Breakthrough
Britain

The Family Law Review

An Interim Report

Working Group Chaired by Dr Samantha Callan

November 2008

THE CENTRE FOR
SOCIAL
JUSTICE

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 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.

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The Family Law Review: Interim Report

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Executive Summary

Introduction

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.*

A review of family law is a necessary part of a concerted effort to stabilize relationships within society, because of the role the law plays in shaping expectations surrounding family life. The common thread running through this review is how the law, legal procedures and processes and ancillary functions might 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, in keeping with the research findings and recommendations of its progenitor, the Social Justice Policy Group (SJPG), this review works from an underlying assumption that marriage should be supported both in government policy and in the law and that fatherlessness (or motherlessness), far more likely to occur when relationships are informal, should be avoided.

Major Themes of the Review

THE IMPORTANCE OF MARRIAGE

Rather than treating marriage as a 'magic bullet', SJPG reports emphasised that the attitudes and behaviours which tend to be more associated with marriage than cohabitation e.g. future-orientation, willingness to sacrifice/invest, greater role specialisation (although not necessarily along traditional lines) were contributors to the greater stability and better outcomes for adults and children.

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. 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,[1] a recent analysis of the Millenium Cohort Study reached similar conclusions.[2]

Breakthrough Britain therefore 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.*

ALTERNATIVES TO COHABITATION LAW

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. This review therefore questions how to raise greater awareness of the limitations and disadvantages of cohabitation and what 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 tacking disadvantages to children in cohabiting relationships) could achieve in terms of improving fairness, without the creation of a new cohabitation law with all its implications.

It also considers whether or not the removal of some alleged disincentives to marry e.g. the non-binding status of pre-nuptial agreements, uncertainty regarding financial provision on divorce and independent taxation, will effect a shift towards marriage.

ASSISTED REPRODUCTION AND ITS IMPLICATIONS FOR PARENTAGE

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

The Human Fertilisation and Embryology Bill contains proposals which are of central concern to the Family Law Review therefore we compiled an earlier

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

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

report, *Fathers Not Included*,[3] to address some of the issues it raises on family and parenting, as well as to highlight other related issues to which we are giving 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 Bill. It accommodates tiny percentages of the population, by insisting that parental status be recognised on the sole basis of adults' intentions. Whilst the law has to take cognisance of the implications of new assisted reproduction technology, nothing should be codified which will diminish or discount the importance of biological parenthood: motherhood and fatherhood.

Recommendations include a call for a thorough public investigation of the implications and applications of the broader welfare principle to assisted reproduction (including the need for a father); more research to be carried out on children born in alternative household structures before changes in the law are made and greater transparency in the birth registration system.

POST-SEPARATION SUPPORT

Promoting stability and commitment will also guide all the work we will be doing on post-separation issues as we consider how the law can support families to rebuild their lives when a relationship is irredeemably broken.

Separated partners often struggle to come to amicable arrangements for the care of children and the division of assets, with insufficient support to navigate the legal maze. A fragmented system, with uncoordinated services, can lead to considerable additional stress and cost to the state. Conflict resolution is unnecessarily overly reliant on the court service and the legal profession and new approaches are needed to implement alternative dispute resolution services, such as conciliation and mediation.

The review has conducted a study visit to Australia to look at their Family Relationship Centres. These offer an early intervention strategy to assist parents going through separation when most have not yet embarked upon an adversarial path and legal proceedings. The policy potential of the Australian model will be reviewed alongside the challenges facing our legal aid system.

CONFLICT OVER CONTACT

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

3 Centre for Social Justice, 2008, *Fathers Not Included: A Response to the Human Fertilisation and Embryology Bill* http://www.centreforsocialjustice.org.uk/client/downloads/FathersNotIncluded.pdf

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 will be 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 also aware that Child Contact Centres continue to be an invaluable resource for children and parents who would otherwise find it very difficult to develop or maintain relationships with important family members. We will assess the service provided by contact centres, the length of waiting lists and whether there is need for more financial support, as part of our review.

EXTENDED FAMILY

There has been a fresh realisation of the important roles played by other family members, especially grandparents, within the family framework. What (very) 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.

For example, if a grandparent wishes to make an application for contact with a grandchild, the Applicant will firstly need to obtain leave of the Court under Section 10(9) of the *Children Act 1989* (unless they are exempt under Section 10(4) or 10(5)). This two-stage approach can cause delay and upset to many grandparents, some of whom will have been very actively involved in their grandchildren's lives.

VULNERABLE CHILDREN

Following on from the recent Centre for Social Justice report *Couldn't Care Less*,[4] we will give attention to the role of the extended family when children are in the care of the Local Authority. Claims that children are being placed for adoption without the knowledge of grandparents who have been closely involved in their grandchildren's lives require consideration, alongside proposals for stricter implementation of the 'need to consult' requirements from the *Children and Adoption Act 2002*. We will also consider how Special Guardianship Orders impact the rights of grandparents and extended family members and whether these Orders have enhanced the stability of these often very vulnerable children's lives.

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

4 Downloadable from http://www.centreforsocialjustice.org.uk/default.asp?pageRef=264

always be the best option and we want to consider alternatives to what can be a harsh and arbitrary mechanism, such as the Drugs Court model being piloted at the Inner London Family Proceedings Court.

CONCLUSION

A review of family law is, by necessity, a major undertaking. The specific areas of concern, as outlined in this report, are not comprehensive but our intention is to progress ongoing debate as well as recommend statutory changes in laws, with the ultimate purpose of strengthening commitment and stability in family life in the UK today.

The final report from the Family Law Review will be published in Spring 2009.

Introduction

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.*

A review of family law is considered to be necessary, as part of a concerted effort to stabilize relationships within society. The following quotes lay out the explicit role of the law as it concerns family and the more implicit and disputed role the law plays in shaping expectations surrounding family life.

> *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.*
>
> Stephenson and Wolfers 2007

> *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.*
>
> Allen and Gallagher 2007

The common thread which will be running through this Family Law Review is that we will be seeking to use the law, legal procedures and processes and ancillary functions and recommend changing them if 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. In keeping with the research findings and recommendations of its progenitor, the Social Justice Policy Group (SJPG), this Family Law Review is working 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), far more likely to occur when relationships are informal, should be avoided.

The SJPG reports' conclusions on the need to support marriage did not rest on 'cause and effect' inferences such as that the act of marriage solely of itself conveys stability and benefit. Rather than treating marriage as a 'magic bullet' the two reports emphasised that the attitudes and behaviours which tend to be more associated with marriage than cohabitation e.g. future-orientation, willingness to sacrifice/invest, greater role specialisation (although not necessarily along traditional lines) were contributors to the greater stability and better outcomes for adults and children.

Although the selection argument regarding marriage does explain some of the differences in outcome (i.e. that those who were better equipped to handle the demands of marriage are more likely to get married now that there is no stigma surrounding cohabitation) we cited studies in both reports, and demographers like Professor John Ermisch, which found that you cannot explain all the effects of marriage through selection. We will never be able to 'lose' selection completely because that would require randomised control trials. However the majority argument, made even by many who have studied this extensively, demonstrates a marked reluctance to admit that an institution like marriage really makes much difference.

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 effect social regeneration. This approach was what we had to challenge in our previous reports, because we did not consider that it adequately took into account the evidence we cited. However we did agree that simply encouraging more people to get married was not the solution as indicated by our divorce rates. 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 will also review how reproductive technology has facilitated the trend towards legal and social rather than biological parenthood. Children still need to know where both parts of their genetic material have come from if their identity is not to be compromised, and benefit greatly from the engagement in their upbringing of parents of both sexes. So, whilst the law has to take cognisance of the implications of new reproductive technology, nothing should be codified which will erode the importance of biological parenthood.

Promoting stability and commitment will also guide all the work we will be doing on post-separation issues as we consider how the law can support families to rebuild their lives when one relationship is irredeemably broken. An important part of that rebuilding may involve the formation of new stable relationships.

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 any of these issues and, moreover, little harmony from academics on how to resolve them. Most agree that 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 on and for UK family law.

SECTION ONE

Family Law in the UK Today

This section of the report will cover the nature of marriage, a brief overview of marriage law, the religious and contractual nature of marriage, marriage and divorce trends and statistics, a brief divorce law overview, legal reforms, and the role of law on family relationships.

1.1. Marriage in the UK

> *Marriage according to the Law of this country is the union of one man with one woman, voluntarily entered into for life, to the exclusion of all others.*[5]

Under English law, marriage is a public and legal relationship between a man and a woman. 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.

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5 The Notice of Marriage by Certificate, signed by couples getting married in a Registry Office.

In some countries, such as Canada and the Netherlands, it is now possible for same-sex couples to get legally married. In certain others, such as the UK, an alternative legal institution, known here as 'civil partnership', is available for same-sex couples. This alternative institution is very similar to marriage. For example, in this country, it is illegal to belong simultaneously to two civil partnerships or to a marriage and a civil partnership.

1.1.1. MARRIAGE LAW IN THE UK

Until the 1750s marriage was largely a private matter between two individuals and their kin and marriages did not need any kind of religious ceremony to be legally valid. As late as the 12th century ritual was the only way marriages were established and there were a variety of rites which, if performed correctly, secured a marriage. Ecclesiastical law regularised the ceremony of marriage by insisting that banns were read and licenses paid for but civil law, in practice, merely required that a marriage could be proven to have taken place. So even clandestine marriages i.e. those done secretly, were valid in the eyes of the church and the law.

