Family Homes and Domestic Violence Bill [HL]

[Bill 141 of 1994-95]

Research Paper 95/105

25 October 1995

This note seeks to explain the background to the Bill and to discuss the major issues that were raised during its Lords stages. It is intended to be read in conjunction with the Law Commission report *Family Law: Domestic Violence and Occupation of the Family Home* [Law Com No 207, HC 1 of 1992-93], the *Notes on Clauses* on the Bill and the proceedings and evidence of the Special Public Bill Committee on the Bill [HL Paper 55 of 1994-95]. Criminal law aspects of domestic violence, police responses, non-legislative government initiatives and refuge provision are not covered in this note.

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I Introduction

In England and Wales existing civil remedies available in cases of domestic violence have been the source of much complaint. On 7 May 1992 the Law Commission published its report *Family Law: Domestic Violence and Occupation of the Family Home*[1] in which it said that the remedies are "complex, confusing and lack integration". At present the orders that the courts can make fall into two categories: orders designed to protect the applicant and/or children personally and orders dealing with the occupation of the family home. Applications can be made to the magistrates' courts, the county courts and to the High Court (although this would be unusual). The orders that are available differ according to the court to which an application is made and according to the marital status of the applicant. Adult persons other than spouses and cohabitants must rely on ordinary tortious remedies (eg injunctions ancillary to proceedings for trespass to the person, nuisance and personal injury) which may be less effective in securing protection for the victim.

II Current remedies

A. Magistrates' Courts

Applications may be made by spouses only. No protection is offered to those who are already divorced or who are simply cohabiting. Orders are made under section 16 of the *Domestic Proceedings and Magistrates' Courts Act 1978.* The principal orders available are **personal protection orders** to prevent violence or threats of violence against the person of the applicant and/or of a child of the family and **exclusion orders** regulating the occupation of the matrimonial home. The exclusion order may require the respondent to leave the matrimonial home or to prohibit him from entering it or to require the respondent to permit the applicant to enter and remain in the home. Unlike in the county court under the *Domestic Violence and Matrimonial Proceedings Act 1976* a person cannot be excluded from a specified area around the family home.

The court can only make personal protection and exclusion orders if it is satisfied that the respondent has already used or threatened violence. Harassment such as telephone calls, shadowing or other psychological harassment is not sufficient for the obtaining of an order in the magistrates' courts. In the case of personal protection orders the magistrates' court must also be satisfied that an order is necessary for the protection of the applicant or a child of the family. In the case of exclusion orders the court must also be satisfied that the applicant (or

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[1] Law Com No 207, HC 1 of 1992-93

child) is in danger of being physically injured by the respondent if the applicant (or child) were to enter the matrimonial home. The court can attach a power of arrest to either order provided that the respondent has already used violence against the applicant (or child) and the court considers that he is likely to do so again. Personal protection orders can be expedited where immediate protection is required. There is no power to make an expedited exclusion order.

B. County Courts

Orders can be sought in a number of ways in the county courts.

First, application may be made under section 1 of the *Domestic Violence and Matrimonial Proceedings Act 1976* by either spouses or cohabitants. The orders available are **non-molestation injunctions** to prevent violence, threats of violence and other forms of molestation and **ouster injunctions** to regulate occupation of the matrimonial home (as in the magistrates' courts) and, in some cases, to prevent a spouse or cohabitant from approaching within a specified distance of it.

Second, application may be made by a spouse to regulate the occupation of the matrimonial home or part of it under the *Matrimonial Homes Act 1983*. There is no power under this Act to exclude a respondent to domestic violence proceedings from a specified area around the family home.

Third, an application may be made ancillary to divorce proceedings for any necessary order but normally only non-molestation injunctions are granted. A spouse requiring an ouster injunction in the course of divorce proceedings would normally apply under one of the other jurisdictions.

Unlike in magistrates' courts there are no statutory conditions to be satisfied before a non-molestation injunction can be granted but the courts have shown that orders will be granted only if there is evidence that there has been molestation (not necessarily actual or threatened violence - harassment may be enough) and the court considers it necessary to grant an injunction to protect the applicant or a child living with her.

