

Chapter 2

Divorce Reform and the Family Law Act 1996

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There is no one branch of the law more important, in any point of view, to the great interests of society, and to the personal comforts of its members, than that which regulates the formation and the dissolution of the nuptial contract. No institution indeed more nearly concerns the very foundations of society, or more distinctly marks by its existence the transition from a rude to a civilised state, than that of marriage.¹

In his history of divorce legislation in England from the mid-sixteenth century, Lawrence Stone contends that the basic moral and cultural values of any society are revealed in its attitude towards the breakdown and dissolution of the institution of marriage. If the complexities and dilemmas of the Family Law Act are to be seen in context, and the current concerns surrounding implementation of Part II are to be examined carefully, it is important to understand how the FLA is shaped and influenced by these values, both past and present.

Before 1857 no English court had the power to grant a decree of divorce which would terminate a marriage. For centuries, divorce had been virtually impossible. As Stone points out, however, there is little reason to suppose that there were proportionally fewer unhappy marriages when divorce was illegal than there are today, but there were powerful forces which kept even the most miserable couples together. There were, nevertheless, a number of ways in which the breakup of a marriage could be achieved: one partner could simply leave (desertion), which was much easier for men than for women; if the parties agreed to separate, this could be achieved through a written deed of separation; occasionally, wives were sold; application could be made to the ecclesiastical courts for separation from bed and board; and from 1690 onwards, very rich husbands could obtain a divorce from an adulterous wife by private Act of Parliament. Since only a very few could afford this latter route, there was for most people no legal way to remarry. Stone shows how, for centuries,

husbands and wives, and the lawyers who served their interests, continued to use, adapt, circumvent and openly deceive the law in order to deal with marital breakdown.²

As we noted in Chapter 1, the relationship between law and social behaviour is far from straightforward. Family law is directly influenced by public opinion and social behaviour: it usually follows rather than leads. There is generally a considerable time lag between the identification of a problem (and cries for reform) and the development of new legislation, and policymakers are inevitably affected by current values. Once new legislation is enacted the law itself shapes public opinion and social behaviour. We can, then, discern a

¹ *Speeches of Henry Brougham*, Philadelphia (1841), Vol. 2, p. 289. Lord Brougham was to become Lord Chancellor, and maintained a keen interest in divorce reform.

² Stone, L., *Road to Divorce: England 1530–1987*, Oxford University Press (1990).

strong 'reciprocal relationship between the enacted law, current theories of justice, and the social, economic and cultural background'.³

Divorce reform generates conflict and political friction and does not come easily or quickly. Throughout our history, there has been a reluctance to change the laws of marriage and divorce, often driven by the fear that change might result in unwanted social and political side-effects. This fear was reflected in many of the debates on the Family Law Bill 1995, which focused on concerns that any change in divorce law inevitably leads to an increase in the number of divorces. In other words, there has been and remains a belief that attempts to reform legislation make the underlying problems worse. Not surprisingly, perhaps, governments steer clear of taking the initiative in proposals for divorce reform precisely because it is a controversial topic which is inextricably linked with the subject of marriage. It is impossible to discuss divorce reform, it seems, without discussing the institution of marriage; and both topics have been central to the interests of powerful groups in society such as lawyers and the clergy. The 1995 Bill was the first government-led initiative in divorce reform since 1857, and the various interest groups were vociferous in responding to it. Those interests have continued to be influential in various ways throughout the information meeting pilots.

The controversial nature of divorce reform usually means that it takes a very long time to achieve. So, for example, the reforms recommended by a Royal Commission in 1912 were not turned into statute law until 1937. On this kind of time-scale, the FLA had a relatively short period of gestation, with just ten years between the work of the Booth Committee⁴ and the presentation of the Family Law Bill. It is, of course, four years since the Act received Royal Assent, and Part II, the most radical section of the legislation, is not yet enacted. Characteristically, then, the current changes are being made slowly and hesitantly, and even when they are enacted, there is little obvious shift in behaviour in the short term. There is always a wide time gap between intentions and impacts, and we would argue that it is probably unrealistic to expect to see any major changes in behaviour until long after the Act is implemented, and certainly not during a pre-implementation pilot period.

Historians have concluded that there is no single model of change which can explain the shifts in marital breakdown and divorce in a single country for all periods of time and for all classes of society.⁵ It is not possible, therefore, to claim that there is a simple link between the law and marital/divorcing behaviour. As historians point out, and as we have discovered in our evaluation, life is messier than that.

Early Steps towards Reform

Despite much discontent about legislation concerning marriage and divorce from the sixteenth century onwards, little was done to address the issue of marriage breakdown publicly until the middle of the nineteenth century. From 1600 onwards there were repeated proposals for change, many put forward by the clergy, but there were enormous fears about the consequences of tampering with the law. The first constructive step towards divorce reform in England and Wales was the establishment in 1850 of a Royal

³ *ibid.*, p.10.

⁴ Report of the Matrimonial Causes Procedure Committee (Chairman: The Hon. Mrs Justice Booth DBE) (1985).

⁵ See Phillips, R., *Putting Asunder: A History of Divorce in Western Society*, Cambridge University Press (1988).

Commission on Divorce. For the previous 20 years there had been growing criticism of the chaotic and unjust system of parliamentary divorce. The Royal Commission did not propose changes in the law of divorce, however, but did suggest a reconstruction of the process through the abolition of the jurisdiction of Parliament and of the ecclesiastical courts in respect of divorce. Although the government argued that the Divorce Bill 1856 would make it possible for the poor to divorce, this claim was exposed as fraudulent during parliamentary debates. Nevertheless, relatively few people were in favour of opening the door to divorce to working-class families. Debates raged over the content of the Bill, specifically over any suggestions that women should have rights equal to men's in respect of divorce, and over questions about remarriage for guilty wives and their lovers.

