts are desperately needed.

It is part of the same attitude which fails to recognise the singular importance of the family justice system to the functioning of our society. It is quite unlike any other type of litigation, involved as it is with the very heart of the litigant's life. I always remember asking Mr. Justice Munby when he was appointed, why he had chosen to sit in the family division rather than the chancery division, where he was equally well respected and in demand. He answered my question with a question. 'Which is more important,' he said, 'squabbles between greedy company directors or business partners or removing children from their parents or sorting out the problems of families at war?' Of course the thrust of his questions was right. It is a no-brainer.

What seems always to be forgotten nowadays is that, for reasons I have already highlighted, far more members of the public are likely to be involved in the family justice system than any other part of the national court or justice system. Those who indulge in crime are a very small minority of the population. Ditto those who are involved in the civil courts.

Those who find themselves in the family justice system are a large part of the community and by and large they are ordinary, frequently taxpaying, decent members of our society who now find themselves caught up in family breakdown. So they turn to the system (which is paid for by their taxes) to find it overstretched to the point of collapse and acutely and chronically underfunded at all points. Delays are rife in every part of the system through lack of resources. And delay, as we all know, exacerbates all the problems and compounds the stress.

And, just to make matter worse, the present substantive law of divorce, and financial division and the law relating to the property of unmarried couples (other than gay ones) administered by the courts is out of date, hardly fit for purpose and crying out for a thorough overhaul.

In this situation there has never been a greater need for the public to have access to a lawyer with specialist family law and family justice experience than now. They are as vital a commodity in our national life as the local GP. Indeed their tasks are not dissimilar.

When a family is going through crisis whether it be medical or psychological or legal, caused by family collapse the first port of call is and should be the local GP, if it is medical, and the local family lawyer, solicitor and barrister, if it legal. These are not the fat cats much beloved or hated by the media. They are a vital front line social service serving the community at local level, sorting out the problems of local people when their families fall apart or the social services move in to rescue a child at risk. They are just about making a living but precious little else.

So when we look at the family justice system, what in fact do we find?

In the field of private law, i.e. disputes within the family, we find legal aid, once a well resourced and efficient system available to all who needed it, now to all intents and purposes available only to the very poor and not the majority of the ordinary taxpaying public. The system is simply withering away. Of course the government will trumpet the increase in the amounts now spent. But this is almost entirely accounted for by the very high cost, long and complex terrorism and fraud trials. For the ordinary, taxpaying member of the public on the average wage, legal aid is virtually non-existent in family cases; killed off by government by the simple expedient of reducing or not increasing the financial threshold to such an extent that almost no one qualifies. So a system once the envy of the world is now largely history.

A direct consequence of this removal of publicly funded legal aid, is an upsurge in the number of litigants in person coming to court to sort out their family's future without the help of a professional and at a time of the greatest possible stress in their lives. This inevitably leads directly to the lengthening of cases, the reduction in the number of negotiated out of court settlements and so delay. The McCartneys are not the only ones to end up with a six day hearing when one side has no proper representation. How can an unrepresented wife or husband know whether an offer made by the represented side is fair and acceptable without proper advice. The dismantling of the legal aid system by government is not only grossly irresponsible, it is grossly unfair.

In the public law field, we find a government determined to pay the publicly funded family lawyers so little that they are just giving up and turning elsewhere. In time they will disappear from the high street and they will never come back. And don't let me hear from government that the statistics do not back this up. Of course they don't today. Family lawyers are not going to pack up as one overnight. But talk to anyone who knows what is happening and what is going to happen in London or the provinces. They will tell you that their departments are being shunned by their partners, that they will for the time being limp along and operate in cheaper premises. But they will not recruit or be able to recruit new comers or pay the trainees. These are tomorrow's family legal specialists. And if there are no specialist lawyers where will the specialist judges come from in ten or twenty years. There simply will not be the reservoir from which the judiciary at all levels can be drawn. We find Local authorities children's departments desperately short of social workers so that those who are there are stretched beyond breaking point and unable to carry out their real function of supporting vulnerable families in their homes. Now too we find Local Authorities being asked to take on a huge increase (up to as much £4,000) in the cost of instigating and conducting care proceedings. What on earth is the thinking behind a policy which requires one part of government (the Local Authority) to pay another part of government (HM Court Service) for the actual cost of

administering as vitally important public service as the protection of the most vulnerable children? It is muddled and dangerous bureaucratic illogic. It is certainly not child centred thinking.

And if, as some have suggested the government is providing the resources to meet the increased cost what is the point in passing them round in a circle. Of course, it is not doing any such thing. It is all being lost in a small general increase in Local Authority funding. This increase in the fees will create a major disincentive to local authorities starting proceedings in a timely way. There will be understandable hesitation before children at borderline risk are brought under the protective umbrella of court proceedings. We find local authorities unable to fund proper residential assessments to enable the critically important questions about removing children from their parents to be properly considered. Mr. Justice Bodey, not a man given to exaggeration or extravagant statement, said this, in a recently reported decision (*A Local Authority v M* 2008 EWHC 162 Fam) where the local authorities inability to fund an assessment was the central question:

This case demonstrates an urgent need for further consideration of the funding of residential assessments. Some arrangements need to be put in place to avoid the need for routine hearings like this on a case-by-case basis, hearings which are costly and which divert judicial resources. It is unsatisfactory if not invidious that courts charged with taking serious and sensitive decisions about children, where an under-informed decision could on occasion spell disaster, should have to choose between (a) overburdening an already over-stretched Local Authority or (b) denying a residential assessment to a parent for whom it represents the only hope of avoiding the loss of his or her child to adoption.

This is a question which has to be faced and not ignored. Taking children away from their parents is arguably the most drastic of decisions any court in this country has to face.

We face it on a daily basis, up and down the land. It can and should never be done, on the cheap. Again it is grossly unfair. We find CAFCASS despite recent funding increases and despite its massive efforts to make its resources stretch to meet demand (via its excellent chief executive) unable, in many parts of the country, to produce a report in under three months. In some places it is much longer. And there is still a shortage of guardians. We find a terrible shortage of contact centres. Those wonderful, small organisations staffed often by dedicated volunteers unable to provide enough space in a reasonable time so that children can see their absent parents safely, in cases where there is a risk or other need for some supervision.

But very little of what I am saying today is new. I quote from the *Final Report of the Lord Chancellors Advisory Committee on Judicial Case Management in Public Law Children Act Cases*, written 5 years ago in May 2003. It was the

report which led to the production of the first public law Protocol. Mr. Justice Munby and I (with Mr. Justice Ryder's help) chaired the committee which had 29 members drawn from every single part of the family justice system from the professions, local authorities, the Department of Health, the Court Service and many independent bodies involved at every level of the system.

Under paragraph 5 under the heading of 'major obstacles to success the following is to be found'; I emphasise this is 5 years ago.

- 1.1. The Protocol is an essential step forward, but the Committee would like to record the following major obstacles to real success in this area:
 - 1.1.1. Social services departments continue to be seriously understaffed; suffering both recruitment and retention of staff problems. This critically limits their ability to speed up the pre-application stages in the care process. It also has the effect that, were they to focus more of their precious human resources on the actual litigation stage, their other roles in care, prevention and education would be likely to be compromised.
 - 1.1.2. CAFCASS has a shortage of guardians which, in parts of the country, remains significant. Effective case management within the courts and CAFCASS will alleviate some of the pressure. Increased funding for the next financial year is obviously welcome and helpful. However, until guardians can be promptly allocated at the start of each case throughout England and Wales neither the children nor the courts will be receiving the essential and proper service.
 - 1.1.3. Publicly funded remuneration for the legal profession must reflect the fact that PLCACs require the full input and cooperation of experienced, specialist practitioners. Without such practitioners the protocol will not work to its best advantage. Underpayment of the practitioners who do this work will inevitably lead to a shortage of such specialist lawyers (and accordingly in the future to a shortage of specialist judges, both part and full time) as the brightest and best turn to better remunerated fields of practice. Remuneration must also be structured to reflect the fact that the Protocol requires advocates to do considerably more work at the early stages of a case to ensure the early identification and narrowing of issues.
 - 1.1.4. The need for significantly more Family sitting days in some areas
 - 1.1.5. A shortage of experts in a number of fields prevents the swift hearing of cases in some areas. The Protocol should help but the problem persists.

That was 5 years ago and nothing of any significance has changed. So what is to be done to halt the downward spiral and turn things around?

I would suggest the following areas require urgent addressing:

1. So far as government is concerned; family breakdown and family justice needs to be at the top of the political and justice agenda. The maintenance of the family and family life in this country is the priority. It is nothing less than the business of the preservation of our society. It is not just a rather irritating and increasingly expensive political sub issue. It is as important as the management of the economy or the war on terror. And rather more important than the abolition of the plastic carrier bag or the taking of oaths of allegiance. It is as important as the preservation of the NHS. Indeed it is part and parcel of our national health. It requires a full time minister devoting his or her energies to nothing else. It calls for a complete change of attitude by those who govern or would aspire to do so.

Is it fair that there should be a two tiers of children, those who have received a reasonable and secure upbringing and those who have suffered the traumas of family breakdown for most of their minority.

As CS Lewis, one of the greatest Christian apologists of the last century wrote in his seminal work, *Mere Christianity*:

It is easy to think the state has a lot of different objects – military, political, economic and what not. But in a way things are much simpler than that. The state exists simply to promote and protect the ordinary happiness of human beings in this life. A husband and wife chatting over a fire, a couple of friends having a game of darts in a pub, a man reading a book in his room or digging the garden- that is what the state is there for. And unless they are helping to increase and prolong such moments, all the laws, parliaments, armies, courts, police, economics etc are simply a waste of time.