In emergency cases the court can grant non-molestation injunctions *ex parte* which means that the respondent will not be heard but the court must be satisfied that there is a real and immediate danger of serious injury. When considering applications for ouster injunctions or an order under the *Matrimonial Homes Act 1983* the court will have regard to the spouses'

conduct; their needs and resources; the needs of any children; and all the circumstances of the case. Powers of arrest can also be attached to injunctions obtained in the county courts.

Although domestic violence may result in criminal proceedings breach of an injunction is not a criminal offence. Failure to obey an injunction is a civil contempt and renders the respondent liable to committal to prison or a fine.

III Law Commission Report

In its report on *Family Law: Domestic Violence and Occupation of the Family Home*[2] the Law Commission attributed the inconsistencies and anomalies in the present law to a piecemeal statutory development and the adoption of a remedy for a particular purpose in one context for different purposes in another:[3]

> 2.23 There are many inconsistencies and anomalies in the present law. These have arisen largely as a result of piecemeal statutory development or adaptation of a remedy developed for a particular purpose in one context for different purposes in another.
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> The existing remedies have been developed in response to a variety of needs. Those under the Matrimonial Homes Act 1983 were first introduced in 1967 in order to ensure that deserted wives were not left without a roof over their heads, by giving them rights of occupation in the matrimonial home which could be registered and enforced against third parties, and by giving the court power to regulate occupation of the matrimonial home in the long or short term. To this was later added a power to prohibit the exercise by the property-owning spouse of his right to occupy the home. The remedies provided in sections 16-18 of the Domestic Proceedings and Magistrates' Courts Act 1978 and the Domestic Violence and Matrimonial Proceedings Act 1976 have protection against violence and molestation as their primary objective and were designed to provide an urgent legal response to this, which could include an exclusion order where the circumstances justified it. The principles applicable to regulating occupation of the home in the short or long term and to providing protection from violence and molestation are not necessarily the same. But it is impossible to treat them separately because, very often, the removal of one party from the house is the only effective protection which can be provided in cases of violence.

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2 *op cit*

3 para 2.23

The Commission was particularly concerned with the problems surrounding orders regulating the occupation of the matrimonial home, particularly under the *Matrimonial Homes Act 1983*. It summarised the possible criticisms as follows[4]:

2.26 A number of possible criticisms of the present law, and in particular the application of the Matrimonial Homes Act criteria, were put forward in the working paper and were generally approved by those who responded to it. These can be summarised as follows:

(i) the criteria are now out-dated, having first been enacted in 1967 for the purpose of identifying those non-owning spouses (usually wives) who were sufficiently deserving of long term accommodation in the matrimonial home to entitle them to resist dispositions to third parties; this was before most of the significant developments in this field;

(ii) by requiring the parties' conduct to be balanced against the other factors, the criteria may suggest that an ouster order is in effect punishment for bad behaviour, so that the court should be asking itself whether the respondent's conduct is serious enough to justify an order, rather than whether the effect upon the other people in the household is serious enough to do so;

(iii) these criteria with their concentration upon the conduct of the parties are applied to the whole range of very different situations: the need to provide immediate protection against violence or other forms of abuse; the need to resolve short term problems of accommodation when a relationship is or may be breaking down; and the need to resolve longer term problems where the relationship has already broken down;

(iv) where divorce proceedings have already begun, there may well be a need to resolve disputes about who should live in the matrimonial home in the short term, and if possible this should be done without either pre-judging issues which may be in dispute in the proceedings or forcing upon the parties a procedure that is based on language relying on conduct and fault whether or not they wish to pursue the disputes between them in those terms;

(v) there is a risk that the children's welfare will be given insufficient weight, contrary to the general trend towards giving increased, if not predominating, weight to their interests even in relation to matters of finance and property;

(vi) a general assumption that the effects of an exclusion order are invariably so severe as to merit the terms drastic or even Draconian, while obviously warranted in many cases, may obscure the considerable differences between the circumstances of the individual parties and in which the remedy is sought; in combination with a requirement that the respondent's conduct be bad enough to merit such a step, this may impede the sensible and practical resolution of the particular problem presented;

(vii) the Matrimonial Homes Act criteria are not easily applicable to unmarried couples, for example because they do not give any indication of the relevance, if any, or respective property rights.