The Matrimonial Causes Act which emerged in 1857 bore little resemblance to the Bill that had been introduced, and it did not change the basic principles on which divorce was to be granted. Divorce was a legal remedy available to an injured and legally guiltless party whose partner had committed adultery. The doctrine of fault was central, and one of the objectives of the Act was to shore up the family by restricting adulterous behaviour. In reality, the number of divorces remained low, but a number of significant changes were made over the next forty years: the legal support for husbands to control their wives was ended, wives were granted control over their own property, and mothers could and did obtain custody of children. As the power of the Church weakened, and the Law Lords became exasperated by the level of collusion in divorce cases, so the women's movement gained prominence in its quest for equality. But further reform did not come until 1937, despite a Royal Commission in 1912 which argued for divorce to be regarded as the legal 'mopping-up operation'⁶ after the marriage was over and proposed expansion of the grounds for divorce to include desertion. The Commission, like public opinion, was split about divorce reform, and the cost and complexity of divorce litigation kept the number of divorces low.

Although the Matrimonial Causes Act 1937 did extend the grounds for divorce, fault (or unsound mind) still had to be proven. It was argued that to allow divorce by consent would destroy the institution of marriage and undermine the sanctity of marriage and family life: arguments which were used again during the passage of the Family Law Bill nearly sixty years later. Nevertheless, the retention of the matrimonial offence as the basis for divorce came under increasing attack from 1937 onwards. Indeed, during the passage of the 1937 Act, some reformers had put forward the radical view that once love and companionship had withered away, the quicker the marriage was dissolved the better. The preamble to the 1937 Act listed a number of objectives, including the 'true support for marriage' and the protection of children: objectives echoed in the 1996 Act. Nevertheless, the 1937 Act made it possible, for the first time, for many people who had been trapped in unhappy marriages to divorce, resulting in rapid increases in the numbers divorcing and creating panic that marriage breakdown was running rampant.

In 1956 the next Royal Commission on Marriage and Divorce traced the general trends in western culture which were contributing to increasing numbers of marriages breaking down, and called for measures to stem the flow, including more marriage counselling and education for young people to inculcate a greater sense of responsibility to the community and a greater sense of duty to protect children from the effects of marriage breakdown. Again the Commission was split, with some members advocating a more liberal divorce process and others unwilling to relax the grounds for divorce because they wanted to

⁶ Stone, *op. cit.*, p. 393.

promote stability in marriage. It was another twelve years before the problem of divorce was tackled, by two separate bodies: a Committee appointed by the Archbishop of Canterbury and the newly established Law Commission. Each reported in 1966 and both called for radical reform. The Archbishop of Canterbury's Committee argued that a divorce decree should be seen simply as a judicial recognition of a state of affairs, and that the matrimonial offence should be replaced by a detailed inquest into the breakdown which would include ascertaining what attempts had been made at reconciliation and exploring the events which had destroyed the marriage.⁷

The Law Commission, in its report, took as its starting point the view that a good divorce law should seek:

- (i) To buttress, rather than undermining the stability of marriage; and (ii) When, regrettably, a marriage has irretrievably broken down, to enable the empty legal shell to be destroyed with the maximum of fairness, and the minimum bitterness, distress and humiliation.⁸

The Law Commission concluded that an offence-based divorce law fails to satisfy these criteria, since it discourages reconciliation, tends to embitter relationships, does not achieve fairness, and thereby increases the damaging effects on children when their parents split up. It did not accept the proposal of the Archbishop's Committee for an inquest, seeing this as humiliating and impracticable. A year later, both bodies issued an agreed statement proposing radical reform towards a no-fault principle. The breakdown of a marriage was to be established by one of a number of facts. The Government maintained a position of neutrality on the merits of the proposals, but the Law Commission's proposals were included in a private member's Bill which was introduced by Leo Abse MP, who outlined the defects of the existing legislation: first, it terminated dead marriages by channelling them into contestatory litigation, thus creating bitterness and hostility and minimising any chance of reconciliation; and second, it denied divorce to many people whose spouse refused a divorce, thereby condemning them to live in illegitimate second unions. Leo Abse suggested that the new proposals would strengthen rather than undermine the institution of marriage and be more supportive of family life.

Despite the radical nature of the proposals, however, what emerged was not no-fault divorce. The irretrievable breakdown of a marriage was to be proved by reference to one or more of five facts, which included the old fault-based grounds. Opponents to the Bill argued that divorce would be made easier and that more marriages would end as a result. Nevertheless, the Divorce Reform Act 1969 became law in January 1971, and has provided the basis for the current legislation in England and Wales enshrined in the Matrimonial Causes Act 1973. It was based on the belief that the court would need to be satisfied that the fact or facts on which irretrievable breakdown was claimed was or were so serious that further married life would be intolerable. In reality, inquiries are virtually non-existent if the respondent does not oppose divorce – and the advice given to respondents is usually not to oppose. Defended divorce has become a thing of the past, and 'quickie divorces' based on allegations of unreasonable behaviour or adultery are very much the norm.

During the 1970s and 1980s, as we have seen, the divorce rate continued to rise, and some opponents of reform blamed the 1969 Act for making divorce too 'easy'. Others felt that the legislation was not living up to its objectives: there was little attempt to identify

⁷ *Putting Asunder: A Divorce Law for Contemporary Society*, London (1966).

⁸ *Reform on the Grounds of Divorce: The Field of Choice*, Law Commission No. 6 (1966).

saveable marriages and to facilitate reconciliation, and bitterness, hostility and distress were not reduced. The promise of a no-fault system which would both support marriage and end dead marriages with the minimum of distress did not materialise, and the social and economic costs of a rising divorce rate were increasingly considered to be too high. Once again, steps were taken on the road to reform.