That may now sound a little home spun, written as it was during and after the second world war, but the underlying message of the need to preserve and protect our real family life is as valid now as then. Perhaps even more so. And let us all, for it is not only the government's responsibility, wake up to what is happening. We are sleep walking to the edge of the precipice whilst the rot and disease rages out of control.

2. If we are to stem the tide of broken families and the fall out from those families, very significant resources of manpower and money have to be deployed at the expense of less important demands. The tanker has to be stopped and then turned round or diverted. It will take research, expertise, and a lot of time and money. There are certainly no instant solutions. The causes of family breakdown need to be addressed at their very root. We cannot just deal

with the fallout and pick up the pieces. This requires education of adolescents and their parents into the causes of relationship breakdown and ways of managing it and preventing it. There are many excellent small charitable organisations working in this area and doing excellent work in for instance, prisons. The success of their work in reducing re offending is all the evidence that is needed as to its efficacy. But it is a matter for national investment as a matter of urgency. It will not produce instant returns even within the lifetime of a parliament. It requires imagination, innovation and cross party long term cooperation. But if the incidence of family breakdown is reduced the returns on the investment are huge. All the social ills which stem from it, and are a massive drain on the public exchequer, from the reduction in criminal and anti social behaviour to improvements in mental health and schooling begin to happen. I would suggest the NHS would save a fortune too. And of course the need for the rescue services of which the family justice system is an integral part, reduces with it

In the shorter term, stop chipping away at the family justice system and trying to have it on the cheap. When the forest fire is raging across the land, out of control, it is not the time to reduce the fires stations and pension off the firemen. When the contagion is at its height we need all the doctors we can get. Those who are in the system are all we have at present. Recognise its vital function, fund it properly, all parts of it and let it get on with its skilful and sensitive work. Contact centres, as an example are an inexpensive and vital part of the system. Fund them so they can expand their services. If all this means other sacrifices in the public finances have to be made, recognise that the work is, as important as the NHS in its effect on the health of the nation.

3. In addition we need, certainly in some parts of country, mine included, a real increase in the number of family sitting days. It is no use having the extra family judicial manpower if we do not have a fair allocation of the overall supply of days. We do not a fair share because political constraints determine that crime should have much more. That thinking is misplaced and quite out of date.

4. Finally 'fairness'. Face up to the need to reform the substantive law of divorce, financial ancillary relief and the law relating to cohabitants. Stop ducking the issue. Divorce law and ancillary relief law was last properly reformed two generations ago in the mid sixties when society was altogether different. The current laws are not suited to modern social mores or the way we live now. When the last major reform was introduced there was no such thing as cohabitation outside marriage. Now it is as common as marriage if not more so. In 2002 in *Cowan* and again last year in *Charman* Lord Justice Thorpe in two long and careful judgements in the Court of Appeal called for urgent reform. There is simply no one in the land who has a greater wealth of experience in this field than him. His pleas have fallen on totally deaf ears twice.

The Government began the process in the nineteen nineties but because it all became somewhat controversial (as it is bound to be in relation to any reform of the law which directly impacts almost everyone one in the country) they backed off and lost the will to proceed. Now, also, any attempt to produce a comprehensive reform of the law relating to the property of those who cohabit without marrying is going on the back burner. We shall continue to struggle on using concepts from the middle ages. Both these areas need urgent and in depth reform. The attempts by the House of Lords with *White* and *Macfarlane* and more recently the Court of Appeal in *Charman* to put a new supercharged engine into the old chassis are imaginative and perhaps better than nothing. 'Fairness' is what we are all asked to try and achieve. But what does Fairness mean in the context of the social and behavioural mores of 2008. Their Lordships have given us all plenty to chew on but enough is enough and their pronouncements are no substitute for new and proper, up to date law which is the product of the elected legislature and which meets all the needs of society as it now functions.

In fact, as we know, in practise, aspects of these decisions have produced much confusion and many of the new concepts, fine in theory, are expensive to apply and examine. The old but even more imperfect system of applying the criteria of 'needs' at least had the merit of being cheap and simple to apply. The new approach is complex and costly in all but the most simple cases.

As Lord Justice Thorpe said in *Cowan* when talking about the need for reform 'It is for Parliament not the judges to take us there, however uninviting the terrain may appear to the government of the day.'

The judges can take the matter no further without making matters worse and more uncertain. Government simply has to grasp the nettle and get on with it. Surely, if enough parliamentary time has been found over the last decade to reform the law relating to the rights of minorities, it can be found to reform critically important laws affecting the rights of the majority?

These are my suggestions for urgent action. We cannot go on like we are or the consequences for society in the medium and long term are frankly dire. I hope you do not think this is just another rant about the shortage of resources at a time when public finances are, as always, overstretched. It is not meant to be. It is a call for a radical rethink by government and by us all about the centrally important family justice system I am convinced the whole system is doing its best to help. The very successful reforms to the financial proceedings were entirely judge and profession driven. The Private law programme, the initiative of the last President has been a consummate success. The first Public law Protocol in 2003 was also the initiative of the President. The new Public Law Outline is yet another innovative, judicially led reform supported by the government which has the potential for saving time and money, But only if it and the system as a whole is properly funded by government. (And that seems a big 'if').

And from the ranks of you own members the introduction and increasing use of Collaborative Law. A radical new approach which I for one

wholeheartedly champion whenever I get the chance. These are all examples of the forensic process being scrutinised to achieve savings of time, money and, as important, stress to the family at a time of maximum stress in their lives. But there are limits to what can be achieved by the system as it is and as it is becoming, unaided.

So my message to you is that the work of this organisation has never been more vital to the health of the nation. Do not allow yourselves to lose sight of the big agenda of which you are an essential part. The family judiciary are your greatest supporters and I am in the vanguard of the fan club. With the Family Law Bar Association you are providing a vital service to the community at a time in the life of the individual families' for whom you act, when they are at their most fractured, needy and stressed.

I love the name '*Resolution*'. It is an inspired name for the organisation. It imports both the concept of being *resolved* to get things done, combined with resolving problems in the sense of finding solutions. If those are your twin aims they are the right ones. That is what your organisation stands for and should stand for.

Thank you, on behalf of all the family judiciary, for what you all do so well. Thank you very much for giving me the opportunity to speak to you this morning. I hope you have an exciting and stimulating conference.

Paul Coleridge

APPENDIX SIX

Forms of ADR

SUMMARY OF FORMS OF ADR.

- **Parties negotiation direct** – this occurs between litigants in person including sometimes after legal advice but requires important safeguards before final settlements and orders can be made. It is the form of negotiation most susceptible to bullying and undue pressure. It often has its place in opening the negotiations in broad terms, then to be passed to other forms of negotiation and settlement.
- **Lawyer negotiation** – this is still the primary and invariably best way of resolving disputes; the parties have the benefit of specialist legal advice about the law, procedure and merits of particular terms, and the lawyers using negotiation skills as best suit the case and the client, with the lawyers then drawing up a consent order to be made by the court. This can often go on in parallel with progressing the court proceedings until a settlement is obtained.
- **Mediation** – the involvement of a specialist trained professional, independent of the parties, assisting them to understand their respective positions, negotiate, compromise and work towards a settlement; it does not incorporate legal advice and can be either financial disputes or children disputes.
- **Directive mediation** – the same as traditional mediation however the mediator has specific authority to guide and steer the parties towards likely and appropriate terms of settlement and therefore better to enable them to settle if a settlement is proving difficult; moreover it is often suitable as a case approaches a final hearing or there is a real difficulty in reaching a settlement through traditional mediation. It can incorporate more easily the parties' lawyers with their clients in the mediation room. Directive mediators are invariably experienced family lawyers with good negotiating skills.
- **Collaborative law** – a recent innovation in which the lawyers conduct the case in a particular style to work towards a settlement, invariably based around meetings rather than written communications in order to build up trust and minimise distrust; there is a fundamental basis that if either party commences proceedings other than by consent the collaborative process ends and each party has to instruct new lawyers, perceived by some as its

strength and by others as a considerable weakness especially for women and/or the financially weaker party.

- **Early neutral evaluation** – an indication given by a senior professional on what might happen if the matter were to go to court; it can assist in overcoming a logjam or difficulty on one particular issue or the whole matter and incorporates what happens at a Financial Dispute Resolution hearing (FDR).
- **Arbitration** – an out of court adjudication used extensively in civil disputes including consumer disputes but not yet binding in family law disputes and therefore very little used; it has been adopted in family law in a number of countries abroad to some success.

APPENDIX SEVEN

Report on domestic violence reform by Rachel Gillman

THE DOMESTIC VIOLENCE, CRIME AND VICTIMS ACT 2004

1.1 The Government's White Paper Justice for All (Cm 5563) published in July 2002 outlined wide ranging plans for reform of all aspects of the criminal justice system. The Paper also addressed proposals to reform the law concerning domestic violence, such as whether breach of a non-molestation order could be made a criminal offence, whether allowing anonymity for victims in such cases as there is for victims of sexual offences would increase the reporting of offences, and how to encourage better liaison between the civil dealing with actions relating to the family and criminal proceedings for offences (Part 8.9).