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[4] para 2.26

The Commission also pointed out the difficulties caused by the more limited remedies available in magistrates' courts. In those courts, where it is relatively cheap and simple to obtain orders, only spouses may apply and there is no remedy for non-violent harassment. In addition, the present law provides no remedy for divorced spouses unless they happen to be again living together "as husband and wife". Rights of occupation under the 1983 Act end on divorce unless the court orders otherwise and if no order is made before the divorce none can be made after the divorce but before the financial orders following the divorce are made. A further "serious limitation of the law" was identified as the lack of any simple machinery comparable to that under the *Matrimonial Homes Act 1983* for adjusting cohabitants' rights of occupation.

The Commission considered various solutions to these problems and finally decided in favour of a new code containing a single, consistent set of remedies. The Commission had three aims in making its recommendations for reform:

- to remove the gaps, anomalies and inconsistencies in the existing remedies, with a view to synthesising them, as far as was possible, into a clear and comprehensive code
- to improve the level of protection from that available at present
- to achieve the above aims as far as possible without exacerbating the hostilities between the adults (this aim is consistent with the philosophy behind the Children Act 1989)

A substantial number of respondents to its consultation paper felt that reform should take account of the fact that domestic violence is not limited to violence between spouses, cohabiting partners and children, but is prevalent in many other forms of relationship. The Commission recommended, therefore, that non-molestation orders should be available to people who are associated with one another in any of the following ways[5]:-

(i) they are or have been married to each other;

(ii) they are cohabitants or former cohabitants;

(iii) they live or have lived in the same household, otherwise than merely by reason of one of them being the other's employee, tenant, lodger or boarder;

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[5] para 3.26

(iv) they are within a defined group of close relatives;

(v) they have at any time agreed to marry each other (whether or not that agreement has been terminated);

(vi) they have or have had a sexual relationship with each other (whether or not including sexual intercourse);

(vii) they are the parents of a child or, in relation to any child, are persons who have or have had parental responsibility for that child (whether or not at the same time);

(viii) they are parties to the same family proceedings.

Protection would therefore be offered in certain homosexual relationships and to elderly persons who were living with relatives.

Molestation goes wider than actual violence but it was recommended that it should not be subject to statutory definition in order that the courts have the flexibility to tailor orders to individual circumstances. The recommended criterion for granting non-molestation orders was "where this is reasonable having regard to all the circumstances including the need to secure the health, safety or well-being of the applicant or a relevant child"[6]. The aim of this model was to provide a complete and comprehensive code which is to be applied by all courts, including the magistrates' courts.

Another major objective of the Law Commission's proposals for reform was to remove the confusion between ouster orders, occupation orders under the 1983 Act and exclusion orders. The Commission recommended that the court should simply have power to make an occupation order, and that this should be capable of providing for a number of different matters. The order would be either declaratory or regulatory in its terms[7] .

Declaratory orders would be those:-

(i) declaring pre-existing occupation rights in the home;

(ii) extending statutory occupation rights beyond the termination of the marriage on divorce or death;

(iii) granting occupation rights in the home to non-entitled applicants ("an occupation rights order").

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[6] para 3.7

[7] para 4.1

The regulatory orders available would be those:-

(i) requiring one party to leave the home;

(ii) suspending occupation rights and/or prohibiting one party form entering or re-entering the home, or part of the home;

(iii) requiring one party to allow the other to enter and/or remain in the home;

(iv) regulating the occupation of the home by either or both of the parties;

(v) terminating occupation rights; and

(vi) excluding one party from a defined area in the vicinity of the home.

It was recommended that occupation orders should be available to those to whom non-molestation orders are available where the applicant has a legal right of occupation in the property. Where he or she has no such right then it is recommended that an occupation order should be available only to cohabitants or former spouses[8]. Spouses always have a legal right of occupation in the matrimonial home and come within the first category. Where a person with no legal entitlement to occupy the home (ie a person in the second category) applied for an occupation order the court would be required to consider the following qualifying criteria:[9]

(i) where the parties are cohabitants or former cohabitants the nature of their relationship, the length of time during which they have lived together as husband and wife and whether there are children of both parties or for whom both parties have parental responsibility;

(ii) where the parties are former cohabitants or former spouses, the length of time that has elapsed since the marriage was dissolved or annulled or since the parties ceased to live together; and

(iii) the existence of any pending proceedings between the parties for financial provision or relating to the legal or beneficial ownership of the dwelling house.