Various Acts were passed to try and halt such clandestine, but legal, marriages but none were successful until the Hardwicke Act. The Hardwicke Marriage Act of 1753 took control over marriage from the hands of individuals and vested it in the state. From the point at which the law took effect, in 1754, religious control was brought to bear on the marriage ceremony and marriages which had not taken place within the Church of England or the synagogue were rendered invalid.

It was not until the Marriage Act of 1836 that the State reverted to the essential view of marriage i.e. that it is effected by mutual consent and not religious ceremony. The *Marriage Act 1836* and the *Registration Act 1836* came into force in 1837 in England and Wales, and provided the statutory basis for regulating and recording marriages, including civil marriages. 1838 was the first full year of civil registration in England and Wales.

After 1857, by virtue of the Divorce Act of that year, a new court of the Crown undercut the ecclesiastical ideal of the indissolubility of marriage by making statutory provision for divorce on the grounds of adultery. By making divorce legally possible on the grounds of adultery this planted the idea that marriage was a matter of contract rather than status. Many argue that we need to see today's lower marriage rates, high divorce and cohabitation rates not in the light of the prevailing social conditions of the 1950s but in the context of the last millennium.[6] They are correct that the popularity of marriage has waxed and waned, there was concern about marriage levels at the end of the 19th century and it seems to be an issue that is subject to angst whatever the actual figures. However one new factor is that an increasingly contractual view of marriage is driving the trend towards pre-marriage agreements and more readily available divorce and this has important implications for us today.

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6 Coontz S, 2005, *Marriage, a History: From obedience to intimacy or how love conquered marriage*, New York: Viking

1.1.2. MARRIAGE AND DIVORCE TRENDS IN THE UK

1.1.2.1. Marriage

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.[7] In 21st century Britain, marriage is still the dominant family form.

The *Marriage Act 1836* and the *Registration Act 1836* came into force in 1837 in England and Wales. There were 118,000 marriages in the first full year of civil registration in 1838 in England and Wales. Annual numbers of marriages rose steadily from the 1840s to the 1940s apart from peaks and troughs around the two world wars. The historian John Gillis labeled the period from 1850 to 1960 the 'era of mandatory marriage'[8] and, since peaking in 1970, the annual number of couples getting married has fallen by one third. Marriage rates have remained fairly steady over the last few years although a change in the law from 1 February 2005 designed to discourage 'sham marriages' may have been one of the many factors that have contributed to a drop in the number of marriages since 2004.[9]

In 2006, there were just over 275,000 marriages in the UK, a fall of 4 per cent since 2005. Marriages in England and Wales fell by 4 per cent in 2006 to 236,980, which is the lowest number of marriages since 1895. In Scotland, marriages dropped 3 per cent to just under 30,000, whilst in Northern Ireland marriages increased 1 per cent to 8,259. The long-term picture for UK weddings is one of decline from a peak of 480,285 marriages in 1972.[10]

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. In 2001 there were more than 11.6 million married couple families in the UK, compared with around 2.2 million cohabiting couple families.[11]

Furthermore, results from the British Household Panel Survey on marriage expectations of people aged 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.[12]

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7 '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...marriage 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

8 Gillis J R, 1985, *For Better or Worse: British marriages, 1600 to the present*, Oxford: Oxford University Press

9 Office for National Statistics, 26 March 2008, http://www.statistics.gov.uk/cci/nugget.asp?id=322

10 Office for National Statistics, 26 March 2008, http://www.statistics.gov.uk/cci/nugget.asp?id=322

11 ONS 2008, *Social Trends* 38

12 http://www.lse.ac.uk/collections/pressAndInformationOffice/newsAndEvents/archives/2007/MarriageStillIdeal.htm Second

It would seem that marriage is more popular than ever and 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.*[13]

The conclusion that marriage appears to be very much a personal ideal in 21st 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'.[14]

1.1.2.2. Divorce

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 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. By 2005 the number of divorces was around 155,000.[15] Currently approximately four in ten marriages end in divorce. It should be remembered however that most marriages last a lifetime, and those marrying for the first time are more likely to last longer than those re-marrying: two thirds of first marriages last until one partner dies.[16]

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.[17] Such 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

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

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

15 ONS 2008, *Social Trends* 38

16 ONS 2004, *Social Trends* 34

17 ONS 2008, *Social Trends* 38

relationship breakdown. The empirical evidence in *Breakdown* 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 security and their ability to form future stable families.

1.1.3. 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 2006, 66 per cent of marriages were solemnised by civil ceremonies.[18] 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.[19]

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 2005 88 per cent (143,000) of all couples who married in a civil celebration cohabited with each other first. In contrast, 64 per cent (54,666) of all couples who married in a religious celebration gave identical addresses prior to their marriage.[20]

1.1.4. 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 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

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18 Office for National Statistics, 26 March 2008, http://www.statistics.gov.uk/cci/nugget.asp?id=322

19 News Release, Office for National Statistics, 26 March 2008, http://www.statistics.gov.uk/pdfdir/marr0308.pdf

20 Marriage, Divorce and Adoption Statistics, Series FM2, no33, Office for National Statistics 2008, http://www.statistics.gov.uk/downloads/theme_population/FM2no33/FM2_no_33.pdf

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.

Given the contractual character of marriage, this review will consider the merits of proposals to make 'pre-nuptial' written agreements about the distribution of money and property legally binding, for those who wish to use them, not least because of the ongoing public interest in this subject[21] and the possibility that these would foster a greater awareness about the obligations, responsibilities and the contractual nature of marriage itself. We will consider whether or not the absence of enforceable pre-nuptial agreements in UK law may be discouraging certain (particularly wealthier) sections of the population from marrying.

1.1.5. 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.

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

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. It is fault-based and contains the notion of marital offence. It is hard to dissolve and a rapid dissolution can only be obtained after proof that the other party was at fault.

1.1.6. 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.[22] For instance, 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.'[23] *Fractured Families*, a report from the Social Justice Policy Group, claimed that

> *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.*[24]

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,

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22 Social Policy Justice Group, 2006, 'Fractured Families', Volume 2 of *Breakdown Britain*; also Social Policy Justice Group, 2007, *Breakthrough Britain*, Volume 1, both published by the Centre for Social Justice

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

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

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.[25] 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.

However, 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. In addition, however, marriage has causal effects which 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.[26]

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.

This review will visit the issue of marriage preparation and/or information 'classes' and the role that churches and other voluntary organizations can play in providing them for those getting married in civil as well as religious ceremonies, and will consider to what extent government should seek to support people's efforts to 'pre-qualify' themselves for entrance into marriage. The National Couple Support Network and Relate are successful relationship education umbrella organisations that could be expanded further given the resources and support. For example, the National Couple Support Network aims to provide 'coordinators' in every registration district through whom engaged couples can access marriage preparation services. However a lack of government validation for marriage preparation and recognition of research that indicates its likely effectiveness is currently discouraging many registrars from engaging with these coordinators.

The key question which needs to be asked is if, by ensuring that all elements of the institution are understood as much as possible, is it likely that more marriages will be entered into with a greater understanding of what is entailed to sustain a partnership over the life course?

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

26 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

1.1.7. MARRIAGE 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 generally far less clearly defined and less influential on couples (for example, marriage is no longer deemed socially 'necesssary'). Increasing numbers of marriages are second or third unions. 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 they hold. 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 a 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.*[27]

Sociological theorists have written about the growing individualization of personal and married life. Giddens in particular popularized the concept of

27 First broadcast on UK, Channel 4 October 11 2004

'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 'deinstitutionalization' of marriage that occurred in the late 20th century.[28] He describes how marriage has undergone 'a weakening of the social norms that define partners' behavior over the past few decades', as evidenced by both the increasing number and complexity of cohabiting unions and the emergence of same-sex marriage.[29] Moreover 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.

1.2. Divorce Law in the UK

The *Divorce Reform Act 1969* came into effect in England and Wales on 1 January 1971. The Act introduced a solitary ground for divorce – that of 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 for on the couple's separation.[30]

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). (If there are proceedings about children, they run separately.)

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 Act and so have no analogues amongst the grounds for divorce under former legislation. 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 immediacy of access to the divorce courts, often to obtain its ancillary powers to deal with the financial consequences of separation and divorce.

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

29 ibid

30 Marriage, Divorce and Adoption Statistics, Series FM2, no. 33, Office for National Statistics 2008, http://www.statistics.gov.uk/downloads/theme_population/FM2no33/FM2_no_33.pdf

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 Act the time bar was three years, although if a petitioner could prove they had suffered exceptional hardship or that the respondent had exhibited exceptional depravity, a petition could be brought earlier. This discretionary time bar was replaced by an absolute time bar of one year. 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 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 clean break orders. 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.

England is one of the few advanced jurisdictions which still retains fault as a basis for divorce. No-fault divorce legislation was introduced in the 1996 Family Law Act, which was passed by Parliament, but Part II of the Act, which contained the 'no-fault' divorce provisions was not implemented. The Government proposed to repeal this part of the Act before it ever came into force. One reason given for this was that evaluation of the pilot (information-giving) schemes showed key parts of the Act to be unworkable.