5 priority areas for action were identified (Part 8.6)

- to increase safe accommodation choices for women and children
- to develop early and effective health care initiatives
- to improve the interface between the civil and the criminal law
- to ensure a consistent and appropriate response from the police and CPS
- to promote education and awareness raising

1.2 A consultation paper entitled *Safety and Justice: the Government's Proposals for Domestic Violence* (Cm 5847) followed a year later in June 2003 with specific proposals in Part 3: 'Protection and Justice' for reform of various of the provisions of the Part VI of the Family Law Act 1996, together with guidance for the police when dealing with domestic violence incidents. The considerations in this paper lead to The Domestic Violence, Crime and Victims Act 2004 (DVCVA) which received Royal Assent on 15th November 2004. This Act, as well as carrying out the proposed reforms in the Criminal Justice System, has introduced reform both to the civil and criminal law dealing with the domestic violence. The headline provisions as far as domestic violence is concerned being the criminalisation of breaches of the civil injunctive orders, the extension of category of those able to seek civil injunctive orders and, making common assault an arrestable offence.

- 1.3 The purpose of this paper is to measure the impact and effect of these of these changes bearing in mind the objectives behind the legislation which were to ensure an effective police response when victims report domestic violence, making sure that the civil and criminal law offer maximum protection to prevent re occurrence, improving the prosecution of domestic violence cases, and making sure that sentences reflect the crime.

2.0 The main provisions of the DVCVA relating to domestic violence

- 2.1 Section 1 (commencing 1/7/07). The amendment of non-molestation orders obtained in the civil court to include a criminal sanction for non-compliance of these orders (now S.42A *Family Law Act 1996*).
- 2.2 Part VI of the FLA 1996 enables the civil family courts to make orders protecting the applicant and any relevant child from molestation (not limited to assault or fear of assault, but also including harassment, molestation and interference generally) by an associated person. Breach of a non-molestation order is now a criminal offence which can incur a prison sentence of up to five years on conviction on indictment, 12 months on summary conviction. Magistrate's courts can currently only impose a 6 month custodial sentence unless two or more either way cases are before them. Legislation allowing them to sentence up to 12 months for one offence has yet to be implemented.
- 2.3 **Previously, breach of such an order was punishable only as a civil contempt of court.** Enforcement of such an order previously, was via a number of routes, police could arrest for breach with the police bringing the perpetrator before the court which had made the order, within 24 hours of arrest, *but only* provided that the original order had contained a power of arrest. Otherwise, the applicant either applied for an arrest warrant or, more commonly, commenced committal proceedings pursuant to Order 29 CPR.
- 2.4 The innovation allows the police, always, to arrest for breach of a non-molestation without the need for the court to attach a power of arrest, or for the victim to apply to the civil court for an arrest warrant. There is no requirement for the alleged perpetrator to be produced at court within 24 hours of arrest.
- 2.5 Sections 2 – 4 (s 2-3 commencing 5/12/05 and s 4 commencing 1/7/07. Extension of the provisions of Part 4 of the 1996 Act to same-sex couples and non-cohabiting couples.
- 2.6 Section 10 (commencing 1/7/05) common assault now an arrestable offence by adding the offence of common assault to Schedule 1A to the Police and Criminal Evidence Act 1984.
- 2.7 Section 12 extends the circumstances in which a restraining order can be made under the Protection from Harassment Act 1997 following criminal proceedings. Subsection (1) extends the courts' power to make a restraining order on conviction for any offence, rather than on conviction for offences

under the 1997 Act, and on acquittal of an offence under the HA 1997. This has not yet been enacted although as part of the Home Office's 'Tackling Violence Against Women and Young Girls' it was announced that this would be implemented in September 2009.

3.0 *Consideration of the effect of the legislative changes*

3.1 Concerns as to whether objectives of the Act are being achieved are being expressed by legal practitioners but perhaps most vociferously by judges of the civil courts who have very considerable experience the domestic violence legislation and have hitherto dealt exclusively with breaches of non-molestation orders and have seen firsthand the effects of the changes. The main focus of concern appear to be the following,

- (i) concern that victims may not report incidents for fear of 'criminalising' perpetrators i.e. worry by those in a domestic setting that their partner may end up with a criminal record and/or be dragged through the criminal justice system
- (ii) whether incidents of DV being reported to police and applications for the injunctive protective measures have fallen due to the concern this concern of criminalising a partner. What proportion of matters reported, are subsequently withdrawn.
- (iii) that the effect of making breach a criminal offence has almost entirely shifted the business of dealing with breach of civil injunctions, from the civil courts to the criminal courts. Whether breaches of orders are being expeditiously prosecuted in the criminal courts by the CPS. The timescales and outcomes for those prosecutions, as well as the effect of the change of venue on the victims.

3.2 Whilst a number of commentators have voiced concern that victims would desist from reporting incidents/ making applications for protective measures for fear of criminalising partners a contrary view was robustly provided by a number of those directly involved with victims. The view of Karen Bailey, from the Greater London Domestic Violence Project, whose staff are involved and very experienced with victim support provision in London prior to and post the Act, was that victims supported injunction breaches being criminal offences, viewing previous enforcement action on breaches as '*pretty poor (and expensive)*'. She reported that women, having often experienced multiple breaches of injunctions, were not concerned with the criminalisation of the perpetrator and wanted stronger police sanction. The seeking of protective orders normally came about when victim and perpetrator had or were in the process of separating. She further commended the inclusion of breach of an injunction as an arrestable offence. She also noted that it was GLDVP's experience that many BAMER women are so fearful of repercussions from the perpetrator, wider family members and the community that an injunction was not even an option.

- 3.3 This view was strongly endorsed by Anthony Wills of the charity Standing Together Against Domestic Violence, actually believes the Act should have gone further in making ‘*domestic violence*’ a specific criminal offence, because of the Gravity of the offence and its effects. He was also of the view that the Act’s provision on breach meant that the State was taking responsibility for DV offending rather than the victim, which he felt was universally welcomed. Previously the victim’s view on a possible police prosecution that might arise (or previously committal proceedings in the civil court) would have been determinative. Thus the effect of the Act was to take that responsibility away from the victim and place it squarely where it should be, with the State. Anthony Wills felt that making breach an arrestable offence was long overdue, police were pragmatic in their approach and would arrest where needed, particularly since the ‘flagging’ of DV incidents, and Forces had adopted a positive arrest policy.
- 3.4 There appear to be 2 views as to police prosecution, firstly that in an on-going domestic setting, where the victim might have cope with the consequences of a proven breach i.e. imprisonment of partner and/or family provider, her view on prosecution should be taken into account, and the contra view being that the victim should always be absolved from such a decision, which may lead to further retributive violence. Some commentators have suggested that victims are now not given choice, with victims concern that a criminal prosecution maybe pursued against their wishes. The Ministry of Justice’s own research in their Early Evaluation of the Act reports that the majority of victims’ advocates welcome the criminalisation.
- 3.5 Sharon Stratton DV Coordinator for the Metropolitan Police believed that the possibility of ‘criminalising’ a partner was not at the forefront of the victim’s mind, who simply wanted the violence to stop, and a swift arrest ensuring the removal of the perpetrator from the situation. She too was firmly of the view that it was the State’s responsibility to take action to hold perpetrators accountable for their actions whilst acknowledging that some victims need appropriate support as they may not want to see a partner caught up in criminal proceedings , as this may deprive the household of income or some other form of distress to the family. She viewed a breach of a non-molestation order becoming an arrestable offence as positive given that such arrests and subsequent convictions would be recorded on the Police National Computer and would assist with risk management of offenders and the protection of victims. She made the further observation that previously, information that someone had been found to have breached on a committal in the civil court, stayed in the civil court, and that a proven breach offence was not recorded on the Police National Computer, *even if a prison sentence was received*. She cited that lack of information as to proven civil breaches and sentences in the civil courts had been unhelpful to police in the

management of DV through the Criminal Justice System and that police and the courts now had the broader picture of what had been the offending history in a particular case.

4.0 Effect of Legislative Changes – Has there be a drop in the reporting of incidents to the police now that common assault is an arrestable offence?

- 4.1 As mentioned above The Ministry of Justice commissioned an early evaluation of the effects of the legislation in 2008 and a report by Professor Marianne Hester, Dr. Nicole Westmarland and others entitled *Early Evaluation of the Domestic Violence, Crime and Victims Act 2004* was published in August 2008 to look at the main provisions of the Act relating to DV. Data of all domestic violence incidents, reported to the police in just 2 areas namely Croydon and South Tyneside in the month of November for years 2005, 2006 and 2007 was utilised to compare the pre and post implementation of the Act. The results showed that Croydon saw a decrease in the proportion of DV incidents reported post implementation in 2006 (374 to 296) but that this was back to just over pre implementation levels the following November. South Tyneside saw a significant increase in 2006 (211 to 274) which fell back in 2007 to 2005 levels. As stated, these were just 2 sample areas over 1 month, but the *early* figures do not support a resistance to report an incident for fear of arrest of a partner. This is perhaps unsurprising given that the victims would know that arrest may be likely for a number of other reasons, such as breach of the peace.
- 4.3 An interesting feature is the number of incidents of DV *resulting in arrest*. The Ministry of Justice Evaluation concluded that arrest as a *proportion* of incidents did not show an increase in South Tyneside, whereas in Croydon the proportion of incidents resulting in arrest showed an increase in 2006 and decrease the following year 2007, and that a longer period of examination was required before any significant patterns may be ascertained. The conclusion of the Evaluation was that there was insufficient (and often unreliable data).
- 4.4 Incidents recorded as *Common Assault* increased in all 3 years in both areas ‘supporting a tentative finding of an increased use of common assault since this became an arrestable offence.’
- 4.5 Evidence gathered from professionals and victims for this report was unanimous in support for this measure ‘the general view being that it would enable a perpetrator to be removed from a situation thus giving them time to ‘sober up or ‘calm down.” However, arrest is not always immediate or certain, and in some cases where no further criminal action is taken the perpetrator is allowed back into the home.
- 4.6 The MOJ suggest that their ‘Early Evaluation’;
provides evidence of this aim being achieved, with professionals seeing the measure as a positive move that provided clarification of

existing good practice, and a tentative finding of increasing use of common assault sine this became an arrestable offence.