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[8] para 4.9

[9] para 4.13

Regulatory orders would actually alter the right to occupation despite a person's legal entitlement to occupy the home and the Commission recommends that the court should have power to grant considering all the circumstances of the case and in particular the following factors:-

(i) the respective housing needs and resources of the parties and of any relevant child;

(ii) the respective financial resources of the parties; and

(iii) the likely effect of any order, or of any decision by the court not to make an order, on the health, safety and well-being of any relevant child.

It was also recommended that the court be under a duty to make an order if significant harm to the applicant (or child) greater than that to the respondent would result if an order were not made[10] .

Various other recommendations were made which would allow the courts to retain a general discretion to make *ex parte* orders in cases of emergency and to attach a power of arrest to orders.

A draft Bill was attached to the Commission's report. On 15 June 1994 the Lord Chancellor announced that[11]:

> "The Government have decided to implement almost all of the recommendations contained in the [Law Commission's] report and consider them to provide a firm basis upon which to reform the law relating to the civil remedies for domestic violence and occupation of the family home. Legislation to implement the recommendations will be introduced when a suitable opportunity occurs. The Government have not accepted the recommendation to give the police power to take civil action on behalf of victims of domestic violence or the recommendation for two of the proposed new categories of associated persons who would be able to apply for non-molestation and occupation orders. The categories which have not been accepted are people "who have at any time agreed to marry each other (whether or not that agreement has been terminated)", and people "who have or have had a sexual relationship with each other (whether or not including sexual intercourse)"."

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[10] para 4.33

[11] HL Deb vol 555 c97WA - 15.6.94

IV Other Reports

In July 1992 Victim Support published its Working Party report on *Domestic Violence.* The Working Party included national representatives from the police, Women's Aid Federations, Victim Support, Relate, the Probation Service, Social Services and the legal and medical professions. It was set up to look at domestic violence in a context wider than the problem of crime. It recognised the effect that violence and threats of violence might have on the health of families and noted the vulnerability of women who were socially and economically dependent on men. The report made a large number of recommendations and the Working Party was surprised at the consensus among its members, both in relation to seeing domestic violence as a major social problem and to the means necessary to reduce it and help victims. One of the major principles behind the recommendations was that civil law should be improved and simplified to provide better protection for women and children from violence occurring in their own homes[12].

The Home Affairs Select Committee published its report on *Domestic Violence*[13] in February 1993. The Committee made a number of recommendations, many of which reinforced the recommendations already contained in the Victim Support and Law Commission Reports. The Committee largely endorsed the Law Commission's proposals and recommended that legislation based on the Commission's draft bill be introduced in the next session of Parliament[14]. No legislation was introduced in that Session.

The Committee recommended the rejection of the Law Commission's proposal that the police should have the power to pursue civil remedies on behalf of the aggrieved party in domestic violence cases on the grounds that police powers should not be extended from a criminal function to a civil function. This aspect of the Law Commission's proposals has been rejected by the Government[15].

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[12] para 9.5
[13] Third Report of 1992-93, HC 245
[14] para 119
[15] HL Deb vol 555 c97WA - 15.6.94

V The Bill

The *Family Homes and Domestic Violence Bill [HL]* was introduced into the House of Lords on 9 February 1995. It is seen as a major reforming measure in the field of family law and it follows on from the *Children Act 1989* by bringing together a large number of piecemeal statutory provisions in a single piece of legislation. On Second Reading the Lord Chancellor endorsed the view of the Law Commission[16] that the changes provided for in the Bill will[17]:

- remove the gaps, anomalies and inconsistencies in the existing remedies, with a view to synthesising them as far as possible into a clear, simple and comprehensive code
- improve the level of protection available for victims of domestic violence
- avoid increasing hostilities between the adults involved so far as compatible with providing proper and effective protection both for adults and children

The Bill was taken under the Jellicoe procedure which provides for less contentious law reform bills to be committed to a Special Public Bill Committee in the Lords. The Committee can hear evidence and go through a bill clause by clause. Membership of such a committee does not guarantee the Government a majority; independent peers hold the balance. On Second Reading in the Lords the Lord Chancellor said:[18]

> I believe that the Bill will make a considerable contribution to the interests of victims of domestic violence. I also believe that it is uncontroversial in party political terms. We all appreciate the damage which can be inflicted by perpetrators on victims and on their families. I commend the Bill to the Special Public Bill Committee as a candidate for the non-controversial Bill procedure. Indeed, I have had some discussion in that respect. I believe that it is appropriate that that should be done.
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> I hope that noble Lords will feel that what I have said today illustrates my belief that the Family Homes and Domestic Violence Bill provides a firm a comprehensive foundation for the reform of the civil remedies for domestic violence. Therefore, I commend the Bill to the

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16 see page 9
17 HL Deb vol 561 c1255 - 23.2.95
18 c1257

House for Second Reading.