1.2.1. THE ROLE OF THE LAW

The balance of evidence is that law changes do have an effect on family behaviour and, as Allen and Gallagher claim, it would appear that family law affects the likelihood that couples and children will enjoy the benefits of stable marriage.[31]

It is important to undertake a detailed consideration of the effect of changes in divorce law in England and Wales. Has a 'low cost of divorcing that allows one party to unilaterally break the marriage vows' caused undesirable changes?[32] This review will look at financial distribution after divorce in terms of its potentially destabilizing effects. That is, to what extent, if any, have

31 Allen D & Gallagher M, 2007, *Does Divorce Law Affect the Divorce Rate? A Review of the Empirical Research 1995-2006*, iMAPP

32 ibid

significant incentives to work at a marriage been removed because of low costs of exit, or indeed, in some cases, financial benefit in ending the marriage?

The evidence available before us makes it very hard to argue that the law is not itself 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 will examine what reforms might be necessary to achieve such an end.

1.3. Key Issues/Questions

In our review we will set out the societal context for changes to family law in the UK. The last decades have witnessed major social upheaval and changes in family structure, with a sharp decline in marriage rates, and an increase in cohabitation and divorces. 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. 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 instrumental value of marriage. Our aim is to create a legal and social context that encourages people to aspire to and choose to make long-term, committed relationships, ideally 'healthy marriages'. Then when people choose this, we want to see them 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.

Policy can and should be focussed on stemming the tide of relationship breakdown. Promoting stability and commitment will thus guide all the work we do and the policies we recommend.

- We will look at the role of the law as a potentially stabilising factor in relationships and particularly marriage.
- This review will consider the merits of proposals to make 'pre-nuptial' written agreements about the distribution of money and property legally binding, for those who wish to use them.
- We will assess the extent to which Government should seek to support people's efforts to 'pre-qualify' themselves for entrance into marriage through marriage preparation, in the light of the effectiveness of relationship education identified in *Breakthrough Britain*, and the possible role that churches and voluntary organisations could contribute to their provision.

- We will look at financial distribution after divorce in terms of its potentially destabilising effects and question whether a 'low cost of divorcing', if it pertains in reality, has caused undesirable changes and removed significant incentives to work at a marriage.
- Many cases go to trial without attempting prior resolution, despite England being the most conciliatory and settlement-orientated jurisdiction in the world. It has been argued that Alternative Dispute Resolution (ADR) should be seen as Primary Dispute Resolution (PDR), with courts being very secondary. We will review the need for the introduction of binding arbitration and consider options for more use of ADR.

SECTION TWO

Family Law and Heterosexual Unions

This section of the report will cover some of the issues of 21st century marriage: the impact of financial settlements on divorce on marriage; whether pre-nuptial agreements have a role to play in supporting marriages and the pros and cons of marriage versus cohabitation. Coverage of each area will include a brief summary of the current law and possible future legal and policy reforms.

2.1. Marriage and Cohabitation

2.1.1. TRENDS IN COHABITATION

Over the last 20 years, the proportion of unmarried men and women aged under 60 cohabiting in Great Britain rose from 11 per cent of men and 13 per cent of women to 24 per cent and 25 per cent respectively. As stated earlier, despite this 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. In 2001 there were more than 11.6 million married couple families in the UK, compared with around 2.2 million cohabiting couple families.

Cohabiting couple families tend to be much younger than married couple families. In 2001, one half of cohabiting couple families in the UK were headed by a person aged under 35, compared with one in ten of married couples.[33] 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 being 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

33 http://www.statistics.gov.uk/cci/nugget.asp?id=1865

to almost all of the EU-27 is the increase in the percentage of births occurring outside marriage, with the UK one of the highest. In the UK, the proportion of jointly registered births outside marriage has risen consistently, from 17 percent in 1988 to 37 per cent in 2006.[34]

Professor Scott Stanley[35] 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.[36] The pressing problem from a policy perspective is that children are increasingly being born to these commitment-vulnerable couples.

2.1.2. 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. 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 John Ermisch (Professor of Economic Demography at ISER) reveals that:

> *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:

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34 Preceding statistics all from *Social Trends* 38, 2008

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

36 Stanley S, Rhoades G & Markman H, 2006, 'Sliding vs. Deciding: Inertia and the premarital cohabitation effect', *Family Relations* 55, 499-509

> *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.*[37]

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.[38] Millenium Cohort Study data on 15,000 mothers shows that during the first three years of a child's life, the risk of family breakdown faced by those who describe themselves as 'cohabiting', is 3.5 times greater than that faced by married parents.[39] Amongst those who describe themselves as 'closely involved', the risk is 13 times greater. 6 per cent of married mothers, 20 per cent of 'cohabiting' unmarried mothers and 74 per cent of 'closely involved' unmarried mothers had split up.

In other words, the continued ongoing rise in family breakdown (affecting many young children) has been driven by the dissolution of cohabiting and other non-married partnerships. This same Millennium Cohort Study data indicates that unmarried parents account for 73 per cent of family breakdown.[40] The average length of marriage on divorce was 11.5 years in 2004[41] but the average live-in relationship lasts two years[42] before separation or marriage. As Ermisch states, 'The 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.'[43] This accords with other research that indicates that whilst marriage tends to be stabilized by childbearing, the opposite is true for cohabitation.[44]

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37 ISER, 2008, *In Praise of Panel Surveys: The achievements of the British Household Panel Survey* http://www.iser.essex.ac.uk/press/releases/docs/IPOPS.pdf

38 Kiernan K, 2003, *Cohabitation and divorce across nations and generations*, Centre for Analysis of Social Exclusion, LSE, CASE paper 65, cited in Social Policy Justice Group, 2006

39 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

40 This analysis of the MCS investigated differences in outcomes based on family structure, whilst controlling for income and other potential confounds.

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

42 In Praise of Panel Surveys: The achievements of the British Household Panel Survey, September 2008. http://www.iser.essex.ac.uk/press/releases/docs/IPOPS.pdf

43 ibid

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

2.1.3. 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 who live together as man and wife. 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.

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.

It is argued that the current laws are not satisfactory and there is strong argument for change not least because there is a body of deserving claimants amongst the cohabiting population who seek significant changes in law, procedure and otherwise. This body, it is argued, would justify the cost of increased referrals to already overworked family courts, legal aid, the impact on other family law cases, and possibly marriage itself.

We need to consider if the current laws are inadequate and unsatisfactory or if there should rather be a much more concerted and urgent attempt to acquaint cohabitees with their lack of legal protection? Should the State confer on cohabitees 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?

2.1.4. THE LAW COMMISSION REPORT 2007: 'COHABITATION: THE FINANCIAL CONSEQUENCES OF RELATIONSHIP BREAKDOWN' (LAW COM NO 307)

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'. They concluded that reform was needed to address inadequacies in the current law and recommended a statutory scheme designed specifically for cohabitants on separation. 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

who had not decided to 'opt out' of the scheme 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.

However the proposals are far from clear on the subject of assessment of the quantum of the economic disadvantage suffered by the cohabitants or the benefit gained by them. The question of what awards might be made under the new regime also remains very unclear, although it is envisaged that the court might award lump sum, property adjustments and short term financial support in event of separation. By not following financial provision as on divorce but creating thoroughly new criteria for awards, perhaps commendable in itself, the new law would create considerable litigation over the next decade to establish how it operates in practice.

2.1.5. KEY ISSUES/QUESTIONS

If cohabiting relationships are less stable and afford less legal protection than marriage, then it is important to consider why cohabitation is on the increase, rather than simply 'chasing the practice' with the law. Given the steep rise in cohabitation, an approach which is supportive of marriage arguably precludes legal protection for cohabitees. *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.*

This 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.[45] 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

45 Rhoades G, Stanley S & Markman H, 2006, 'Pre-engagement cohabitation and gender asymmetry in marital commitment', *Journal of Family Psychology* 20, pp 553-560

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.'[46]

Although this existing law protects children, albeit imperfectly, it is most likely underused because is does not also sufficiently protect (typically) mothers. (They may for example be allowed to live in the family 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. Finally, 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.

Related issues that might be considered include the following:

- In view of cultural shifts and our concern with promoting family stability and encouraging commitment, especially amongst cohabiting couples, we will assess Professor Scott Stanley's 'sliding versus deciding' transition and risk model. We will question whether there is a need to educate people and raise greater awareness of the limitations and disadvantages of cohabitation and how this might best been done.
- If some alleged disincentives to marry are removed e.g. non-binding pre-nuptial agreements, reform of financial provision on divorce, and tax reforms, will they effect a shift towards marriage, especially in wealthier circles? Would this type of reform obviate or minimise the need for cohabitation law reform?
- Although we remain unconvinced that the increase in cohabitation justifies a reform, are there any parts of the Law Commission proposals that are acceptable as they stand or which shed light on other aspects of this review (see Section 2.3.5)?
- What 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 tacking disadvantages to children in cohabiting relationships) might improve fairness without the creation of a new cohabitation law with all its implications?
- What other models of reform might be contemplated? Whichever reforms might be finally recommended would however be driven by the aims and objectives of this overall law review and not by what some see as a compelling need to reform the law on cohabitation *per se*.