The Background to the Family Law Bill

In November 1995, for the first time in 138 years, the government of the day put forward proposals for divorce reform, which were outlined in the Queen's Speech. The Family Law Bill 1995 was introduced in the House of Lords after yet another period of lengthy and considered public debate and consultation beginning with the Report of the Matrimonial Causes Procedure Committee in 1985.⁹ The Committee concluded that the fault element in the existing legislation frequently exacerbated and prolonged the unhappiness experienced by divorcing couples. In 1988, the Law Commission¹⁰ published the first of two reports addressing the issue of divorce reform, arguing that the existing law fell far short of its objectives. In its second report,¹¹ published in 1990, the Law Commission concluded that reform was needed. It described the present system as confusing and misleading, as discriminatory and unjust, as distorting the parties' bargaining positions, as provoking unnecessary hostility and bitterness, as doing nothing to save marriages, and as making things worse for the children. In the view of the Law Commission, the present law had failed to meet either of its stated objectives. The defects cited were grave; and, above all, the present law was accused of failing 'to recognise that divorce is not a final product but part of a massive transition for the parties and their children'.¹² The Law Commission underlined the reality that divorce is almost always painful, that each party may be at different stages in the process when divorce proceedings are initiated, and that the law provides no opportunity for people to come to terms with what is happening in their lives or to reflect on the future. It acknowledged that some matrimonial proceedings will be bitterly contested irrespective of what the law sets out to achieve, but suggested that the courts should be kept to their proper sphere of adjudicating practical disputes, assuring due process and enforcing orders that have been made.

The Law Commission considered a number of options for reform, rejecting a return to a system based wholly on the matrimonial offence. It also rejected the suggestions of a judicial inquest, the granting of divorce on unilateral demand, divorce after a period of separation, and a mixed system allowing both fault and non-fault grounds. The preferred model for reform was one in which divorce was viewed 'as a process over time', and which granted a decree of divorce only after a period of consideration and reflection. The minimum overall period proposed for consideration and reflection was one year. The Law Commission was convinced that this model would find favour among the general public and among the professionals involved in the divorce process. The Law Commission went further, to suggest that counselling, conciliation and mediation services would be important elements in developing a new and more constructive approach to the problems of marital breakdown and divorce. While opportunities to use such services should be made available, participation was to remain voluntary (although it was proposed that the

⁹ Report of the Matrimonial Causes Procedure Committee (1985), *op. cit.*

¹⁰ *Facing the Future: Discussion Paper on the Ground for Divorce*, Law Commission No. 170 (1988).

¹¹ *The Ground for Divorce*, Law Commission No. 192 (1990).

¹² *Facing the Future* (1988), *op. cit.*, para 3.50.

courts should have power to refer couples to attend a preliminary interview to be given an explanation of the nature and purpose of mediation).

The Green Paper

The Government accepted the Law Commission's recommendations and embodied them in a Consultation Paper in 1993.¹³ The Government stressed its commitment to marriage and to the family, but acknowledged its limitations in being able to influence family relationships that had broken down, and recognised that 'changing the divorce law cannot save irretrievable marriages'.¹⁴ The Government believed, however, that 'the law and procedures can have a major effect on the way in which divorces are conducted, and on the impact of a divorce on those concerned'.¹⁵

The Green Paper laid out the objectives of the law and procedure as being:

- to support the institution of marriage
- to include practicable steps to prevent the irretrievable breakdown of marriages
- to ensure that the parties understand the practical consequences of divorce before taking any irreversible decision
- to minimise the bitterness and hostility between the parties and to reduce the trauma for children where divorce is unavoidable
- to keep to a minimum the cost to the parties and the taxpayer

A distinction was made between marriages which could be saved and those which were irretrievable. The Government's objective was to help to save the former, perhaps through the provision of counselling, and to slow down the process of divorce for the latter, making sure that people realise the full consequences of divorce for themselves and for their children. The belief was that a new divorce law could provide a system which could identify 'at an early stage those marriages that can be saved' and 'provide breathing space for examining the alternatives and for considering reconciliation'.¹⁶

Divorce law, then, was to reflect the seriousness and permanence of the commitment involved in marriage. It could not, however, prescribe happy marriages:

No statute, no matter how cleverly and carefully drafted can make two people love each other, like and respect each other, help, understand and be tolerant of each other or force them to live together in peace and harmony, while they are married and living together as husband and wife.¹⁷

¹³ *Looking to the Future: Mediation and the Ground for Divorce*, Cm 2424 (1993). Referred to subsequently in this report as the Green Paper.

¹⁴ *ibid.*, para 1.3.

¹⁵ *ibid.*, para 1.3.

¹⁶ *ibid.*, para 1.5.

¹⁷ *ibid.*, para 3.4.

It might be helpful to add that no statute, however carefully it is crafted, can make two people respect each other and force them to live in peace and harmony after they have divorced. There appears to be an expectation that if appropriate processes are put in place divorcing and divorced people will behave in a rational, responsible and conciliatory way. In promoting mediation in its proposals for reform, the Government believed that it could not only identify saveable marriages, but also enable spouses

to accept responsibility for the ending of the marriage, to address face to face questions of fault and blame and to deal with feelings of hurt and anger. Where the conduct of one spouse or another is an issue and is proving an impediment to an amicable settlement of the arrangements, mediation offers an opportunity to address what went wrong with the marriage.¹⁸

Mediation as it is practised in England and Wales is future-focused. It has not embraced attempts to deal with the ending of the marriage, and in this important respect the government of the day was almost certainly over-optimistic about the potential benefits of mediation. The Green Paper rightly describes mediation as an alternative to the adversarial method of resolving disputes or negotiating at arm's length through lawyers. Unfortunately, in its recommendation that mediation should be encouraged as part of a new and more constructive approach to divorce, the Government appears to have expected it to do rather more than offer an alternative dispute mechanism.