No evidence has been found to contradict this early finding.

5.0 Effect of the legislative Changes – Decline in the number of applications/orders

5.1 Immediate caution is required when looking at the number of Family Law Act orders post the Act, as from 1st July 2007 there must be separate orders for non- molestation orders and occupation orders. Therefore as flagged by HHJ Platt to us, the number of civil injunctive orders emanating out the family courts does not equate the number of applicants and ‘could well mask a large drop in the number of applicants seeking the protection of the courts.’

5.2 Data obtained first hand by concerned judges such as DJ Mornington (through the Family Justice Council and from a number of courts directly) who were seeing first hand a decrease in applications in their courts, showed that whilst results varied, some were the same, a few higher, but that more were lower – on average applications were down by 15 per cent. DJ Mornington posited a number of reasons for this overall decrease, namely solicitors believing that injunctions are now pointless, so that fewer are applying for them. This being directly linked with the perception among legal practitioners in her area that there is little action on breach with the police and CPS not doing enough. She quoted that previously ‘her court had 2 committals per week and that now magistrates courts are doing 2 committals per year.’ Further, she mentioned that there is a reduction of solicitors doing this work as a result of reductions in legal aid, and/or a reduction in the availability of entitlement to legal aid, but her feeling was that decrease was **due to concern re lack of prosecution for breach of orders.**

5.3 The Ministry of Justice’s ‘Early Evaluation’ supports the above findings re a reduction in applications, based on HHJ Platt’s research –

Research published as this report went to press provided evidence of a decrease in the number of applications – between 15% – 30% across 6 county courts – when the six-month period prior to implementation (1 January 2007 – 30 June 2007) was compared with the following six-month period (1 July 2007 – 31 December 2007) (Platt, 2008).

The MOJ report when comparing July – Oct 2007 to the same period in 2006 found a fall in the number of applications from 6 195 to 5 560 i.e. 10 per cent. Significantly, the Legal Services Commission LSC data shows that post implementation the number of legal aid certificates issued was down by 13 per cent on the previous year. It is said, by some commentators that the 2008 figures show an *increase* of 7 per cent, however this data remains unreliable. As of beginning of 2009, 2 courts have reported to the writer a resumption of applications to the levels prior to the Act, namely Croydon and Maidstone.

- 5.4 Karen Morgan-Read Senior Policy Advisor for the CPS has commented as follows:

linking the fall in applications for injunctions or committals upon poor prosecution of breaches is disingenuous and is not supported by any current statistical evidence. The data indicates that applications for injunctions were falling year on year before the implementation of the legislation.

It should be noted that the MOJ 'Early Evaluation' report provided statistics that in the years *prior* to the DVCVA there had been a steady decrease in the number of applications and orders. The number of applications falling from 19 131 in 2002 to 16 044 2007 (HMCS FamilyMan system) and orders falling from 24 999 to 21 934 during the year 2002-2006. This continued a trend that had begun in 1994, with the FLA 1996 not proving as effective in terms of civil protection as anticipate (Edwards (2001)). Edwards suggested that changes in legal aid criteria and eligibility may be responsible as well as increased use of criminal approaches in favour of civil remedies; and a refusal by judges to make an order due to a reluctance to attach a power of arrest (a situation largely remedies by the 1996 Act). The MOJ report thus backs what is said by the CPS that these prior trends need to be kept in mind when looking at the impact of the criminalisation of breach.

Following criminalisation of breach of a non-molestation order the number of applications and orders decreased when compared to the previous year. However, with such a short trend it is not possible to conclude whether this is linked to the DVCV Act or whether it represents a consolidation of previous trends. Aug 2008

- 5.5 Mandy Burton of the University of Leicester has carried out an extensive, recent review for the Legal Services Commission in September 2008, to examine trends in the number of applications for non-molestation orders generally in recent years, and post the implementation of the DVCVA **and to consider reasons for any decline**. As per the MOJ report by Prof. Hester and others mentioned above, her findings were that the number of applications had been declining since 2002 with an overall downward trend since a peak in the early 1990's.

There is some evidence that the DVCVA, in particular the provision criminalising breaches of non-molestation orders, may have produced sharper downturn in applications since 2007. However it is still too early to assess the impact of the DVCVA.

She looked at the figures provided by HHJ Platt. Whilst HHJ Platt noted the drop in applications of between 15-30 per cent in 6 courts between July – Dec 2007, the average fall was closer to 25 per cent (Platt 2008). She reports that HHJ Platt considered that there might be a number of explanations but suspected that the provision of the Act criminalising breach and its effect on the willingness of potential applicants to pursue orders was the main reason

for the fall. HHJ Platt accepted that his figures did not give a clear indication for the potential longer term impact of the DVCVA.

However he argued that if the fall of the first six months were sustained over a 12 month period that would translate into 5 000 fewer applicants a year coming to the family courts for a protection. Such a drop would clearly be sharper than any decline in previous years.

- 5.6 HHJ Platt in his article for Fam Law (July 2008) did suggest that a reason for the decline in applications may be that victims were bypassing family courts for criminal proceedings. Given that most abuse involves the commission of a criminal offence, victims were going straight to the criminal justice system in favour of civil injunctions. He pointed out that figures from the CPS showed an increase in prosecutions up from 34 839 2004/05 to 63 819 in 2007/08. However, there is no objective analysis in these figures showing the percentage of successful prosecutions as set against the number of DV matters charged or the number of incidents reported. The data needed for this type of comparison is simply not available. HHJ Platt suggests that the other alternative for the downturn in applications is that elements of the new provisions are having an effect on the willingness of applicants to apply to the family courts for protection.
- 5.6 Mandy Burton suggests that one of the key factors for the decline may be the response from solicitors when initially contacted by potential applicants, and her concern re solicitors not being sufficient specialised in the field of DV, and recommended that solicitors receiving LSC funding for DV should participate in accredited DV training. [It is difficult however to accept that this is somehow a recent problem.] She also identified the lay perception as to 'the efficacy of orders and issues surrounding cost.'
- 5.7 It must be reiterated that it remains too early to assess whether the significant decline in applications seen in 2007 has been sustained.
- 5.8 The MOJ report that at this early stage there is no conclusive evidence of impact regarding non-molestation and occupation orders being made available to same sex relationships and to couples who have never lived together.

6.0 Effect of the Legislative Changes – Criminalising the Breach of a non-molestation order.

- 6.1 It is suggested that this is the area of most concern that the Act is not working in achieving an objective of firstly bring perpetrators before the court upon breach and secondly securing conviction. The MOJ report, widely quoted above, **did not address at all** the extent to which alleged breaches of no molestation orders granted in the civil courts were being prosecuted in the magistrates or crown courts.

- 6.2 The system in place prior to the Act, whereby breaches were dealt with by the court that had imposed the order (most often a county court), provided a swift outcome. An influential District Judge told us;

before the Act came into force anyone arrested under a power of arrest had to be brought back before the court which made the order within 24 hours. That court would then check that the order had been properly served and that the arrest was lawful. It would ascertain whether the arrested party wished to seek legal representation and if so would either remand him on bail or in custody. If there was no wish for legal representation the breach could be dealt with at that first hearing. Any remand would be for not more than 14 days and the case would normally be dealt with at that hearing. The court would have the benefit of all the documents in the case and possibly related files to assist it in making a decision. A Magistrates Court dealing with a breach does not have that information and is dealing with breach in isolation.

The potential for delay following criminalisation was envisaged and debated by the attorney General baroness Scotland during debate in the House of Lords. They conceded that whilst cases may take longer to conclude the increased sentence and criminalisation of the breach would justify any delay.

- 6.3 There is widespread concern among practitioners about the practical implications associated with this measure. The MOJ report commented on professional concern re the phased entry different measures under the Act, and confusion among police and others as to whether the new law or old law applies. The same District Judge also commented that the Act can cause confusion citing examples:

In a few cases there may be both a non-molestation order which prevents a return to premises or their vicinity and an occupation order carrying a power of arrest which also prevents a return to the premises. A police officer arresting someone in breach of the condition not to return will not know whether he is arresting for breach of the non-molestation order or the occupation order.

DJ Cole (Croydon) points out that the power of arrest (now not available for non-molestation orders) was a very useful tool in that it was unequivocal leaving no room for doubt (either for the perpetrator or the police) that breach would result in arrest and a return to the civil court, whereas now non-molestation order carries merely a notice warning that breach is a criminal offence. His view is that the new procedure is not nearly as effective and unequivocal as previously, leaving the discretion for dealing with breach with the police, who in his view often take no action, despite there being 2 possible offences, breach of the order and assault.

- 6.4 According to CPS sources, the CPS must now authorise charge on all cases of domestic abuse irrespective of whether the defendant admits his/her

guilt. However, *before* files are passed to the CPS, there is anecdotal evidence of the police dealing with matters by way of caution, or (as in the experience of the writer) giving a harassment warning under the PHA.

- 6.4 The CPS makes a decision to prosecute based on the Code for Crown Prosecutors, Prosecutors must be satisfied that there is a reasonable prospect of conviction (the evidential stage) and that it is in the public interest to proceed. Foremost in the prosecutor's mind is the implication for safety for the victim and any children. The CPS must be satisfied that there is enough evidence to provide a 'realistic prospect of conviction' but in DV cases the only evidence normally available will be that of the victim and possibly the police who may have witnessed the aftermath of an incident.