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46 Law Commission, 2006, *Cohabitation: The Financial Consequences of Relationship Breakdown, A Consultation Paper (Overview),* pp 16-17

2.2. Binding Financial Agreements

2.2.1. PRE-NUPTIAL CONTRACTS

Pre-nuptial agreements are part of the cultural and legal landscape in much of continental Europe, unlike in England and Wales. However, since the early 1980s, the English Courts have supported proper and fair agreements reached by adults with legal advice, providing that they do not result in injustice. It is only since the divorce landscape changed in 2000, following the case of *White v. White* [2001] 1 AC 596 and *Miller v. Miller* [2006] UKHL 24 and *Charman v. Charman* [2007] EWCA Civ 503, [2007] 2 FCR 217, that they have become more influential and also more popular. The English family law courts have constantly stressed that they cannot be bound in law by any agreement reached, whether by the parties through solicitors on separation, through arbitration or mediation, or pre-marital agreements. By statute law they are unfettered from doing what is fair and just in every case.

The consequence has been uncertainty and an incentive to litigate, even after agreements reached through lawyers and after disclosure. There is also a growing perception that the unenforceability of pre-nuptial agreements may act as a disincentive to marriage (a view shared by some wealthy individuals) principally because of the lack of certainty and predictability on entering marriage and in the event of divorce.

A pre-nuptial agreement allows couples to agree to what they believe is a fair settlement if they go their separate ways. These agreements are seen by some as a positive step forward, a means to allow couples to take more control and responsibility for ordering their lives, thereby helping them to build a solid foundation for their marriage. They do this by 'forcing' them to consider all possible future aspects, scenarios and problems likely to arise in their marriage and to agree fair and reasonable terms on those issues before they get married. This is perceived by some to provide them with more certainty and clarity, financially, legally and psychologically during the marriage or in the event of divorce. This is contrasted with the possibility of having to submit themselves to a 'judicial lottery' by being subject to the discretion of a judge and the very wide range of possible 'fair' outcomes.

Although pre-nuptial agreements may be advantageous for some, many feel however that they do not necessarily create greater satisfaction nor ensure a fair outcome in certain types of cases. For example, where there has been a lengthy marriage, where unforeseen events develop during a marriage (as is almost always the case) such as the onset of a physical or mental illness or disability or where one party has received a very large inheritance. These types of situations might not have been catered for in the pre-nuptial agreement. Herein lies the major issue. Marriage is clearly full of unexpected events and, in the event of divorce, a pre-nuptial agreement entered into decades previously, in very different circumstances, might potentially create an unfair outcome. It is also argued that pre-nuptial agreements simply foster negative

expectations on the part of those contemplating marriage. They may also encourage divorce if one party considers they would do well by its terms.

2.2.2. CURRENT LAW

The English courts had historically always adopted the attitude that pre-nuptial agreements should not be given any weight because they are considered to be contrary to public policy, even if they have been properly entered into. There have clearly been times when the courts have been right to disregard pre-nuptial arrangements but at other times such an insistence has allowed no room for the private ordering of affairs.

Historically the current law resulted from a decision as to the status of marriage more than 75 years ago. In 1929, *Hyman v. Hyman* [1929] AC 601, the House of Lords declared that public policy should preclude enforcement of pre-nuptial agreements in the event of a divorce because (a) it would weaken the emotional sanctity of marriage if people entered into it with a view to what should happen if the marriage were to fail and (b) the parties should not be permitted to oust the courts' jurisdiction to dissolve or alter their marital status. In very recent years, the judicial trend in England has allowed pre-nuptial agreements to be afforded greater significance, and some judges have given judicial endorsement as to their significant value.

2.2.3. IS THERE A CASE FOR REFORM?

- Pre-nuptial agreements may be advantageous by giving people more choice, allowing them more responsibility for ordering their lives and helping them to build a more solid foundation for their marriage by encouraging them to look at financial and other issues they might face in marriage and reach agreement beforehand.
- They may provide greater certainty on property matters. This could perhaps encourage some people to marry rather than cohabit, and perhaps provide couples in a less stable marriage greater assurance about their future, and also greater protection for children of first marriages, who can often be overlooked.
- They are popular amongst the elderly who wish jointly to make sure that their assets built up over their lifetime go to their children, not to the other spouse. In this they are often part of estate planning which includes wills which are binding, whilst pre-nuptials are possibly given little weight.
- However all of the above may be countered by the argument that pre-nuptial agreements will undermine marriage, and the promise of life-long commitment inherent within the institution of marriage, and even encourage divorce.

Evidence for all of the above will be considered.

Question 15 of the Government's 1998 consultation paper *Supporting Families* was concerned with pre-nuptial agreements, more specifically the desirability of allowing couples to make written agreements dealing with their

financial affairs on divorce and the safeguards which would lead to an agreement not being legally binding. (See Appendix 1.) Whilst the consultation response to the Green Paper's proposals was semi-favourable with approximately half of the respondents (i.e. 80 of the 157) in favour of allowing binding pre-nuptial agreements and 77 against, the judiciary's then unanimous response was to express reservations on these agreements saying that they were concerned about two main issues: namely whether or not the law should *encourage* these agreements and what effect the law should give these agreements if and when they gave rise to different results to those reached under the usual principles of family law (*Matrimonial Causes Act 1973*).

The judicial resistance to the agreements appear to be lessening now. They are slowly starting to attach more weight to pre-nuptial agreements in appropriate circumstances and subject to the critical assessment of whether the agreement was procedurally and substantively fair at the time when it was made, and provides fairly for both parties.

There has been continuous movement by the legal profession towards the view that agreements should be given a proper review and possibly be introduced into family law in the not too distant future, as evidenced in the following:

- In 2005, Resolution (Britain's largest group of family lawyers) published *A More Certain Future – Recognition of Pre-marital Agreements in England & Wales* urging the Government to give pre-nuptial contracts statutory force. The Report was subsequently fully supported by the Money and Property Sub-Committee of the Family Justice Council.
- In February 2007, the Money and Property Sub-Committee of the Family Justice Council invited the Law Commission to consider the reform of matrimonial finance law stating that 'pre-nuptial agreements in the UK were…ripe for…reflection and…reform and...balance should...be struck between individual autonomy and state paternalism.' Their view was that the issue of pre-nuptials '…cannot be addressed in isolation from the general question of reform of the ancillary relief provisions of the *Matrimonial Causes Act 1973*.'
- In May 2007, the Court of Appeal made reference to pre-nuptial contracts in the postscript to the judgement in *Charman* (ibid), despite the case itself having nothing to do with pre-nuptial contracts. It stated as follows: '...our law has so far given little status to pre-nuptial contracts...should not the parties to the marriage or the projected marriage have at least the opportunity to order their own affairs otherwise by a nuptial contract?'[47] (See Appendix 3.)

47 *Charman v. Charman* (2007), EWCA Civ 502, [2007] 2 FCR 217, postscript, para 124.

- In *Crossley v. Crossley* [2007] EWCA Civ 1491, [2008] 1 FLR 323 CA the Court of Appeal indicated that in a very short, childless marriage where the parties were independently wealthy, the existence of the pre-marriage agreement was of paradigm importance. In *S v. S* [2008] EWHC 2038 (Fam) the High Court said an agreement should be followed and its existence was of magnetic importance to the outcome.

2.2.4. KEY ISSUES/QUESTIONS

We will consider if pre-marital agreements should or should not be introduced in law and if so, to what extent. With regard to the second, there are four main areas that we would review. First, what are the pre-requisites for the court to give any weight to a pre-marriage agreement? Secondly, would a pre-marriage agreement be binding or simply taken into account as a factor? Thirdly, under what circumstances would the court be able to depart from the agreement?[48] Fourth, should any new law be extended to all marital agreements such as separation agreements rather than just pre-marriage agreements? This is the position in Australia which has binding financial agreements, both for pre-marriage and post-separation.

- As a starting point for review and reform of the law, we will consider whether the recommendations of the 1998 *Supporting Families* document are suitable for legal endorsement.[49] The first consultation any Government had published on the family, its aim was to set out a major programme of action, opened up to consultation, to strengthen the family. One of its proposals was to 'make 'pre-nuptial' written agreements about property legally binding for those who wish to make them.' (See Appendix 1.) Its recommendations included making agreements non-compulsory and ensuring that the interest of the parties in an economically weaker position, and children, would be protected. Should we ignore, adopt or strengthen the safeguards or pre-conditions set out in the 1998 document?
- Should pre-nuptial agreements be binding or merely a factor to take into account? About ten years or so ago, the prevailing feeling in the legal profession was that our society was not yet ready to go to binding pre-marriage agreements. However, it can be argued that making them just one of many discretionary factors makes it too weak for any real account to be taken. It seems to us that the prevailing opinion now is that we should go to binding agreements, with appropriate safeguards. An assessment of public opinion will be one of the factors we take into account on this issue, beneath our over-arching aim of promoting stability and commitment within relationships.

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48 To achieve a balance with the anxiety of opening the floodgates of litigation yet allowing opportunity for fairness in changed circumstances.