In order to encourage greater use of marital counselling (for reconciliation) and mediation (for dispute resolution), the Green Paper proposed that everyone contemplating divorce should be well-informed about the law and the procedures and consequences of divorce, and directed to services appropriate to their needs. This was to be achieved through the provision of a single first port of call for everyone wishing to initiate divorce. That first step would be a mandatory *personal interview*. This interview would:

- provide essential information about the divorce process, backed up with information packs and possibly a video
- offer advice about marriage guidance
- allow referrals to and enable appointments to be made with appropriate organisations and agencies
- influence the decision as to whether to mediate, to negotiate at arm's length through solicitors or to litigate
- include a preliminary assessment of the most appropriate way forward
- advise on the respective costs of different services
- advise on eligibility for state funding for those seeking the help of mediators and lawyers

The interviewer would provide general examples of how the law works in practice, but not of how the law might be applied to a particular case. The Green Paper made it clear

¹⁸ *ibid.*, para 7.5.

that legal advice should not be given, and defined legal advice as involving an explanation of how the law applied to the facts of a particular case and recommending a course of action.

A number of options were put forward as to who should conduct the interviews, including family court welfare services, mediation services or a new independent organisation. In the light of the circumstances disclosed at the interview, the parties would be informed that they could proceed on their own, take time to reflect and come back at a later date, be helped to make contact with one or more of the divorce-associated professionals, apply for public funding for mediation or legal advice, and/or complete the registration document that would initiate the divorce process. The entire interview was expected to take about an hour, and was clearly intended to be a very important gateway to information, help and non-legal advice, and to key agencies such as marital counselling, mediation and legal services. It was expected to be an interactive participatory interview, conducted in private on a one-to-one basis in a single first port of call.

The White Paper

After a period of consultation, the subsequent White Paper in which the Government laid out its proposals for legislation¹⁹ confirmed its commitment to there being a first port of call, and listed the advantages of this as providing an opportunity to consider whether divorce is the right course of action, ensuring that everyone obtained the same access to information about the divorce process and related matters, raising awareness of support services, and encouraging couples to consider family mediation. Nevertheless, the information given was to be 'entirely objective'. There was, however, a significant shift between the Green Paper and the White Paper in the Government's thinking about how to deliver the information. The proposal for an information interview had not met with overwhelming support. The Law Society, for example, in its response to the Green Paper, feared that the

provision of divorce information has been floated as a cheap and cheerful method of capping the Legal Aid budget.²⁰

The Law Society went on to suggest that

in an effort to cut solicitors out of the divorce process ... a home has had to be found for all of the functions – except advice – currently allotted to solicitors.²¹

The Solicitors' Family Law Association, in its response, believed that it would be impossible in practice to make a distinction between the provision of legal information and legal advice, and that family lawyers were the only professionals equipped to provide such a service, although it acknowledged that *if* information could be distinguished from advice, other professionals such as mediators and counsellors could be trained to give information.²²

¹⁹ *Looking to the Future: Mediation and the Ground for Divorce: The Government's Proposals*, Cm 2799 (1995). Referred to subsequently in this report as the White Paper.

²⁰ *Fairness for Families: The Law Society's Blueprint for Resolving Disputes on Family Breakdown*, The Law Society (1994), p. 12.

²¹ *ibid.*

²² Solicitors' Family Law Association, *Looking to the Future – Mediation and the Ground for Divorce*, (1994).

Not all the divorce-associated professions were as cautious, however. Relate, for example, in its response to the Law Commission's earlier proposals in respect of the provision of information, had suggested that accredited interviewers should be marital counsellors, mediators, probation officers or other professionals with a related casework qualification, including experience in working with couples.²³

Nevertheless, having noted concerns about the danger of information giving spilling over into advice giving, the Government moved away from a personal interview towards the proposal put forward in the White Paper for a group session which was viewed as 'a device for providing objective information face to face in the most expedient, comfortable and cost-effective manner', and as 'a much more sophisticated approach' regarding how much information might be presented (by the use of a video and talks by experts from different professions, for example). In proposing that attendance at a group session would be a condition precedent to starting the divorce process, the Government argued:

It will be essential that the information sessions present a fair and unbiased view of all the services available to couples and of the options open to them. Such a system should result in couples having a better understanding of the emotional, social and practical consequences of marriage breakdown and divorce. It should also mean that parents better understand the effects of separation and divorce on children, and especially the harmful effects on them of continuing conflict.²⁴

The focus was on helping couples to understand the consequences of their actions, and the emphasis was on maintaining 'a level playing field' for the various services from which they might seek help. The Government retained the objective of enabling couples with marital problems to be encouraged to seek help as early as possible, thus 'ensuring greater integration of Government policies supporting marriage with those on divorce'.²⁵ Apart from the shift to group information sessions, the Government's proposals largely reflected those of the Law Commission and those put forward in the Green Paper. The information session would mark the gateway to a 12-month period for reflection on whether the marriage could be saved, and consideration of the consequences of divorce before it happened. The Government listed ten major benefits of its proposals. It was suggested that the proposals would:

- ensure that couples whose marriages are in difficulty will be better informed about the options available to them
- introduce a system that is better at identifying saveable marriages
- facilitate referrals to marriage guidance when couples believe there may be some hope for the marriage
- make available every opportunity to explore reconciliation even after the divorce process has started
- ensure that there is an adequate period of time to test whether the marriage has genuinely broken down

²³ Relate Marriage Guidance, *A Year with Purpose: Relate's Response to the Ground for Divorce Law*, Commission Paper No. 192 (1991).

²⁴ The White Paper, *op. cit.*, para 7.21.

²⁵ *ibid.*, p. v.