The nature of DV would mitigate against a high evidential burden, as domestic violence tends to happen in private and without witnesses and the lack of independent witnesses may influence against a prosecution.

- 6.5 A further problem identified by HHJ Platt in respect of charging decisions is that there is a lack of information sharing between the police and the court granting the injunction. The investigating police officer and the CPS when deciding whether or not to prosecute are unaware of the evidence that was relied upon in the civil court to obtain the injunction.

Consequently, what may appear to be an isolated and comparatively minor incident leading to the arrest may in fact be a small part of the much larger and more serious picture. Wrong charging decisions and decisions simply to caution have certainly been made as a result in the gap in the system.

This problem has still to be addressed with police still not routinely requiring sight of the original sworn statements supporting the making of injunctions (which in any event would not be admissible in the criminal setting until turned into a formal statement). HHJ Platt did also say however that this problem has been addressed in Greater Manchester and Yorkshire by the adoption of local protocols which ensure that a copy of the affidavit evidence in support of the injunction is served on the police with the order.

- 6.6 The standard of proof required in both the civil and criminal courts to secure conviction for breach is the criminal standard. The nature of DV is often a paucity of corroborative evidence be it witnesses, medical or otherwise. Certainly county court judges were used to making a determination, based on witness testimony alone. Mandy Burton (2008) further points out that 'the CPS face evidential barriers in cases where the victim does not want to testify (Ellison 2002; 2003). The court shows a continuing reluctance to admit hearsay evidence, although they have suggested that evidence besides the victim's testimony (such as the fact of an emergency call and the observations of attending police officers) might be enough for a case to proceed (R v C (2007) EWCA Crim 3463).'

- 6.7 Another problem identified (and discussed in Mandy Burton's report) was that given the criminalisation for breach a higher standard of proof might be required for the making of a non - molestation injunction i.e. a heightened standard of proof where breach of a civil order was punishable as a criminal offence. This line of reasoning has been rejected by the courts, most recently in *Re B* [2008] (Care Proceedings: Standard of Proof) 2 FLR 168. The House of Lords has clarified that the civil standard is not heightened by the seriousness of the allegations involved, or the seriousness of the consequences of any findings. It should be no more difficult to obtain injunctive relief than previously.
- 6.8 Positive benefits of criminalisation are the wider range of penalties in the criminal courts such as the requirement for participation in a Domestic Abuse Programme (run by the Probation Service) which can be imposed alongside another penalty, such as a community order and can be specified to last for up to 2 years. Where a defendant has been sentenced to a community order that court can impose various other conditions as part of that order under the CJA 2003 i.e. curfew exclusion order/ prohibited activity order. Therefore a victim may not need to seek redress through the civil court as he/ she may have something akin to a civil injunction through the criminal sentencing process.
- 6.9 A number of judges in the civil courts have suggested that their sentencing powers be extended to include the range available to their counter parts in the magistrates courts, given that district judges already have the power to impose custodial sentences of up to 2 years. DJ Cole commented that in the event that the alleged perpetrator elected to be tried in the crown court, the district judges could remit the matter to the magistrates for committal. Alternatively, given their general concern re the downturn of applications and concern in respect of the number of breaches being prosecuted. We have queried whether there should be a repeal of section 1 of the DVCVA with the extension of sentencing powers to the civil judges but have considered that it would be premature to consider any repeal of parts of the Act without proper research into whether or not it is working. Clearly, repeal of the provision criminalising breach would represent a major departure from one of the main objectives of the legislation.
- 6.10 Burton considered that rather than repeal of section 1, consideration could be given to extending the sentencing powers of the district judges for 'those cases that continue to go down the civil enforcement route.' Herein lies a problem, the civil courts are not seeing or are very rarely now seeing enforcement via the civil route. The experience of DJ Mornington quotes above is not atypical, whereas county courts would, previously, have typically have dealt with a number of committal applications per week, the numbers have dramatically declined so that these applications are rarely seen.
- 6.11 The law states that a perpetrator cannot be sentenced for the same breach offence in BOTH the criminal and civil court. As DJ Cole points out 'a

breach offence can be in both courts but there cannot be a result in both.’ Clearly victims’ lawyers are cognizant of this fact and where the matter is in the hands of the police/CPS tend not to pursue a civil remedy. Further, and crucially it seems to be generally perceived by solicitors that where there are criminal proceedings in hand that public funding is not available. HHJ Platt also helpfully commented on the funding issue in his Fam Law article pointing out that solicitors representing an applicant wishing to go down the civil enforcement route would have to firstly apply for an extension to the certificate which is not covered by delegated powers and that this would cause delay. Mandy Burton addresses the issue of criteria for eligibility, stating that the Funding Code does not embargo public funding when criminal proceedings are in progress ‘the Code encourages consideration of the criminal route but it makes provision for funding in cases where there is ‘good reason’ not to pursue It, or the police have not provided adequate assistance. There appears to be a gap between the letter of the Code and the perception about its operation. This maybe enough to partly account for a reduction in applications for non-molestation orders.’

- 6.12 HHJ Platt also highlights the problems facing a would be applicant for a civil enforcement if CPS decline to prosecute, ‘Initially, the LSC took the view, first, that the Government had expressed a strong preference for the prosecution of perpetrators and, secondly, that a CPS decision not to prosecute indicated that a committal was unlikely to succeed and applicants were refused extensions for either or both these reasons. Following representations, the LSC issued guidance in 2007 to clarify the position and extensions may now be granted for committal. However, enforcement activity in the county court remains at a much lower level than previously.’
- 6.13 The above comments in respect of funding serve to illustrate that there would need to be a highly proactive approach to the LSC by a solicitors seeking a civil route, pointing out that the criminal route is either unavailable through police inactivity or otherwise having to posit a reason why the criminal route is unsuitable *before* legal aid would be available. This is bound to have impacted on the drastic decline of this route as an option for victims.

7.0 Performance of the CPS in relation to prosecution of breach

Mandy Burton has commented that

Overall the rate of successful prosecutions for domestic violence has increased from 46 per cent in 2003 to 67% in 2007-2008, if ‘success’ is measured by conviction rate. However as HASC (2008) observed this date only tells us about the proportion of charges resulting in conviction and is not related to data on incidence, reporting, arrest and charging. The attrition rate in DV cases is very high (Hester et al, 2003).

- 7.1 Rates of convictions in the Specialist domestic violence courts (SDVCs) are reported to be high with good victim support and other practices, such as specialised training for magistrates. CPS data demonstrates that the number

of offences which reached a first hearing under this legislation in 2007-2008 was 603. The equivalent figure for 2008-2009 was 3 160. Currently the CPS is not able to provide any more detail in respect of the outcomes of these hearings. As stated above there is an improvement in the *volume* of prosecutions – from 34 839 2004-2005 to 63 819 in 2007-2008.

- 7.2 It is suggested that it is wholly unsurprising that there is an increase in convictions given the legislative changes which has placed responsibility for dealing with breach in the criminal justice system. What is urgently needed is data as to the number of cases passed to the CPS, the number of those cases a) prosecuted b) withdrawal or c) the matter discontinuing for other reasons, the conviction/ acquittal rates, and timescales from arrest and charge to conviction/ acquittal, in order to properly assess the impact of prosecution of breach in the criminal courts. An improvement in the CPS conviction rate, viewed in isolation, does not assist. As stated another concern is that cases are not getting to the CPS for consideration, and that police are using cautioning as a means of dealing with breaches.

8.0 What is the victim experience of prosecution in the criminal setting?

- 8.1 Sharon Stratton of the Metropolitan Police was keen to point out that victim support throughout the criminal process was to be commended and she felt that this had been lacking for the victim during the civil enforcement route. Many would disagree. Importantly in civil committal the victim had the support and exclusive attention of her own legal team as well as the benefit of victim support groups within her/ his area. In the criminal system the victim is not represented, she is simply a witness.

Karen Morgan-Read (CPS): Supporting witnesses and victims through the criminal justice system is pivotal to the increase in successful outcomes experienced in the CJS in recent years. The CPS are part of a multi-agency criminal justice team which endeavours to ensure victims are supported not only during the court process but where possible, beyond i.e. Independent Domestic Violence Advisers (IDVA), Multi-Agency Risk Assessment Conferences (MARAC) and risk assessments all enable the victim to have a more joined up approach which places her safety and well being at the centre of the process.

- 8.2 Delay – the effect of the legislation provision providing as it does for up to 5 years imprisonment for breach of a civil order is to give the accused the right to jury trial. This can delay matters by months. Compare this to the civil route as described above whereby the vast majority of committals were heard and finally dealt with within 3-4 weeks of arrest. The pressure on a victim over months, waiting to give evidence in the criminal court cannot be under estimated. The anxiety re the court case can take hold increasing the likelihood of the victims withdrawing, with the increased possibility of pressure on the victim. As stated, there is unfortunately no data available from the CPS dealing with withdrawal/ attrition rates in the cases prosecuted.

9. Summary of conclusions

- (i) Early indications showed that applications overall appear to have fallen by some 15 per cent since the implementation of the DVCVA. The trend already in existence since 2000 was a general decline (a 16 per cent fall between 2000 - 2006) but was clearly not comparable to the current fall. If this level of decline continues this would be very worrying in terms of victim loss of confidence in the legislative provision.
- (ii) The 'front line' view of victims as communicated through victim support groups is that they welcome the main legislative changes of criminalising breach because of the perception that criminalisation means DV is taken seriously. They also welcome an arrest for common assault.
- (iii) The greatest concern among family law practitioners and the civil judges is that breaches are not routinely being prosecuted. This is of course disputed on behalf of the CPS. However, the concerns about the delay in the criminal system compared with the previous expeditious civil route are justified, as is concern re the effect of that delay on victims.
- (iv) Victim *choice* as to whether to pursue a civil or criminal remedy for breach has been all but taken away, given the emphasis on the criminal route and the struggle for funding for the civil route.