49 The Home Office, *Supporting Families,* 1998, pp 3

- Under what circumstances should the court be able to depart from the agreement? We will consider the rights of the Courts to intervene and set agreements aside in cases where they are likely to produce an unjust outcome or where there have been unforeseen circumstances arising during the marriage as mentioned earlier.
- In terms of judges' opportunity to intervene and set aside pre-nuptial agreements where they are considered unfair and unjust, we will consider how much discretion should be allowed. The Government allowed a narrow discretionary factor in the 1998 paper. Should we adopt the stance of this paper, which would only allow the courts a narrow discretion? To what extent does greater discretion tend to ensure fairness and justice but devalue such agreements?
- Should the function of the pre-nuptial agreement be confined to protecting assets present at the date of the marriage? In the case of someone with significant cash sums, should the future interest from these be regarded in future as part of the original assets, and in the case of property, should increases in the value of that property also so count?
- Should fault (where that is a clear and absolute matter, not a judgement about minor matters of behaviour) play any role in determining issues concerning the agreements?

2.3. Financial Provision on Divorce

2.3.1. THE CURRENT LAW

This is only a very brief summary of a complex area of our current law which derives originally from statute: the *Matrimonial Causes Act 1973*. 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, periodical payments (to meet spousal maintenance needs) in accordance with what is regarded as fair in all the circumstances of the case. Financial settlements used to look primarily to needs (invariably of the mother with primary care of the children). In middle-class cases, needs were usually converted to reasonable requirements. The courts are also required to achieve clean break settlements wherever possible, including capitalisation of maintenance and term orders.

After much dissatisfaction with financial settlements made by the Courts in the 1990's, the House of Lords decision in *White* (ibid) transformed family law by introducing the requirement of a check against equality to avoid gender discrimination. It started the shift towards equality of outcome in terms of capital, as well as perhaps income and provided a better sense of fairness and justice.

A period of great uncertainty in the law followed due to lack of clear, logical guidance from the higher courts between 2001-2006. The House of Lords cases of *Miller* (ibid) and *McFarlane v. McFarlane* [2006] UKHL 24, [2006] 2

AC 618 helped with additional principles of equality sharing but *Charman* (ibid) provided greater practical clarification on a number of issues.

The law now requires a fair settlement on the division of all assets, including (but not limited to) those built up during marriage (i.e. matrimonial and non-matrimonial resources), and income. The fairness strands are needs, sharing and compensation. Matrimonial (acquest) resources are assets built up during the marriage. Non-matrimonial resources are pre-marriage assets, inheritances and gifts, and some post-separation assets.

Where the assets of the couple are only sufficient to provide for basic needs, then needs (particularly accommodation needs of the primary parent caring for the children) overrides equal sharing and compensation (known as 'good reasons to depart from this principle of equality'). However, in cases where assets are greater than needs (i.e. in non-needs cases) then matrimonial resources are divided equally in almost all cases (the starting point for financial division). Similarly non-matrimonial resources are divided by starting with equal division between the parties, but there can be good and better reasons to depart from equal division.

Compensation particularly for a high-income earning spouse who, for example, gave up her career to look after the children may also be a reason to depart from equal division. However judges have, since *McFarlane* (ibid) limited these compensatory claims, challenging some people's expectations of fairness.

In England and Wales we are wedded to the discretionary system, whereby judges have a wide discretion to decide on the outcome of cases. This is excellent for individual cases because it ensures that each case is given individual attention and the court's interpretation of justice and fairness. However it fails to provide any degree of predictability, certainty and clarity, the lack of which may be acting as important disincentives to marriage for some, and considerable disinclination to re-marriage leading to more cohabitation. Moreover, costs increase as cases do not settle.

This present law has no resemblance to the statutory criteria: 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* (ibid). However it has many disadvantages, including:

- It is judge-made and not based on any public debate or Parliamentary discussion.
- The mores are arguably more rooted in judicial background than in wider society.
- It leads to unpredictability and uncertainty (and therefore less opportunity for settlements) as judicial decisions can conflict with each other.
- It is determined by the issues in the cases before the courts. So some issues, for example in 'small' money cases, are not adjudicated, while in contrast, in 'big' money cases micro-issues are exhaustively examined with little relevance.
- Groups in society dissatisfied with the direction of judge-made law have limited democratic redress.

- It 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.

In many ways this has in fact worked, however there is a real belief that there is one form of justice and fairness that operates at county court level and in most cases, and another more sophisticated form for the 'big' money cases, which is somewhat unsatisfactory.

Finally, one of the key arguments for reforming settlements after divorce is that women are still being treated as dependents when the rest of our social norms are stressing their capacity to be independent. This is also seen in the fact that civil partnerships are to be dealt with in the same way as marriage and, while some same-sex couples will be involved in child-care, a key historical reason for treating mothers as dependents, more thought will be given by this group to what is, in effect, the unchallenged re-emergence of the notion of an adult dependent. It has to be acknowledged that women are economically vulnerable when they are raising children alone as the poverty figures for lone parents in *Breakdown Britain* showed and marriage itself is a relationship of interdependence. The extent to which interdependence is ongoing in post-marriage life is an important area for discussion.

2.3.2. THE CASE FOR REFORM

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 3, written in the name of the President of the Family Division Sir Mark Potter). Similarly Lord Justice Thorpe before whom the case also came has highlighted the implications for the law of dramatic demographic changes in England (especially London), the high level of wealth, the social and gender changes and the influence from Europe.

Furthermore, the impact of recent cases featuring massive payouts on divorce (*Miller, MacFarlane* and *Charman*) appears to be creating a disincentive to marriage, and the sense that there is a 'judicial lottery'. England is regarded as the world's most generous divorce jurisdiction.[50] There is a discernible perception that the current laws of financial settlement on divorce have been a significant factor in discouraging many from marrying, particularly wealthy individuals. This stems from the public frustration that House of Lords cases like *Miller* and *McFarlane* have failed to provide clear rules or any degree of certainty or predictability on the financial resolution of any divorce, particularly where parties have significant assets. Indeed, Alan Miller is taking the UK Court to the European Court of Human Rights claiming English divorce law is so uncertain and unpredictable as to infringe his human rights. There is a level

50 See paragraph 116 in postscript to *Charman* (2007), Appendix 3

of uncertainty in several key areas, including whether, and to what extent, a spouse's premarital and/or inherited assets may be redistributed upon divorce. Some therefore consider that these 'financial risks' far outweigh the benefits of marriage in this 'judicial lottery'. The non-enforcability of pre-nuptial agreements may also further discourage them from marrying.

2.3.3. LEGAL AID – THE OTHER END OF THE SOCIOECONOMIC SPECTRUM

Separated partners are often struggling to come to amicable arrangements for the care of children and the division of assets but there is insufficient support to help people navigate the legal maze. They are often forced to seek help in a fragmented system, and offered services that are not coordinated. This can lead to considerable additional stress and cost to the state. The present system for dealing with conflict resolution is unnecessarily overly reliant on the court service and the legal profession and as mentioned earlier, new approaches are needed to implement alternative dispute resolution services, such as conciliation and mediation.

This is exacerbated by new fee structures for legal aid which are driving many solicitors away from providing family law services, restricting future access of low-income people to justice.

2.3.4. KEY ISSUES/QUESTIONS

Our current law goes some way to helping couples achieve a fair settlement. However, the far-reaching review we have embarked upon will consider the following:

- Do our current laws meet the main aim and objectives of encouraging and promoting stability and commitment? Do they in any way help to avoid the high costs and wider impact on society and community of relationship breakdown? If no on either count, we need to address many questions which are unpopular among the judiciary namely the issue of whether we should now move towards creating financial settlements with greater certainty and predictability, even if these produce unfair, unjust and 'hard' outcomes. This idea of predictability goes, in practice, against the whole direction of English financial provision law, but it is an important one for lawyers, mediators and other advisors, and will be examined in detail.
- Are we able to send a positive message to people by finding a model able to provide greater certainty to couples, perhaps a fair and equal sharing of the 'fruits of the marriage' which reflect the commitment, sacrifices and contributions made during a marriage from the outset, during and at the end of marriage? A possible model is the Community of Property model adopted in many jurisdictions whereby assets acquired during the marriage are divided equally but no other capital claims are possible e.g. on pre-marital or inherited assets. However, this concept is greatly

opposed by English family lawyers and the judiciary and believed to be unfair on women and does not do justice to marital commitment.

- Should we adopt a variation on the discretionary system, with a presumption of equality and the statutory need to show a specific basis for departure? Do we look at New Zealand, as did the House of Lords in *Miller* and *McFarlane*?
- Compensation recognises the sacrifices and commitments made in marriage, yet rarely finds an outlet in outcomes. Ironically it has more weight in the Law Commissions proposals for cohabitants which begs the question should these be borrowed?
- Instead of equality, do we embrace the concept of redistribution of resources if proven that there has been unjust enrichment and/or economic disadvantage suggested by the Law Commission Document 2007 on cohabitation reform? Should there be a more mathematical process, with opportunities for web-based solutions and a computer based formula for outcomes? This might then perhaps be overlaid with narrow judicial discretion based on a starting point of equality.
- In many walks of life, outcomes to complex requirements are compiled in computer programmes. The impact of the Budget is shown for a myriad of individuals and families. Could one part of future resolution be via web/computer-based programs, 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 childcare if a mother with young children is under financial pressure to return to work.
- If new fee structures for legal aid are driving many solicitors away from providing family law services, we need to consider how best to improve access to justice for low and low-middle income separating couples. We will consider whether legal aid should be taken out of the hands of private firms and/or whether there should be a public defence fund.
- We will consider models of Alternative Dispute Resolution (ADR) including the introduction of binding arbitration, powers to refer out of court into ADR as in the 1996 legislation[51] and similar.
- Related to this, there are other distinct areas of law ready for review and possible reform, such as reconciliation – should we adopt the reconciliation period proposed in the 1996 reforms, on its own or part of no fault divorce? If so, when do the proceedings begin? Should we revisit the proposals set out in the 1996 legislation or do we need to find another model?