- remove the acrimony and hostility inherent in the current divorce process
- minimise conflict and so reduce the worst effects of separation and divorce on children
- help and protect children by encouraging parents to focus on their joint responsibility to support and care for their children
- encourage couples to meet the responsibilities of marriage and parenthood before the marriage is dissolved
- allow couples to make workable arrangements through family mediation in respect of their children, home and other matters following separation or divorce

These benefits could be seen as providing markers against which the new legislation could eventually be judged. The Lord Chancellor, in his Foreword to the White Paper, spoke of having

a heavy responsibility to ensure our law recognises the importance of the institution of marriage and also to ensure that it does not impose unnecessary damage on the personal relationships with which it deals, particularly those of parents with their children.²⁶

These words are redolent of those of Lord Brougham, in the epigraph to this chapter, over 150 years earlier. The Government's proposals were embodied in the Family Law Bill, and many proved to be contentious, particularly for the Government's own supporters. In order to save the Bill from defeat the Government had to accept many amendments, particularly in the Committee Stage in the House of Commons.

From Family Law Bill to Family Law Act

Debates about divorce have, for centuries, aroused strong feelings about the place of marriage in society, and the debates in both Houses during the passage of the Family Law Bill were no exception. The then Lord Chancellor introduced the Bill on its Second Reading by reaffirming his commitment and that of the Government to marriage. He pointed out that consultations had revealed 'a very grave concern about marriage and the need for greater emphasis on and support for marriage'.²⁷ He went on to comment that the consultation about reform 'has been as much about marriage as it has been about the finer details of the divorce system'.²⁸ This duality also characterised all the ensuing parliamentary debates.

In order to promote the four key objectives of supporting marriage, promoting a conciliatory approach to divorce, reinforcing continuity in parenting and providing protection from domestic violence and child abuse, the Bill proposed the removal of the concept of fault as evidence of irretrievable breakdown. This was one of the most

²⁶ *ibid.*, The Lord Chancellor, Lord Mackay of Clashfern, p. ix.

²⁷ The Lord Chancellor, Lord Mackay of Clashfern, Official Report (H.L.), 30 November 1995 at col. 700.

²⁸ *ibid.*

contentious elements, primarily because removing fault was considered by some as trivialising marriage:

Providing 'no fault' undermines marriage vows. What, after all, is the point of making a vow when there is no fault if you break it? ... The removal of fault undermines individual responsibility. By removing it, the state is actively discouraging a concept of lifelong commitment in marriage ... Furthermore, it undermines the legal basis of marriage by making the contract meaningless ...²⁹

The counter-argument referred to the inability of law to deal with the issue of blame:

To say that irretrievable breakdown should be the sole ground for divorce is not to deny personal responsibility for the breakdown of a relationship. It is not to deny the place of human fault and sin in the process of matrimonial breakdown. It is to say that a human court of justice is too blunt an instrument for apportioning blame in so complex an area of human behaviour ... what is the point of apportioning blame?³⁰

The latter view prevailed, and the no-fault provision was passed on a free vote in both Houses. Accordingly, the Act provides for one or both partners to begin the legal process of divorce simply by making a statement that the marriage has broken down. Only at the end of the legal process is a marriage to be assumed to have broken down irretrievably. This represents a considerable shift from the present system, where the specified fact 'proving' irretrievable breakdown is laid out at the very beginning of the process. Under the FLA, only after a period of reflection and consideration, and when all future arrangements have been made, is the marriage regarded as irretrievable and its dissolution as inevitable. Such a shift was intended to ensure that the door to reconciliation would be kept firmly open throughout the divorce process, and that the importance of attempting to save the marriage would be loudly signalled:

... the requirement that everyone should wait a minimum of a year before applying for an order ... together with the requirement that all arrangements will have to be decided before divorce, will do far more to reinforce and underline the institution of marriage and its inherent obligations and responsibilities, than the present system which allows quick divorce following allegations of fault.³¹

The period of reflection and consideration was one of the provisions which were the subject of considerable amendment in the House of Commons, resulting in the uncoupling of mandatory attendance at a meeting to receive information from the making of a statement of marital breakdown. The appropriate length of the period was a matter on which there was much disagreement, and concern about the impact of delay on children was an influential factor in the eventual decision-making. After much to-ing and fro-ing in debates, the Bill was amended to provide a minimum period of 12 months from attendance at an information meeting (9 months from the making of a statement of marital breakdown) before an application can be made for a divorce order, but where there is a child under the age of 16, or if one party applies for time for further reflection, then the minimum period is 18 months (15 months from the making of a statement of marital

²⁹ Baroness Young, Official Report (H.L.), 30 November 1995 at col. 733.

³⁰ The Lord Bishop of Birmingham, Official Report (H.L.), 30 November 1995 at col. 733.

³¹ The Lord Chancellor, Lord Mackay of Clashfern, Official Report (H.L.), 30 November 1995 at col. 703.

breakdown). The period for reflection and consideration was to be used purposefully, and reflection was to be influenced in different ways: by the provision of information, through the opportunity to meet with a marriage counsellor, and through the use of mediation.

Information provision: a changing construction

As we have noted above, by the time the Family Law Bill was introduced in the House of Lords, the information interview had shifted to a group session. Concerns were expressed, however, particularly during the Committee stage in the House of Commons, about the seriousness of such a meeting and about the need for privacy:

... it could just mean turning up to a local citizens advice bureau – whether on one’s own or with other people – and being put in front of a video, or being given a leaflet entitled ‘How to get a divorce’ printed by the Lord Chancellor’s Department. That would not constitute what I consider to be a serious information meeting.³²

It seems that people could be herded into a room and addressed from the front or be given leaflets.³³