Rachel Gillman

17th April 2009

On behalf of the Centre for Social Justice

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 DJ Mornington – Mansfield County Court
 Karen Morgan Read – Senior Policy Advisor, Crown Prosecution Service

APPENDIX EIGHT

Report on visit to Australian Family Relationship Centres by Helen Grant

A review of the November 2008 study visit for the
Centre for Social Justice
By Helen Grant LL.B

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INTRODUCTION

The provision of ‘marriage guidance’ in Australia dates back to the late 1940’s. Based on the national Marriage Guidance Council in London, services were initially provided by volunteers. Following the passing of the Matrimonial Causes Act 1959, which introduced the first uniform divorce laws for Australia, a number of agencies providing ‘marriage guidance’ were given formal approval and a level of funding by the Commonwealth Attorney General’s Department. These services continued to be subsidised by the Australian Government following the passing of Australia’s Family Law Act 1975; furthermore until the mid 1980s, their focus remained almost exclusively on ‘couples counselling’ and in some cases on relationship education. During the 1980s many agencies developed a ‘professional’ status and also began to

expand their range of services. During this same period Government began to move some its post-separation mediation services from the Family Court into the community sector. A number of these agencies, as well as a number of new players, successfully tendered for this work. During the 1990's a raft of other services, such as children's contact centres, family violence prevention programmes and men's services were also contracted out to these agencies by the Australian Government.

Notwithstanding the growing professionalism and expansion of these agencies, the Report of the Family Law Pathways Advisory Group (Australian Government 2001), found that the public remained confused about how to access appropriate services. It also found that there was little coherent crossover between the court and its services and the services provided by the community sector. This, as well as increasing concerns about both family violence and father absence after separation, became key foci of the inquiry initiated by the Howard Government, which in turn culminated in the 2003 report 'Every Picture Tells a Story'.¹

The above introduction briefly tracks the evolution of Australia's current approach to dealing with family difficulties and disputes related to breakdown, particularly where children are involved. The principles might be summarised as follows:

- Parents need to be supported to have and keep the interests of the child and his/her upbringing at the forefront of their minds both during and after separation.
- To achieve this, parents need access to a full range of family services via simple and readily accessible advice and referral systems.
- As far as possible courts dealing with children issues should be reserved for cases involving allegations of violence or child abuse, urgent cases and cases that for other reasons such as the existence of significant mental health issues, are not amenable to dispute resolution processes.
- In the interest of promoting cooperation between parents and a focus on their children, adversarial processes and the adversarial effects of the law should be removed or at least significantly modified from the process of separation, in the interest of promoting cooperation between parents.

In July 2004, the Prime Minister announced the Government's response to the 'Every Picture Tells a Story' report.² Its centrepiece was the creation of Family Relationship Centres (FRCs) to act as family information and referral centres which would also offer free mediation. As the ideas evolved prior to implementation, the Government decided to make some form of family

1 *Every Picture Tells A Story* – Report on the inquiry into child custody arrangements in the event of family separation. Commissioned by the House of Representatives Standing Committee on Family and Community Affairs, December 2003, Canberra

2 *A new family law system – Government Response to Every Picture Tells A Story* – June 2005

dispute resolution (FDR) a mandatory step in children's cases before even filing an application to the Court,³ unless exempted for reasons such as a history of domestic violence.⁴ Before this, it was a stage of the process after filing an application. Parents must make a genuine effort⁵ to resolve their dispute. Even if FDR cannot settle the matter, it is hoped that it will refine the issues between the parties and help them to focus on the children.

The Less Adversarial Trial,⁶ which involves many changes to the normal operation of trials using the traditional adversarial system, was implemented as an additional strand to the strategy. This had been piloted in Sydney and was extended by legislation to operate in other areas.

Analysis indicated that 65 FRC's would be needed to reach the Australian population, strategically located across the country, based upon 1 FRC per 300,000 of population. There was little infrastructure to build upon as most existing family services were fragmented, unevenly distributed or not in highly visible and accessible locations. Australian geography presented a further challenge with some areas of the country being vast and very sparsely populated. It was therefore decided that the initiative would be put out to competitive tender, as a new start-up, relying upon the creativity of the marketplace to devise the means to deliver the service in each different location.

The Government provided prescriptive rules for service delivery which included strict use of FRC branding. Three year funding contracts were agreed, with ongoing compliance audits. The scheme was piloted with 15 sites opening in July 2006, followed by 40 more in July 2007 and the final 10 by July 2008.

- 3 Family Law Act 1975 (FLA) s601 – In most cases, parties who wish to commence legal proceedings in the Federal Magistrates Court (FMC) or the Family Court of Australia (FCA) are now only permitted to do so if they also file a certificate from a registered Family Dispute Resolution Practitioner with their application. These certificates show they have complied with the requirement to attempt to resolve their dispute through family dispute resolution.
- 4 Exceptions to the requirement to obtain a certificate include cases where the court is satisfied there are reasonable grounds to believe that family violence or child abuse has occurred, or that there is a risk they may occur (s60I(9)(b)). Further exceptions include applications for orders made by consent (s60I(9)(a)(i)), situations where an urgent determination is needed (s60I(9)(d)), and circumstances where a party is unable to participate effectively, including for reasons of physical remoteness or a lack of capacity (s60I(9)(e)).
- 5 The meaning of 'genuine effort' – The Attorney-General's Department (AGD) provides the following guidance about the meaning of 'genuine effort' (AGD 2007), which so far has not been defined in case-law or statute. It indicates that this is a matter on which the FDRP should form their own opinion, having regard to these factors:
 - It should be given its ordinary meaning;
 - It is not equivalent to 'good faith';
 - It should be a real attempt to resolve the issues, not a superficial, token or false effort;
 - It does not require people to agree;
 - It does not require a minimum number of FDR sessions; and
 - It does not require FDR practitioners to 'tick off' objective indicators and subjective matters may be considered.
- 6 The Family Court takes a less adversarial approach to trials in child-related proceedings. The Family Law Act 1975 mandates this approach in Division 12A of Part VII. This means a trial in a child-related proceeding:
 - is focused on the children and their future
 - is flexible so that it can meet the needs of particular situations
 - is anticipated to be less costly compared to traditional trials and will save time in court
 - is less adversarial and less formal than is usually the case in a court.

The judge, rather than the parties or their lawyers, decides how the trial is run.

The FRC tender was essentially about delivering the Family Dispute Resolution package and act as a gateway to early intervention strategies (EIS), and post separation services (PSS). In Australia PSS's are funded by the Attorney General's office⁷ whilst EIS's are funded by FaHCSIA⁸ (including drug & alcohol, male aggression, drought, relationships and skills training, adolescents and family courts). Tenders for EIS and PSS were put out separately and the co-location of EIS and PSS was not encouraged, although providers were allowed to bid for more than one service and in certain locations independent providers formed consortia to bid for multiple service contracts.

Recommended further reading about the background, development and implementation of the FRC initiative can be found in *Child & Family Law Quarterly*, Volume 18, published in 2006.⁹

METHODOLOGY

There is no early evaluation report available to provide any conclusions, performance indicators or best practice at this stage, although Allan Hayes and Matthew Grey of the Australian Institute of Family Studies in Melbourne (part of the Department of Prime Minister and Cabinet, headed by Professor Alan Hayes with Dr Matthew Gray of the Deputy Director's Department) are producing a study scheduled for publication in October 2009.

It was therefore decided by the CSJ that a study visit was required to establish as much evidence as possible, from a wide range of stakeholders, to establish how FRC's might be translated into a UK context. The preparation work for this study trip was greatly assisted by guidance from Professor Patrick Parkinson AM and Associate Professor Lawrie Moloney to whom we are extremely grateful.

Evidence was gathered from senior civil servants involved in the creation and funding of the FRC's at Federal Government level, the main service providers who operate the FRC's for end users, managers and staff employed at FRC's, family lawyers and the judiciary who are involved in the legal processes.

6 FRC's were identified for site visits, in varied demographic locations, operated by different service providers.

Australia's inaugural Family Relationship Services Association (FRSA¹⁰) National Conference took place at the same time as the study visit over a three day period which allowed a unique opportunity for networking and engagement with the full range of stakeholders within this specialist sector.

7 Attorney-General's Department maintains and improves the system of law and justice, national security and emergency management systems. <http://www.ag.gov.au/>

8 FaHCSIA - Department of Families, Housing, Community Services and Indigenous Affairs. Responsible for social policies and support affecting Australian society. <http://www.facs.gov.au/>

9 Parkinson, P., 2006, 'Keeping in contact: the role of family relationship centres in Australia', *Child and Family Law Quarterly*, Vol 18, No 2, pp157 – 174

10 For the first time service providers have been brought together under the umbrella of this one organisation.

ACTUAL PRACTICE – EVIDENCE GATHERING AND EVALUATION

Site Selection

6 FRC's were visited as set out in *appendix 8a*. The Sydney region was selected due to its international accessibility and its wide range of diverse and locally accessible FRC's. The individual sites in New South Wales were selected on the basis of reputation for best practice and best outcomes, comparative diversity in operational ownership and client demographics, and those most likely to have greater length and breadth of experience in client issues and the challenges involved in setting up and operating.