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51 http://www.opsi.gov.uk/acts/acts1996/ukpga_19960027_en_1. Section 12 and 13

SECTION THREE

Family Law and Alternative Family Structures (specifically those made possible by new reproductive technologies)

3.1. The Human Fertilisation and Embryology Bill

In the UK, the law on embryology and assisted reproduction has been primarily governed by the *Human Fertilisation and Embryology Act 1990*, which regulates the way in which fertility treatment is provided. This Act is currently under revision in the light of new scientific developments, and a number of changes have been recommended to Parliament in a new Bill, the Human Fertilisation and Embryology Bill [HL] (2007-08) (HFE Bill)

This Bill contains proposals which are of central concern to the Family Law Review therefore a specialist division of the Family Law Review, the Assisted Reproduction Working Group, was set up to address issues being debated in the Houses of Parliament in the first half of 2008. We compiled a report to address some the issues it raises on family and parenting, as well as to highlight other related issues to which we intend to give ongoing consideration. The resulting report, *Fathers Not Included*,[52] was published in May 2008, prior to key Parliamentary debates.

3.2. '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 necessitate on-going consideration and that will be considered when writing the final report from the Family Law Review.

The Assisted Reproduction Working Group concluded that the needs of childless adults are disproportionately represented in the HFE Bill, which is challenging the need for, and nature of, fatherhood and calling for a redefinition of parenthood. Experience from adoption has taught us that children benefit

52 Centre for Social Justice 2008, *Fathers Not Included: A Response to the Human Fertilisation and Embryology Bill* http://www.centreforsocialjustice.org.uk/client/downloads/FathersNotIncluded.pdf

from knowing where both parts of their genetic material have come from, and from the engagement in their upbringing of parents of both sexes. Whilst the law has to take cognisance of the implications of new assisted reproduction technology, nothing should be codified which will diminish or discount the importance of biological parenthood, of motherhood and of fatherhood.

We concluded that the provisions in the HFE Bill would signal fundamental changes in the meaning of parenthood – motherhood as well as fatherhood. Attempts are being made to change the legal framework surrounding parentage to accommodate tiny percentages of the population, in order for parental status to be recognised on the sole basis of adults' intentions. This runs the risk not only of confusing the concept of motherhood, but also of downgrading the importance of fatherhood – in spite of a wealth of social research showing the importance of engaged fathers for families and communities. It also risks elevating the interests of adults over children in a way that is sharply at odds with other aspects of Government policy and that has profound implications for society.

Whilst the timing of the report was to address issues arising in Parliamentary debates, and some of the recommendations were specific to this, other recommendations are of on-going relevance and a summary of the key recommendations that we made follows this as we believe that it is important to ensure they are kept high on the political and legal agenda.

3.3. Key Recommendations (as stated in 'Fathers Not Included')

- ***That there be a thorough public investigation of the implications and applications of the broader welfare principle to assisted reproduction, including the need for a father.***

  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, they may obtain treatment elsewhere and records of refusal cannot follow them. Many doctors want better training to implement what they acknowledge is an important consideration.
- ***More research to be carried out comparing children born in alternative household structures, before changes in the law.***

  Very little research has been done comparing children born by donor conception and raised by same-sex couples, with children raised in heterosexual families. There are no research findings on the relevance of the 'absent' biological parent or answers to questions such as: are 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 there is very little on parenting by male same-sex couples.

Whilst robust, the behavioural psychology studies that have tended to predominate, such as those by scholars such as Susan Golombok, could not have shown up the emotional and identity issues many donor-conceived adults experience, since necessarily they were focused on their childhood experience. Qualitative research is also required to reveal the complexity of relational dynamics in those 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.

- ***Consideration of an adapted 'special guardianship' status***

  Current proposals to treat same-sex partners as legal parents (but not the donors of sperm or eggs or 'gestational mothers' i.e. surrogates) would sever 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, social parents often have a very important role in the care of a child and if their parental responsibility were recognised, this would make it easier for them to give parental consent e.g. in matters of education and healthcare. This would also obviate any need to have two females or two males registered as parents, which is fundamentally incompatible with the heterosexual reality of parentage. We would recommend a status with some of the features of 'special guardianship' but which 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.

- ***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, relieved, 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 couple families were much more likely to be told about their origins before the age of three than were children of heterosexual parents: 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.[53]

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53 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. http://www.eshre.com/emc.asp?pageId=1114

The Department of Health has acknowledged a need to review the issue of birth certificates for donor-conceived individuals. Despite their rights 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. Moving the birth certificates of those born by assisted reproduction to the General Register Office to bring them into line with those of other people should be considered at the same time.

- ***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. Such a body is currently being piloted. Once its viability is established it could perform a vital social service, and government (and/or assisted reproduction industry) funding and long-term commitment would send an important signal to all those involved in this aspect of assisted technology that the responsibility to assist those concerned to find their origins and related kin is recognised.

- ***Assess the need for mandatory information and greater availability of counselling***

  The new HFE Bill Code of Practice guidance should make it mandatory for all prospective parents using donated eggs and sperm to receive impartial and accredited preparation prior to treatment. This is crucial for helping prospective parents think about: a) all the issues bound up in parenting a child who is not genetically related to either one or both of them, and b) how they will tell their children about their origins. Donors' need for counselling is also set to increase as more children reach the age where they may get in contact and donor-conceived individuals may have identity issues which they need help to resolve. A society which creates a legal framework for taking advantage of reproductive technology should also ensure that such 'follow up' infrastructure is also in place.

- ***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 the new Bill, not least the legal provision for two-mother and two-father families. The Joint Committee who undertook a pre-legislative scrutiny of the Bill noted concern about the draft Bill lacking an ethical underpinning. 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.

SECTION FOUR

Family Law and Post-Separation Arrangements

This section will consider what non-legal support might be made available to engender greater stability and commitment between partners and within families. One model we are considering is that of the Family Relationship Centres which have recently been established in Australia, and we are assessing the role these might play in preventing family breakdown and supporting families which are experiencing, or have experienced, separation.

Child contact and care issues after divorce and separation and the difficulties of post separation parenting will also be discussed in terms of how improvements might be made in the current legal framework as well as in the rights of members of the extended family (most notably grandparents). The role they might play in Local Authority care and in special guardianship is mentioned, as is the area of possible financial assistance for them as carers.

Finally, ways of better supporting family ties when parents are caught up in the criminal justice system, especially when there has been substance misuse, are examined when considering the potential role of Drugs Courts.

4.1. Non-legal Support – Family Relationship Centres

The overarching aim of the Family Law Review is to develop policies which will increase stability and encourage commitment in relationships. We will consider the approach currently being undertaken by the Australian government through the introduction of their Family Relationship Centres (FRCs) and determine if they could be introduced into the British context in a suitable manner to achieve these goals.

The Australian philosophy is that post-separation parenting should not be seen in the first place as a legal issue and we believe that the UK, too, could benefit from a *cultural change* in attitudes to family breakdown. Contrary to current trends,[54] adversarial routes in the majority of cases are generally not the best option for separating families due to the financial and emotional costs that

54 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.

often ensue. Readily available advice, mediation and information on a range of areas, including child support, child contact and care issues, economic and emotional support and therapeutic intervention may be what is required to support families and relationships that are struggling, and deter them from resorting to legal measures. This is acknowledged through the implementation of the Australian Family Relationship Centres.

One of the most common problems experienced by people in the aftermath of separation is where to find appropriate help, advice and support. The first few weeks and months after separation are a particularly important period.[55] Heralded as the Australian government's cornerstone for their new family law system, the Family Relationship Centres offer an early intervention strategy to assist parents going through separation at a time when most of them have not embarked upon an adversarial path and have not begun legal proceedings.

The Family Law Review will be taking 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 the jurisdiction was made in early November 2008.

The Australian Family Relationship Centres have four major functions in that they:

- Provide information for families: people of all ages who need information to help them with relationships 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 throughout Australia 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 programs on parenting after separation;
    - joint sessions for separating parents to help them reach agreement on parenting arrangements.[56]

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55 Parkinson P, 2006, 'Keeping In Contact: The Role Of Family Relationship Centres In Australia', *Child and Family Law Quarterly,* Vol 18, No 2, pp 157-174

56 http://familyrelationships.gov.au/www/agd/familyrelonline.nsf/AllDocs/4567CCA299F85DF7CA25735B00041945?OpenDocument, accessed 20 February 2008

4.1.1. KEY ISSUES/QUESTIONS

We will consider whether the Australian model of Family Relationship Centres could be applicable within the British context. *Breakthrough Britain* highlighted the need for Family Justice Centres,[57] similar to that which is currently working in Croydon,[58] in order to meet both the legal and non-legal needs of individuals. Through careful and ongoing analysis of the impact and progress of the Family Resource Centres and assessment of the specific needs of couples and families in Britain, we will consider what model of Centre, if any, could be introduced in order to increase stability of families and encourage commitment in relationships. Vitally we are interested in how they could be geared, as much as possible, towards prevention of breakdown.