Furthermore, there was much discussion about the advantages of providing information which would direct people towards marriage counselling prior to the statement of marital breakdown being made. Hence, the notion of a compulsory group information session at the beginning of the divorce process gave way to that of a compulsory individual information meeting (at least one per marriage) which must be attended at least three months before a statement can be lodged. The intention was clear: an early meeting could focus on marriage support *before* steps are taken to initiate the divorce process. Suggestions that people should have a compulsory meeting with a marriage counsellor were withdrawn in favour of an information meeting which would direct people to counselling and marriage support services, which would either work towards saving the marriage or put a brake on the divorce process, slowing it down and enabling people to take stock. The period for reflection was brought forward, therefore, so as to start *before* formal legal proceedings could commence:

It is essential that the first visit should not be to a solicitor or a mediator, but to someone who is wholly neutral and will say, ‘Have you thought about the counselling option?’³⁴

People would attend a meeting to explore whether a marriage could be saved and if they say no, that is the end of the matter. At least they will know that they have to go to the meeting and why they are going – it is an opportunity and a window that will be opened. If people choose to go through it, that is a matter for them.³⁵

In support of this position, the Parliamentary Secretary acknowledged that the information presenter should possess counselling skills.

³² Mr Edward Leigh MP (Gainsborough and Horncastle), Official Report (Standing Committee E), 7 May 1996 at col. 136.

³³ Mr Paddy Tipping MP (Sherwood), Official Report (Standing Committee E), 7 May 1996 at col. 147.

³⁴ Mr Brazier MP (Canterbury), Official Report (Standing Committee E), 7 May 1996 at col. 142.

³⁵ Mr Boateng MP (Brent, South), Official Report (Standing Committee E), 7 May 1996 at col. 157.

The provision of marriage counselling

The strengthened focus on marriage support in an individual information meeting was further enhanced by other amendments. There was little disagreement during the course of the debates on the Family Law Bill that if some marriages were to be saved, emphasis must be placed on providing information about and encouragement to use marriage support services. During the Committee stage in the House of Commons, Mr Edward Leigh tabled a series of amendments which, in his view,

would ensure that the party or parties were given the opportunity for a voluntary meeting with a marriage counsellor, and that they were encouraged to hold such a meeting ... [and that] the meeting with a marriage counsellor was free of charge for those who qualify for legal aid.³⁶

He went on to acknowledge that marriage counselling may make no difference in respect of some 95 per cent of divorces, but that saving a few marriages would have a beneficial effect on society. The amendments found favour, and the Government expressed its commitment to doing what it could to save marriages wherever possible. The Government was persuaded that the information meeting could provide couples with the opportunity to take whatever steps they could to save the marriage, and that an opportunity for a meeting with a marriage counsellor would

strengthen the institution of marriage by providing parties with more time to reflect on the information they had received, and ... give those parties the opportunity to receive specialist assistance in the attempts to save their marriages.³⁷

The offer of a meeting with a marriage counsellor became enshrined in the legislation, although detailed work on the format of the meeting was left to the Lord Chancellor's Department in discussion with the marriage support organisations. Concerns were expressed in parliamentary debates about how such services would be monitored, the necessity of having appropriately qualified counsellors, and the emphasis which should be placed on saving marriages. Concerns were also expressed that the meeting with the marriage counsellor should not become

just another part of the divorce process, another box that must get ticked. That would detract from the perception that they [marriage counsellors] are outside the process [of divorce] and that people can go and see them voluntarily to seek alternatives.³⁸

Both the meeting with a marriage counsellor and further counselling would be free for those people eligible for non-contributory legal aid. The provision of public funding for counselling services was predicated on the understanding that

such services will be focused on marriage counselling and not on any other form of counselling that does not have the couple's possible reconciliation as a primary objective.³⁹

³⁶ Edward Leigh, MP (Gainsborough and Horncastle), Official Report (H.C. Standing Committee E), 7 May 1996 at col. 136.

³⁷ The Parliamentary Secretary, Lord Chancellor's Department (Mr Jonathan Evans), Official Report (Standing Committee E), 7 May 1996 at col. 155.

³⁸ Julian Brazier, MP (Canterbury), Official Report (H.C. Standing Committee E), 7 May 1996 at col. 154.

³⁹ The Parliamentary Secretary, Lord Chancellor's Department (Mr Gary Streeter), Official Report (H.C.), 17 June 1996 at col. 538.

MPs were realistic about what such opportunities would achieve for the majority of couples facing divorce, and the Parliamentary Secretary pointed out that

the notion that we can build into the Bill a mechanism that will transform parties seeking divorce into parties seeking reconciliation is unrealistic. We must therefore find ways of identifying the limited number of cases in which that may be a realistic prospect and help them to save their marriage.⁴⁰

Not all MPs restricted the use of counselling to attempts to save the marriage, however, and there was recognition of the value of encouraging someone to talk to a counsellor in order to ‘take stock’:

If people decide not to go through the process of counselling, it will still be helpful for them to have the opportunity to take stock of their marriage to talk to a counsellor. So often, when people are in trouble and have had a chance to talk they say, ‘I feel better for that’. The session would provide an opportunity to take the heat out of the system. People might not go for counselling to save the marriage, but they could have personal counselling to take the hurt out of an extremely stressful situation.⁴¹

Paul Boateng had expressed the view that the advantage of counselling,

whether for the purposes of exploring whether the marriage can be saved or for the purposes of coping with the trauma of divorce, is that it gives all the parties the opportunity to come to terms with [the causes of marital breakdown], either as a way of bringing them back together and saving the marriage, or of better equipping the parties to move forward into joint and agreed responses to the needs of the children, or into more successful second relationships ... From counselling one can best explore the hope of reconciliation, if such hope exists, and one can try to deal with the trauma that is the inevitable consequence of divorce.⁴²

Mr Boateng was reflecting on the need for people to deal with the ending of the marriage, and expressing the thought that counselling can also play an important role in that – a role that extensive research into Relate counselling has revealed and endorsed.⁴³

Nevertheless, despite the identification of other potential benefits, the (then) Lord Chancellor confirmed that

the Bill makes clear that it is marriage support services and marriage counselling that are in issue from the point of view of support ...