The Northern Queensland site in Cairns was selected due to the fact that the Family Relationships Services Australia (FRSA) conference was also located there and was a good example of an FRC that serves a very wide geographical area covering a sparsely populated region that includes a significant proportion of indigenous people.

Site Evaluation

This included consideration of the location, the accommodation and facilities, a management overview of the Centre, and hearings and informal round-table Q & A sessions with managers and staff. Information was freely volunteered and further evidence was obtained through responses to a fixed series of questions put to each group (*appendix 8b*).

Individual Interviewees

Prior to the study visit interviews were arranged with key individuals from a range of stakeholders involved in FRC's. Whilst in situ selections of additional people were interviewed from the list of delegates attending the FRSA conference (*appendix 8c*).

Evaluation process

The one-to-one interviews comprised evidence gathering through hearings and through specific Q & A's. Whilst informal and fluid, the meetings were thorough and wide ranging.

REVIEW OF RESPONSES AND PERSPECTIVES

Positive observations

- The Attorney General has reported that an 18 per cent reduction in the number of family law applications was recorded between July 2007 and June 2008¹¹ compared with the same period in the previous year. This is the first drop in such applications for 25 years although it appears that initially it is only the simpler types of case where the volumes have reduced. Whilst it was felt by many that the FRC's have played a significant role in this result, it was one of several measures that have worked in unison. To offset

11 Sue Pidgeon, Assistant Secretary, Family Pathways Branch, Attorney General's Office

this reduction however, the 2006 legislative reforms seem to have re-enfranchised previously alienated male litigants back into the family law system, and a larger number of more complex cases are now coming through the process.

- There is widespread acceptance of the idea that a mandatory ‘community based’ Family Dispute Resolution (FDR) process represents a significant cultural change from the traditional view of Family Law, the biggest change for many decades according to one very senior advocate. The new system in children matters seeks to ‘Take the Law out of Family Law’ and avoid the adversarial nature of the court environment and family court hearings. There is a swing away from legal issues toward relationship issues.
- The consensus is that mandatory FDR is a good starting point in children cases. The expectation is that most families, for whom mandatory mediation is a first step, will not then need to proceed to court. Further, of those who do still require an adjudication, many will have had the opportunity to test alternatives before using the court system. The statutory definition of FDR¹² is deliberately generic to take in processes that depend on consensual outcomes rather than adjudication. FDR does however, still allow for mediation, conciliation, early neutral evaluation (non binding), case appraisal, advisory mediation, and evaluatory mediation where considered appropriate. The process is handled by a trained professional (known as dispute resolution practitioners), not an arbitrator.
- Group parenting sessions as well as resources and child mediation training from the ‘Children In Focus’ programme¹³ has proved very effective in focusing parents on the effect of conflict on their children and the need to cooperate for their children’s futures.
- There was unanimous support for FRC’s being in high visibility primary locations in high streets and shopping malls. Together with a strong government backed ‘Brand’, the centres have avoided the ‘Divorce Shop’ image and are portrayed as a welcoming and un-embarrassing centre for information. The generic title gets a wide range of people through the door and clients seem to have a high level of trust and confidence, due to the link with government and implied links with the court system, even though FRC’s are actually run by NGO’s. The UK challenge is the cost of this high visibility which is a chief component of the Australian cost yet also a chief selling and accessibility factor.

12 Under the FLA 1975, FDR is defined as a process (other than a judicial process) conducted by an independent family dispute resolution practitioner, in which the practitioner ‘helps people affected, or likely to be affected, by separation or divorce to resolve some or all of their disputes with each other’ (s10F).

13 Children in Focus – a research and development team of La Trobe University, Victoria, Australia, launched in 2002 by Dr Jenn McIntosh and Dr Lawrie Moloney. The fundamental aim of Children in Focus is to raise awareness of the centrality of children in family disputes, legally and psychologically, and to promote pathways for achieving child-sensitive outcomes at various points of contact with parents during separation – principally through counselling and dispute resolution. <http://www.childreninfocus.org/index.html>

- For applicants who reach the court, the individual docket system (One Judge/One Family) is an important innovation. The general principle underlying this is that each case commenced in the Court is randomly allocated to a judge, who is then responsible for managing the case until final disposal. England and Wales would like to introduce this but practical difficulties are often given by court offices for not doing so. It should be actively reviewed.
- The success of FRC's has relied upon two ministers within two political departments (The Attorney General's Office & the Minister for Children and Youth Affairs within FaHCSIA) working together in cooperation, and this has been successful thus far.

Negative observations

- Waiting times for client appointments was a big complaint but this is now subsiding with all 65 centres being operational. The lesson is the care needed in transition planning from the old to the new.
- Solicitor involvement was initially very sceptical and protectionist in some areas, in the same way as were some men's groups and Domestic Violence organisations. Solicitor alienation was also exacerbated by the exclusion of solicitors from the Australian government consultation panel.
- There is a danger of unqualified FRC staff giving legal advice when they should not. This is seen as a general problem in the third sector. The problem is heightened in FRC's because the public trust the Government branding and the implied link to court system, and are therefore more inclined to believe what they are told.
- There is a danger of FRC personnel not being properly trained to deal with high risk DV issues when determining mediation assessments. At the same time a research report by the Australian Institute of Family Studies (2007) found that courts too were struggling to deal adequately with these cases.
- There is some concern that multi cultural aspects are not being addressed in FRC's, although no evidence was provided in this regard.
- Competitive tendering caused considerable rifts between previously cooperative service providers.

Personnel Observations

- Leadership is a critical issue. Centre managers need to be strong, empathetic, and command the respect of their staff.
- It is vital that all staff are properly trained, supervised and mentored/monitored. This includes three clear tiers of personnel: front end staff on the reception counter, second line Family Advisors undertaking the initial triage work and then Family Dispute Resolution Practitioners (FDRP's). Existing mentoring schemes are considered to work very well in the development and supervision of FDRP's.

- Recruitment decisions are presently made through traditional interviews and the 'gut feeling' decisions of managers. Future FDRP's will have to reach a prescribed standard under an accreditation scheme.
- Staff retention is a concern for some but seemingly not yet an issue that has crystallised. Salaries for FRC staff are modest. The FRSA are looking into how to combat potential burn out.
- The Mental Health element is another major recruitment and training challenge and should be considered within the staffing of front-end personnel in FRC's.

What would people change in hindsight?

- The initial 3 year funding contracts are not adequate for a long term programme such as this. Alternatives proposed were either 3 x 3 year contracts or 2 x 5 year contracts and then re-tender.
- Initial tender was for FRC, EIS and PSS as separate services and were offered to separate bidders, to try and get the best services in each category. Now most people support the idea of a single contract to consortia, to cover all services. The downside may be that this will not provide the best services in all facets.
- It is also felt, from Government downward, that co-location of all services i.e. bringing all services together in one place, should have been allowed where practicable, including contact centres. This is now a reality at a few of the most recent FRC's.¹⁴
- Whilst all FRCs are required to have child friendly spaces, short-term child care crèches should be included as standard in the specification.
- Some felt that 6 months was insufficient time from grant of contract to doors opening, particularly for the negotiation of terms for the best located premises.

Australian Respondents' views about the future of the FRC project

- The new AG is seeking to have FRC's working more closely with the courts and possibly giving them an arbitration role in the future.
- The Government is also looking to use the efficacy of FRC's to deal with functions outside the court remit, across a range of services, including early intervention services, pre-marriage courses, relationship strengthening and child protection issues.
- The integration of child contact centres is another development already in operation.
- Other self help groups are developing organically through the existence of FRC's beyond the core family unit, such as Grandparents' groups and groups for children of separated families.

14 Tamworth FRC managed by Centacare New England North West, in West NSW, has child contact co-located.

COSTS

The Australian government announced in the 2005 budget that \$397 million of new funds over four years were to be dedicated to the task of family law reform.¹⁵ According to the AG's office the operating cost for each centre is between A\$800k and A\$1.5m. The most expensive is Darwin which is funded to cover a vast geographical area. The mean annual running cost is A\$1m per centre. Capital costs were funded at 20 per cent of the agreed annual operating costs. All FRC operators asked for additional capital but were told to find it from other places, or to borrow it.

CONCLUSIONS

- It was apparent that there was much support for the FRC initiative and whilst we await a conclusive evaluation report, they seem to be making a real and noticeable difference in Australia, in combination with other reforms in family law and practice.
- Hindsight has also shown that co-location and coordination of services is a desirable concept that will be progressively adopted in the future although this would incur additional costs.
- The shift away from adversarial court environments for family matters is working and is creating a significant reduction in the volume of certain types of court applications.
- Branding and location are important elements in the public perception of the FRC's.
- Leadership, recruitment, training and supervision of staff is fundamental to the success of the scheme.