With this in mind we will also be considering the extent to which Government should revisit other relationship-strengthening proposals made in *Supporting Families* such as those concerning marriage preparation and on-going maintenance. The paper asked what sort of advice might be provided for couples before marriage and how the availability of this advice might best be promoted and it made proposals for changes in practice at register offices such as superintendent registrars providing more information and support to couples preparing for marriage (including information packs and 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, stepped in and aimed to provide 'coordinators' in every registration district through whom engaged couples can access marriage preparation services. However, as stated earlier, a lack of government validation for marriage preparation and recognition of research that indicates its likely effectiveness[59] is discouraging many registrars from engaging with these coordinators. Since relationship programmes have been shown to reduce family breakdown and improve family outcomes[60] there is a strong case for improving access and provision as well as normalising such programmes from their current position at the margins.[61]

4.2. Child Contact and Potential Caring Issues After Divorce/Separation

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

57 Social Policy Justice Group, 2007, *Breakthrough Britain,* Volume 1, Centre for Social Justice

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

59 Carroll J & Doherty W, 2003, 'Evaluating the effectiveness of pre-marital prevention programs: A meta-analytic review of research', *Family Relations* 52, 105-118

60 ibid

61 *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.

following divorce and separation. The Family Law Review will build on the findings of this report in formulating our own recommendations

Breakdown Britain found that over 80 per cent of children live exclusively or mainly with their mother and whilst only one in 10 parents use the law to sort out contact arrangements, the overwhelming majority of applicants for contact with children post-separation (between 75 per cent and 86 per cent) are fathers.

The parent with care 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). Sometimes the non-resident parent is expected to pay a high level of maintenance but is allowed what they deem to be insufficient contact with the child(ren). Alternatively the level of maintenance might take no notice of the not insignificant costs whilst the child(ren) are living with them. We took evidence from many fathers and fathers' organisations (and key organisations campaigning against domestic violence) who highlighted what they considered to be significant deficiencies in current law and provision across a range of areas.

One key issue raised by fathers and fathers' groups was the extent to which courts do not enforce contact obligations adequately. Breaches of contact orders made by the courts in favour of the parent without residence are not easy to remedy because draconian enforcement (such as imprisonment for contempt) can materially harm the children and may not lead to better contact. Transferring residence to the father is sometimes not an option. We recommended that the Judicial Studies Board (responsible for the continuing education of judges) explicitly encourage judges to take a more 'hands-on' approach by stressing to parties the importance of abiding by arrangements, the possibility of being held in contempt of court through non-compliance etc.

These same lobby groups raised further issues on contact, shared residency etc. Such issues touch on complex areas of the law. We did detect that some, admittedly slow, progress was being made through the courts as the views of the judiciary in this country on these areas are already changing to some extent. The judiciary do generally recognise the importance to the child of a father's influence but practical implementation can be difficult. We recommended that the legal position of non-resident parents be considered as part of this current legal review.

NATIONAL ASSOCIATION OF CHILD CONTACT CENTRES

We have also noted the essential service provided by child contact centres around the country, particularly by the National Association of Child Contact Centres, (NACCC). We agree that:

> *It is often a difficult journey from deciding that contact should happen to re-establishing the parent/child relationship. Child Contact Centres*

> *often provide the bridge that makes that journey possible and the courts are immensely appreciative of them.*[62]
>
> The Hon Mr Justice Hedley, Vice President of the NACCC

We support the opinion, too, of their patron, Lord Alton:

> *It is crucially important that there are neutral places where children can continue to meet and to keep in touch with both of their parents.* ***However broken families become there should always be the possibility of putting things back together again and Child Contact Centres help to do this.***[63]
>
> Lord Alton of Liverpool

An LCD mapping exercise in 2003[64] indicated that there are around 520 (private law) child contact centres in England and Wales, although there is some duplication, with the majority either NACCC or NCH affiliated. The NACCC is a national charity that supports around 350 child contact centres throughout the British Isles, with an additional 35 supported by the Scottish Association.[65] Around 30 NACCC child contact centres describe themselves as providing supervised contact which therefore provide intensive service for families where there are safety issues, including the risk of domestic violence.

However, increasing demand has led to 56 per cent of Centres having to operate waiting lists, compared with 33 per cent in 2002.

4.2.1. KEY ISSUES/QUESTIONS

We shall be reconsidering the issues cited above as well as others such as the following:

- Other jurisdictions, such as Australia, have achieved a new level of integration between the child support system, the welfare system and the family law system. The issue of child support (also considered in *Breakthrough Britain*) has been as contentious in Australia as it has in the UK but they have managed to design a system with strong cross-party and public support. Without getting into a high level of detail on the economics of the issue, the extent to which a stable financial system post-

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62 Annual Review 2006-7, National Association of Child Contact Centres, http://www.naccc.org.uk/cms/index.php?option=com_content&task=blogsection&id=0&Itemid=151

63 ibid

64 'Government Funds Better Support Services For Separated Families', 59/03, 15 February 2003 http://nds.coi.gov.uk/Content/Detail.asp?ReleaseID=53430&NewsAreaID=2

65 15,111 children used NACCC Child Contact Centres, 8,146 of these were under six years old. 11,639 families attended 33,644 sessions held at NACCC Child Contact centres during the year. This enabled 9,761fathers, 1,675mothers, 655 grandparents and 469 siblings to spend valuable time with a son, daughter, grandson, granddaughter, brother or sister. In addition to the 1,127 paid staff working within NACCC Child Contact Centres there are 5,687 volunteers working within both supervised and supported NACCC Child Contact Centres.

separation has to be perceived as being a just or equitable one, makes this subject of potential interest in this review. For example we might consider a formula which took into account both parents' income (including benefits/tax credits) and both parents' costs for caring for children.

- Our international consultant, Professor Patrick Parkinson, again from Australia, has described the 'indissolubility of parenthood' post-divorce/separation and the discredited notion that a clean break is possible where children are involved.' He describes divorce as the restructuring of marriage into two separate households as it is increasingly recognized that children need both parents. As such there is now a presumption of shared parental responsibility in the Australian Family Court. Lobby groups have informed us that, contrary to popular opinion, there is not even a presumption of reasonable contact in English law (although in Scottish law the absent parent is under an obligation to stay in touch with the children). Judges are guided by the welfare principle enshrined in Section 1 of the *Children's Act 1989* (according to that section the child's welfare is the paramount consideration whenever the court is asked to determine the upbringing of a child or the administration of a child's property or the application of any income arising from it). We will look closely at the evidence from Australia and elsewhere of the effect that a presumption of shared parental responsibility has had on children and parents, as well as at other proposals relating to this issue.
- We have also received evidence to the effect that, since the implementation of the *Human Rights Act 1998*, this principle is likely to be challenged on the grounds that 'individuals who have discharged their responsibility to the best of their ability should not suffer the liability of losing their right of contact without fault on their part.'[66] In other words, that judges should perhaps be guided by other considerations or at least be required to balance these (competing) considerations.

These issues then raise the question of how should the notions of 'shared parenting' or 'co-parenting' following separation or divorce be interpreted? The concept of quality of contact rather than simple quantum does not perhaps adequately address the claim made by some groups that quality is impossible to achieve without sufficient quantity.

- One of the recommendations put forward in *Breakthrough Britain*, to promote parental responsibility, was to support proposals for tougher enforcement of child support. The motivation behind this being to discourage irresponsible behaviour, by ensuring that men cannot father

66 Bainham A, 2001, 'Men and Women behaving badly: is fault dead in English family law?' *Oxford Journal of Legal Studies*, Vol 21, No 2, pp 219-238

children or walk out on their families without any cost to themselves (the same principle applies to mothers). The report also acknowledged, however, that draconian enforcement (such as imprisonment for contempt) can materially harm the children and their relationship with the absent parent.

- We will consider 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. Throughout childhood, a child needs, and should be allowed to have, a sense of a permanent home. While a continuing relationship with both parents in which both can offer their children physical, emotional and financial support, is obviously beneficial, arrangements should arguably be based on taking into account several factors such as the age of the child, the desire of an older teenager to have a say in how his or her own time should be allocated (bearing in mind weekend sport and other social and educational activities) and the distances and travel involved.
- This raises important issues around presumption of contact and presumption of the welfare of the child. If we take the point that presumption of the welfare of the child (his/her best interests) should be the starting principle, can we then reconcile this with a presumption of shared care? Should the latter be part of primary law? The idea of a presumption of shared care, which some advocate, is a controversial and emotive concept that we will also explore further, not least because of the questions raised when one or other parent needs to relocate.
- We are aware that child contact centres continue to be an invaluable resource for children and parents who would otherwise find it very difficult to develop or maintain relationships with important family members. The job of Family Court Advisers in CAFCASS would be much more difficult without them. In the words of Mrs Pauline Lowe, Vice President:

> *The work of the Supported Centres would still benefit from a more secure financial base and there remains a huge gap in the provision of ongoing supervised contact for which there is little if any adequate funding. I continue to hope that Child Contact Centres may be better resourced in the not too distant future.' The Rt Hon Sir Mark Potter, Patron of the NACCC similarly states that 'As a judge, I am aware of the extent to which* ***the courts welcome the essential service the Centres provide****, and I am very concerned to learn that some have recently had to close due to lack of funding.' We will assess the service provided by contact centres, the length of waiting lists and whether there is need for more financial support, as part of our review*

4.3. Rights of Extended Family

4.3.1. THE ROLES OF GRANDPARENTS AND EXTENDED FAMILY MEMBERS

There has been a fresh realisation of the important roles played by other family members, especially grandparents, within the family framework. *Fractured Families* reported that 60 per cent of childcare is provided by grandparents, and one in every hundred children is living with a grandparent. Grandparents save the economy £3.9 billion per annum according to Age Concern. 20 per cent of grandparents under 60 are also step-grandparents today and it is estimated that there are over 13.5 million grandparents in the UK.