He continued:

When the Bill was in this House previously, I said I believed that marriage counselling was capable of being monitored in quite an effective way, because one can ascertain to what extent the consequences of counselling have

⁴⁰ The Parliamentary Secretary, Lord Chancellor’s Department (Mr Jonathan Evans), Official Report (Standing Committee E), 7 May 1996 at col. 150.

⁴¹ Mr Tipping MP (Sherwood), Official Report (Standing Committee E), 7 May 1996 at col. 148.

⁴² Paul Boateng MP (Brent, South), Official Report (H.C. Standing Committee E), 7 May 1996 at cols 132,133.

⁴³ McCarthy, P., Walker, J. and Kain, J., *Telling It As It Is: The Client Experience of Relate Counselling*, Newcastle Centre for Family Studies (1998).

produced continuation of marriages ... We shall put in place effective monitoring as part of the arrangements.⁴⁴

As we have found in the pilots, however, monitoring the consequences of counselling is far from straightforward.

Promoting conciliatory divorce

The focus on saving and supporting marriage remained at the heart of the debates on the Family Law Bill, with a very high level of consensus that the legislation should convey strong messages about the significance of marriage. In the early stages of debate anxiety was expressed that there was too little emphasis on reconciliation as an objective, and too much emphasis on mediation:

It is mediation on which the Bill focuses and I suggest that it is reconciliation on which it should focus.⁴⁵

To a large extent, the moving of marriage counselling to centre stage reshaped the Bill from one that began by being primarily focused on facilitating conciliatory divorce to one primarily focused on saving marriage, particularly in Part II. Certainly there was not the same universal enthusiasm for mediation as there was for marriage counselling, and there was a very real belief that mediation must remain a voluntary process which could not be expected to be appropriate for everyone. There were concerns that mediation might become the option that was inevitable if people could not afford legal advice: in other words, it would become a second-class service. Whereas the Law Commission and the Government's Green and White Papers all promoted mediation as central to a reformed process of divorce, members of both Houses were more circumspect about its role. The Government saw mediation as capable of reducing bitterness and tension, improving communication and reducing cost. Yet the Commons debates led the Government to table an amendment that there would be no presumption in favour of either mediation or legal representation, thus ensuring an even-handed approach to dispute resolution processes. Nevertheless, the requirement to attend a meeting with a mediator before a party can receive legally-aided representation remained and is already enacted. It was claimed that Section 29 meetings with mediators

will allow parties to make an informed decision on the basis of the facts, and in the process learn of the considerable benefits of mediation for the parties and the children.⁴⁶

Such a provision was not contentious, because it was agreed that

the parties should be free to make an informed choice between mediation and the courts, that requires such a meeting. I hope that in a large number of cases they will prefer mediation ... In pinning so much faith on mediation we are entering substantially uncharted seas.⁴⁷

As the MP for Meirionnydd Nant Conwy put it:

⁴⁴ The Lord Chancellor, Lord Mackay of Clashfern, Official Report (H.L.), 27 June 1996 at col. 1063.

⁴⁵ Lord Ashbourne, Official Report (H.L.), 15 November 1995 at col. 171.

⁴⁶ The Lord Chancellor, Lord Mackay of Clashfern, Official Report (H.L.), 27 June 1996 at col. 1104.

⁴⁷ Lord Irvine of Lairg, Official Report (H.L.), 27 June 1996 at cols 1105, 1064.

Mediation is a welcome principle and it will help in due course to take away a great deal of the acrimony from divorces ... The Bill could prove useful in increasing the success rate of mediation by ensuring an early referral to qualified mediators ... described ... as the 'central plank' of the Government's proposals. As yet, we do not know whether that central plank will be made of teak or balsa wood.⁴⁸

Teresa Gorman described mediation as the 'nouvelle cuisine' of the Bill, and suggested that most people prefer a 'good meal' and, if they can afford it, will go to a solicitor:

The Bill's presumption in favour of mediation is misplaced. At best it is idealistic. At worst, it is naïve.⁴⁹

Speaking for the then Opposition, Mr Boateng went further and argued for the creation of

a context in which there is genuine choice between court-based solicitors and mediation, in which there is an important possibility of moving from mediation to obtaining legal advice, assistance and, if necessary, representation, and back to mediation ... One can buy into mediation and, equally, one can buy into legal advice, assistance and representation as and when appropriate ...

There should be a genuine market in this service. The purpose of the information session is to inform the parties of the nature of that market and what it holds out. It should not be to drive people particularly those who are publicly assisted along a certain path ... It is quite wrong to say that because someone is eligible for legal aid he must go down one course and that someone who is not can do as he pleases ... it must be a genuine choice ... We look for the clearest possible indication from the Government that they accept the principle of a genuinely level playing field between mediation and court-based, lawyer-based solutions and services.⁵⁰

It was the notion of choice which prevailed and the 'level playing field' approach was acknowledged, with clear agreement that even if couples did choose to mediate they would most probably wish to seek legal advice. The extent to which this approach should be retained has emerged as a contentious issue during our evaluation.

The Search for Clarity and Focus

As in 1857, the Act which emerged from the parliamentary process in 1996 was substantially different from the Bill which the Lord Chancellor had introduced. Not all the changes were welcomed, and many members of the House of Lords expressed the view that the original provisions had been better. In respect of the period for reflection and consideration, Lord Irvine of Lairg commented:

... in some respects the Bill was a better Bill when it left this House ... I have expressed a number of times during our consideration of the Bill: that unnecessary delay and uncertainty would be in many cases detrimental to the

⁴⁸ Mr Llwyd MP (Meirionnydd and Nant Conwy), Official Report (Standing Committee E), 14 May 1996 at cols 249, 251, 252.

⁴⁹ Teresa Gorman MP (Billericay), Official Report (Standing Committee E), 14 May 1996 at col. 255.