15 Australian Government, 2005, *A New Family Law System: Government Response to Every Picture Tells a Story*, pp 1–2

APPENDIX 8A – FRC SITE VISIT LOCATIONS

Location	Area served	Demographic	FRC operator
Campbelltown FRC, Address: Level 2, Shop L05, Gilchrist Drive, Campbelltown NSW Phone: (02) 4629 7000 Fax: (02) 4627 8078 Email: campbelltownfrc@unifamcounselling.org	Sydney outer western suburbs	Working and middle class, very diverse ethnic groups including Spanish, Arabic, Filipino, Pacific Islanders (Fijian), Aborigines	Unifam
Sydney City Central Ground level, 118 Sussex Street, Sydney NSW. Phone: (02) 8235 1500 Fax: (02) 9279 3036. Email: sydneyfrc@answ.org.au	Large region – includes Central Business District as well as affluent Eastern Suburbs (Jewish, Greek). La Perouse – also has its own indigenous group with its own needs) and inner western suburbs including Redfern (Aboriginal community – high in profile but not in numbers) and multi-generation European immigrants – Italian, Greek, Middle Eastern etc. Cultural mix includes Chinese area in the CBD.	Mixed	Relationships Australia
North Ryde FRC, Unit 1, North RydeLink Business Park, 277 Lane Cove Road, North Ryde Phone: (02) 8874 8088. Email: northrydefrc@answ.org.au	Northern Sydney Suburbs. Area includes wealthy suburbs of St Ives, Pymble and the upper north shore but there are also areas of lower wealth and a high level of single parents e.g. Macquarie Park.	Mainly people in their 30's to mid 50's and some grandparents. Asian worker community in the Eastwood area. Concentrated Korean community. No significant indigenous population.	Relationships Australia
Sutherland FRC, Shop 1C, 383-385 Pork Hacking Road South, Caringbah NSW. Phone: (02) 9525 6488 Fax: (02) 9525 6498. Email: info@sutherlandfrc.org.au	Sydney southern suburbs and south shore. 2 main areas: Caringbah and St George.	Caringbah – Middle class and working class white Anglo Saxon with lots of settled intransigent young families. St George – more culturally diverse – Asian, Greek, pockets of islanders.	Interrelate
Wollongong FRC, Shop 2, 310 Crwon Street, Wollongong NSW. Phone: (02) 4220 1100 Fax: (02) 4225 0637 Email: info@wollongongfrc.org.au	Regional city in south NSW	Mixed	Interrelate
Cairns FRC, 125 Grafton Street, Cairns QLD 4870. Phone: (07) 4041 6063	Regional city northern Queensland	Large area, mixed and indigenous	Relationships Australia

APPENDIX 8B – QUESTIONS PUT TO GROUPS IN SITE VISITS

- Tell me about [site]
- Accessibility/importance of primary locations vs. secondary or tertiary?
- What is [site's] experience of the difference in attendances for primary locations vs. other? E.g. drop-ins versus appointment only.
- Is there a case for multi-dimensional models rather than just a single approach?
- What are the costs vs. benefits issues for primary vs. secondary locations?
- Is drop-in necessarily a good thing? Or is it a potentially frivolous use of resources for half interested people with a bit of time on their hands?
- Reservedness – is this a significant issue, does it only affect certain groups, and if so which ones?
- What is the demographic for [site] and how does it compare with [other sites]?
- Effect on Family Lawyers – what if any? What lessons can be learned?
- What is their role and level of engagement of Solicitors with FRC's?
- Preventative and reconciliatory work – is this a serious or significant aspect of the work of FRC's in your view?
- If not, why not? – If yes, how are FRC's helping in this respect?
- Ethnicity – are specific groups significant users or are clients homogenous in social and ethnic mixes?
- If there are certain groups identified as high users, what if any are the different challenges that each group presents?
- Are there waiting lists? Discuss.
- What is your view of including more co-located services within FRC's? e.g. Child Contact centres, other services as per the Croydon FJC etc.
- What is the importance/significance if any of telephone support services?
- Web site – What is its importance if any? What per cent of people are online within the captivity area for each FRC – is this an important issue?
- What is your view about 'Information Meetings'?

APPENDIX 8C – INDIVIDUAL INTERVIEWEES

- The two senior civil servants from their respective Federal Government departments involved in the funding, development and monitoring of the FRC project: Sue Pidgeon from the Attorney General's office (civil justice division) and Robyn Fletcher, Head of Family Relationship Services and Family Court Services within FaHCSIA (Department of Families, Housing, Community Services and Indigenous Affairs).
- The senior executives of two of the main service delivery providers; Clive Price (Unifam), Anne Hollonds (Relationships Australia).
- Specialist family lawyers: Jacqueline Dawson & Paul Lewis, of Robyn Sexton & Associates, Sydney.
- The Deputy Chief Justice – Federal Judge John Faulks.
- Former shadow Attorney General (when FRC's were introduced) and current federal cabinet Minister, Senator for Queensland – Joe Ludwig – Minister for Human Services.

- Family Relationship Services Australia (FRSA) communications officer Bonnie Montgomery. The FRSA consults and communicates between FRSA members (service delivery organisations etc) and government.
- Elly Robinson, FHCSIA funded researcher involved in Early Intervention Strategies (EIS's).
- Professor Lawrie Moloney of the Australian Institute for Family Studies, who is preparing an early evaluation report of the first 15 FRC's.

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- Sue Pidgeon – Assistant Secretary, Attorney General's Office, Civil Justice Division, Family Pathways Branch, Canberra, ACT.
- Robyn Fleming – Branch manager for Family Relationship Services, Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA).
- Judge John Faulks, Deputy Chief Justice, Family Court of Australia
- Clive Price – Executive Director, Unifam Mediation & Counselling, Parramatta, NSW. www.unifamcounselling.org.
- Anne Hollonds – CEO, Relationships Australia (NSW), Lane Cove, Sydney, NSW.
- Paul Lewis: Senior Associate Family Lawyer and Mediator, Robyn Sexton & Associates. 34 Burton Street Kirribilli NSW 2061.
- Jacqueline Dawson: Associate Family Lawyer, Robyn Sexton & Associates. 34 Burton Street Kirribilli NSW 2061.

APPENDIX NINE

Reflections on the Marriage Course by Benjamin Fry

My wife and I undertook this course to investigate the alternatives available for couples who find their marriages or relationships in crisis. We both felt like we had no need of this course for ourselves and were unlikely to learn anything given our own background in psychotherapy, but we were prepared to make the sacrifice for the team. How wrong we were! We learnt so much and loved each other more every Monday as a result.

Overall what was striking about the course was its simplicity and key objective. It is very easy to do and broken down into many clear manageable chunks. Everything has a common purpose which seems to be to lower the barriers between individuals in a relationship so that real relating can happen. Perhaps the most important lesson learned was that difference is normal, perfection is impossible; and therefore the most prized skill in a relationship is learning how to manage difference.

The course provides some very straightforward exercises which go with brief talks from the course leaders. These exercises are all designed to get the couples communicating. There is no group work; all the exercises are one-on-one between the couples. My wife, Dorothea, and I have been together for over ten years and thought that we had excellent communication in our marriage. What we discovered through these simple techniques was another layer of richness to what we could share with each other.

I remember particularly an exercise where we had to pick our three most important values in marriage from a list of twenty possibilities. Then we had to guess at our partners'. I got none right, and I think she got one. This was a real eye opener in what was (and is!) essentially a healthy marriage. We found it sometimes hard to face these moments of learning, but equally it really did bring us closer.

It became easy to believe the stories we heard on the course about people arriving with a marriage on its last legs and leaving renewed in their mutual commitments. So much hope and expectation goes into a marriage and yet it is usually done on the basis of the things that the couple like about each other. There's very little instruction about what to do when there becomes an

awareness of the reality of what they don't like about each other. It quickly becomes clear that if you manage the differences successfully, openly and with a mutual sense of commitment, then it is easy to recover and remember the good stuff that brought you together in the first place.

We went to this course as a literate middle-class couple in a church. One of my concerns was that it might not translate across class, ethnic and faith divides. However what I discovered was a simple, secular delivery of some very basic psychological exercises. The work done is about saying what you want and how you feel. I believe that this is an automatic process for people of all educational backgrounds and walks of life. In fact, it is one of our truly universal traits that we all want to be heard and understood.

The Marriage Course made it possible for us to hear and understand each other in a new and deeper way. In doing so it strengthened our marriage and renewed our commitment to each other. It's a great shame to think of any well intentioned marriage ending in the formality of divorce before it has had access to this kind of simple, effective help. It isn't going to be the cure-all of all relationships, but based on our experiences I would expect it to save or improve many.

How much better equipped we would all be for marriage too if we admitted that it is a craft, not a human right, and we all undertook something like the sister course, The Marriage Preparation Course, rather than trying to figure out one of life's most difficult skills all on our own.

Benjamin Fry

Media consultant and member of CSJ Family Law Review.

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Glossary

ADR	Alternative Dispute Resolution
BAMER	Black, Asian, Minority Ethnic and Refugee
CGT	Capital Gains Tax
CPR	Civil Procedure Rules
CPS	Crown Prosecution Service
CRE	Couple Relationship Education
DCA	Department of Constitutional Affairs
DCSF	Department of Children, Schools and Families
DVCVA	Domestic Violence, Crime and Victims Act (2004)
ESCR	Economic and Social Research Council
FAInS	Family Advice and Information Service
FDAC	Family, Drug and Alcohol Court
FDR	Financial Dispute Resolution
FLA	Family Law Act (1996)
FRCs	Family Relationship Centres
GLDVP	Greater London Domestic Violence Project
GRO	General Register Office
HFEA	Human Fertilisation and Embryology Act (1990)
LSC	Legal Services Commission
MCA	Matrimonial Causes Act (1973)
MOJ	Ministry of Justice
NACCC	National Association of Child Contact Centres
NCSN	National Couple Support Network
OECD	Organisation for Economic Cooperation and Development
PREP	Prevention and Relationship Enhancement Program
SDVC	Specialist Domestic Violence Court
SG	Special Guardian
SGC	Sentencing Guidelines Council
SGO	Special Guardianship Orders
SJPG	Social Justice Policy Group
UNCROC	The United Nations Convention on the Rights of the Child

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Mr Justice Coleridge



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