However there seems to be a polarizing of situations where there is often either no contact with grandchildren which may be painful and damaging for all parties, or a substantial burden of care being placed on the aging relative themselves. Although many people may be distanced from their extended family due to increased geographical mobility and other factors, in many cases family members remain close by who can and do assist with (usually informal) childcare. Grandparents can act as anchors during and after family breakdown, and are often the people to whom a child can turn for explanations of change[67] (although after breakdown, children often lose contact with one set of biological grandparents, commonly those on the paternal side). They are often required to take up more emotional, practical and/or financial responsibility during transitions in their adult children's family life, particularly in caring for 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.*[68]

4.3.2. CURRENT LEGAL POSITION

What (very) little law there is on the subject of grandparents rights, is contested by a number of lobby groups, who hold strong views about their perception of current injustices in the system.

For example, if a grandparent wishes to make an application for contact with a grandchild, the Applicant will firstly need to obtain leave of the Court under Section 10(9) of the *Children Act 1989* (unless they are exempt under Section 10(4) or 10(5)). This two-stage approach can cause delay and upset to many grandparents, some of whom will have been very actively involved in their grandchildren's lives. Another practical problem with grandparents' contact applications is that there are only so many free weekends for children,

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

68 Pam Wilson, Grandparents Action Group UK

particularly once they reach a certain age, and if the parent without residence is having even adequate, let alone generous, contact there may be little additional time available.

We attach weight to the evidence that the parties who seem to manage contact issues more amicably are those who were directed towards compromise at an early stage. A collaborative approach that supports and encourages early mediation and conciliation 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 financial burden upon the court service.

Practitioners and grandparents have attested to the fact that contact applications tend to be long, acrimonious and expensive, for the individual or for the state (if the applicant is publicly funded). We recognise that a minority of contact applications by grandparents are used inappropriately as a back-door application to obtain contact for an absent parent who has been refused it. After weighing the evidence (and observing the overarching welfare principle in the law to serve the best interests of the child) we will consider if there is any clear justification for requiring grandparents (including those where the child is primarily residing with their grandparent) to go through this two stage process and will consider the proposed removal of this need to apply.

4.3.3. KEY ISSUES/QUESTIONS

- Is the law too harsh on grandparents; does it serve the best interests of the child?
- Should automatic rights to apply for contact provided for in the *Children Act 1989* be extended to include other family members, including grandparents?
- How effective would a mediative and collaborative approach have in reducing animosity and reducing the emotional and financial costs of long legal battles in the context of grandparents and extended family members?

4.4. Local Authority Care and Special Guardianship

4.4.1. LOCAL AUTHORITY CARE

Following on from the recent Centre for Social Justice report *Couldn't Care Less*,[69] we will give attention to the role of the extended family when children are in the care of the Local Authority. Claims that children are being placed for adoption without the knowledge of grandparents who have been closely involved in their grandchildren's lives will be considered; alongside proposals for stricter implementation of the 'need to consult' requirements

69 Downloadable from http://www.centreforsocialjustice.org.uk/default.asp?pageRef=264

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.

4.4.2. SPECIAL GUARDIANSHIP

Special Guardianship Orders 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 from the child's birth parents and their rights are more limited than full parental rights. 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.

4.4.3. FINANCIAL ASSISTANCE FOR CARERS

Financial assistance given to carers may be removed at the discretion of the Local Authority if they are grandparents who hold a 'residence order'.[70] However, if the courts place the children within the care of the grandparents without such an order, financial assistance is automatically provided. Does this area of unpredictability require regularisation and clarity? May it inhibit relatives from being able to care for the child if extra financial constraint is placed on them unnecessarily?

4.4.4. KEY ISSUES/QUESTIONS

- We will consider if the enhanced duty to promote contact with alternative family members will affect the rights of these potential carers before a child is placed into local authority care.
- Will grandparent's rights be more generally influenced through the recent requirement for Local Authorities to consider potential alternative carers before placing them into the care of the Authority?[71] Will this encourage greater family stability?
- Should the extent of financial assistance given to grandparents be regularised to reduce unpredictability in this arena? Does the irregularity impact the availability of these and other suitable carers for children?
- The potential of a Special Guardianship Order to address the financial inconsistency for carers will be investigated.
- What would be the impact of stricter implementation of the 'need to consult' requirements provided in the *Children and Adoption Act 2002*?

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70 *Children Act 1989*, s.8

71 *Children Act 1989* Guidance and Regulation, Volume 1, Court Orders, in effect from 1 April 2008

- We will consider how the implementation of Special Guardianship Orders has impacted the rights 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.
- Our review will also consider if these Orders have enhanced the stability of these often very vulnerable children's lives.

4.5. 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).[72] Each year it is estimated that more than 17,700 children are separated from their mother by imprisonment.[73] 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.[74] 25 per cent of male young offenders are already fathers.[75]

Prisoners' families, including their children, often experience increased financial, emotional and health problems during a sentence. 30 per cent of prisoners' children suffer significant mental health problems, compared with 10 per cent of the general child population.[76] 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.[77]

4.5.1. THE ROLE OF DRUG COURTS

The safety and interests of the child are clearly the most important factors to consider and often courts have to remove a child from the drug-misusing parent. However, this may not always be the best option and it is the alternatives to what can appear to be a harsh and arbitrary mechanism that we want to consider.

The very recent development of Drug Courts in London may be part of the answer to this problem. The idea for the court came after research showed that two thirds of all care proceedings initiated by the three councils of Camden, Islington and Westminster, were due to parental substance misuse.[78] The Family Drug and Alcohol Court (FDAC) sat for the first time on 28 January 2008, at the Inner London Family Proceedings Court and it is to run as a pilot for three years covering these three councils.

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72 Hansard, House of Commons written answers, 16 May 2003
73 Prison Reform Trust, Prison Factfile, December 2007, pp 5
74 DfES, 2003, *Every Child Matters*
75 HMIP *Thematic Review of Young Prisoners*, HM Chief Inspector of Prisons for England & Wales, 1997
76 Social Exclusion Unit 2002 *Reducing Re-offending by Ex-prisoners.*
77 Department of Education and Skills, 2003, *Every Child Matters*, London: Stationery Office, pp 47
78 (1) The figures are from a feasibility study on the Family Drug and Alcohol court, commissioned by Camden, Islington and Westminster in 2005 and undertaken by Brunel University.

The overall aim of the court is to support families affected by substance misuse so that children can remain at or return home, enabling families to stay together. FDACs seek to provide intensive assessment, support, interventions – such as one-to-ones and group work – and coordination of care for families affected by parental drug and/or alcohol misuse. The FDAC team will advise the court and link parents to relevant local services.[79]

> *We need to change the whole way we address the future of children of drug misusing parents. A drug dependency court which addresses the whole range of problems these families face, including relationship problems, domestic violence, housing, health and income support, holds out the hope of more children staying with their birth families or, where that is not possible, getting them into an alternative permanent placement more quickly.*[80]

4.5.2. KEY QUESTIONS/ISSUES

We are keen to find approaches for families involved in the Criminal Justice System that demonstrate 'joined-up' thinking.

The issue of drugs courts is important for the Family Law Review to consider as it aims to develop policies that reduce levels of dysfunction and build and encourage stable families. District Judge Nicholas Crichton will act as a consultant to the Family Law Review as it deliberates on the creation, development and potential expansion of these Courts across the country.

There is also potential overlap of the aims of the Drug Courts with requests made by grandparents and extended family members to care for the children of substance abusers.

We will evaluate the impact that Drug Courts could have on the levels of care being provided by extended family members if the parents are undergoing treatment for their addictions.

Conclusion

A review of family law is, by necessity, a major undertaking. The areas we will review, as outlined in this report, are not comprehensive – there are many other issues we could also cover – however our intention is that what is covered in this interim report, and in the Family Law Review's final report, will progress further debate as well as statutory changes in laws, that will ultimately serve to strengthen commitment and stability in family life in the UK today.

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

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79 http://www.camden.gov.uk/ccm/content/press/2007/november/uks-first-drug-and-alcohol-court-launches.en 19 February 2008

80 *The Times*, 23 May 2007

claim that they represent the views of other organisations with which Working Group members are associated.

The *Fathers Not Included* report was published earlier this year 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 final report from the Family Law Review will be published in Spring 2009.

APPENDIX ONE

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?

Domestic Violence

13. Sir Mark Potter recently expressed concern in *The Times* newspaper, 'Women at risk, failed by domestic violence law' and District Judge Edwina Milward 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 TWO

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 THREE

Charman V. Charman [2007] EWCA Civ 503, *Postscript to Final Judgment: 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 Lugano 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.

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