⁵⁰ Mr Boateng MP (Brent, South), Official Report (Standing Committee E), 14 May 1996 at cols 259, 260.

interests of the children. I have confidence that the courts will be well able to identify the very many cases where that concern would be justified, so that the further six months should come out in those cases.⁵¹

Earl Russell was similarly concerned:

When a piece of legislation of this sort is introduced, it must be necessary to hope that it will last for at least a generation. I believe that the Bill the noble and learned Lord first introduced met that criterion. The Bill as we have it now, after bitter battles in the course of its passage, falls short of meeting it.⁵²

Despite these reservations, however, the amendments were accepted and a somewhat complex Family Law Act emerged. It has been described as ‘conceptually unusual’,⁵³ primarily because of the inclusion of a process which must be gone through before legal proceedings to terminate a marriage can be commenced, and because of the emphasis on counselling and support services which, for the first time, would be government-funded. As Cretney and Masson have pointed out, ‘the Family Law Act will revolutionise the concept of divorce’.⁵⁴ Nevertheless, they and others have remained sceptical about whether the predicted beneficial effects can be delivered. They point to an excessive reliance on the benefits of mediation, and to unrealistic assumptions about human behaviour:

We would all hope that the parties will indeed give anxious consideration to whether their marriage has broken down irretrievably and to the consequential arrangements. We must hope that mediation and counselling will be successful in this respect. But the evidence for believing that these expectations will be fulfilled is not overwhelmingly convincing.⁵⁵

Fears have been expressed that, notwithstanding ‘the admirable intentions of those who constructed the reform proposals’, the Family Law Act ‘will ensnare countless uncomprehending people in a monstrous and costly legal, social work and counselling nightmare’.⁵⁶ Part 1 of the FLA describes the four general principles underlying Parts II and III of the Act. These are:

- (a) that the institution of marriage is to be supported;
- (b) that the parties to a marriage which may have broken down are to be encouraged to take all practicable steps, whether by marriage counselling or otherwise, to save the marriage;
- (c) that a marriage which has irretrievably broken down and is being brought to an end should be brought to an end
 - (i) with minimum distress to the parties and to the children affected;
 - (ii) with questions dealt with in a manner designed to promote as good a continuing relationship between the parties and any children affected as is possible in the circumstances; and
 - (iii) without costs being unreasonably incurred in connection with the procedures to be followed in bringing the marriage to an end; and
- (d) that any risk to one of the parties to a marriage, and to any children, of violence from the other party should, so far as reasonably practicable, be removed or diminished.

⁵¹ Lord Irvine of Lairg, Official Report (H.L.), 27 June 1996 at cols 1070–1.

⁵² Earl Russell, Official Report (H.L.), 27 June 1996 at col. 1094.

⁵³ Cretney, S.M. and Masson, J.M., *Principles of Family Law* (6th edn.), Sweet & Maxwell (1997).

⁵⁴ *ibid.*, p. 374.

⁵⁵ Cretney, S.M., ‘Divorce reform in England: humbug and hypocrisy or a smooth transition’, in M.D.A. Freeman (ed.), *Divorce: Where Next?*, Dartmouth (1997), p. 52.

⁵⁶ Cretney and Masson, *op. cit.*, p. 382.

One could argue that the Act attempts to do too much, and that there were unrealistic expectations that one piece of legislation could save marriages, change the culture of divorce (one which has been dominant for centuries) and promote a new era of co-operative post-divorce parenting (what Smart has referred to as ‘social engineering’⁵⁷). In this sense, the Act can be seen as reasserting traditional family values within the context of divorce, and as presuming a standard model of family life and human behaviour which is capable of being shaped and influenced by certain interventions, and by new ways of approaching marriage breakdown. But, as was pointed out in debate:

The great problem with family law, which has beset every attempt this century to deal with family law reform, is that the rhetoric and reality seldom meet. The circumstances of breakdown are not altered by changing the rhetoric.⁵⁸

Information meetings emerged as the device for changing both the rhetoric and the reality, for identifying saveable marriages and for encouraging reflection and consideration on the steps which might be taken. There was an implicit belief that behaviour

is fundamentally rational, people will respond to information and reasoned argument; therefore, to achieve desired policy goals, all you need do is to explain them effectively and people will follow them.⁵⁹

Our evaluation of the pilots draws attention to the need to be clear about what information meetings can be realistically expected to achieve and about the focus which they should have. As Eekelaar has pointed out, ‘legal attempts to maintain particular patterns of behaviour, particularly with regard to family living, have not been very successful’.⁶⁰ The following observation of Paul Boateng during a Commons debate is particularly significant for a consideration of the pilots and the way in which their impacts may be judged:

It is an illusion to suppose that at the information meeting a magic wand can be waved that will direct people in the ‘right direction’ of mediators, lawyers and people concerned with reconciliation, because it will not happen.⁶¹

It was always the Government’s intention to pilot the novel interventions in the Act prior to its implementation. With a radically reconstructed piece of legislation to implement, it was left to the Lord Chancellor’s Department to interpret parliamentary intent and to establish pilot projects which would be evaluated. Operationalising Part II of the Act was to be no easy task.

⁵⁷ Smart, C., ‘Wishful thinking and harmful tinkering?’, *Sociological Reflections on Family Policy*, vol. 26 (1997), pp. 301–21.

⁵⁸ Mr Boateng MP (Brent, South), Official Report (Standing Committee E), 7 May 1996 at col. 133.

⁵⁹ Eekelaar, J., ‘Family law: keeping us on message’, *Child and Family Law Quarterly*, vol. 11, no. 4 (1999), pp. 387–96.

⁶⁰ *ibid.*

⁶¹ Mr Boateng MP (Brent, South), Official Report (H.C.), 25 March 1996 at col. 754.