One commentator praised the effect of considering the Bill in a Special Public Bill Committee concluding that "the inevitable and constructive result of which has been to deal now with important issues of scope, jurisdiction and interpretation which all too often only arise after Bills have passed into law".[19]

In the Commons the Bill was committed to a Second Reading Committee and it passed both that stage and Committee stage with very little debate.[20]

The Bill seeks to implement most of the Law Commission's recommendations. It seeks to provide for the regulation of occupation rights to a dwelling-house; to make provision for preventing the molestation of one person by another; to enable the court to include in certain orders under the *Children Act 1989* provision excluding the abuser from the home; to make provision for the transfer of tenancies between spouses and cohabitants; and to apply section 17 of the *Married Women's Property Act 1882* to cohabitants. It would repeal and replace the whole of the *Domestic Violence and Matrimonial Proceedings Act 1976* and the *Matrimonial Homes Act 1983*, together with the relevant parts of the *Domestic Proceedings and Magistrates' Courts Act 1978.* Much of the existing law is, however, re-enacted in the current Bill.

On Lords Second Reading the Lord Chancellor explained which of the Law Commission's recommendations were being rejected and the reasons for this:[21]

> I mentioned earlier that the Government are not seeking to implement every recommendation contained in the Law Commission's report. The recommendation that the police should have the power to pursue civil remedies on behalf of an aggrieved party was rejected because it would have involved a novel extension of police powers from a criminal function to a civil function. It would have required the police to decide whether to seek an order on the basis of brief contact with the parties, amounting to no more than a snapshot of a particular incident. In addition, it would have imposed significant and unaccustomed responsibilities upon the police for which the service has neither the resources nor the requisite expertise.
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> The other significant policy departure from the recommendations of the Law Commission concerns the categories of people entitled to apply for orders. The categories proposed by the Law Commission of: persons who had at any time agreed to marry each other; and persons who have or have had a sexual relationship with each other were rejected, because the persons within them may not have the same domestic link as those in the other categories. In some cases, the relationship might have been brief and the parties would never have lived together. There might also be problems for the courts of definition and proof, which would not apply to the other categories. If that happened, it would undermine the principle that domestic violence remedies should be able to be obtained swiftly in emergencies. Of course, that does not mean that there would not be other remedies available to such people; but it means that the simplified form of procedure available under the

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[19] Hudson, *Domestic Violence and Fiancées* New Law Journal 5.5.95

[20] SRC Deb 26 June 1995 cc 3-6 and SC Deb 'B' 4 July 1995 cc 3-4

[21] c1256-7

Bill would not be available to them for the reasons
that I have given.

VI The Main Provisions of the Bill

The Bill seeks to provide a single consistent set of remedies - "non-molestation orders" and "occupation orders" - which would be available in all courts having jurisdiction in family matters.

A. Associated Persons

Orders would be available to associated persons. By **clause 2** a person would be associated with another person if -

(a) they are or have been married to each other,

(b) they are cohabitants or former cohabitants (ie they are or have been living together as man and wife[22]),

(c) they live or have lived in the same household, otherwise than merely be reason of one of them being the other's employee, tenant, lodger or boarder,

(d) they are relatives,

(e) they have agreed to marry one another (whether or not that agreement has been terminated),

(f) in relation to any child they are both that child's parent or have or have had parental responsibility for that child or they are parties to the same family proceedings. In relation to adopted children persons would be associated to each other if one is a natural parent or grandparent of the child and the other is an adoptive parent of the child.

Orders would then be available to a much wider range of people than at present. Orders could be sought to protect against elderly abuse and abuse by aggressive adult children, for example, in certain circumstances. The exception in (c) above would mean that domestic servants would not be able to seek protection under the Bill.

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[22] as defined in clause 1

Persons who are associated by reason of their agreement to marry would need to be able to produce evidence of their agreement to marry in accordance with **clause 15**.[23]

B. Non-molestation Orders

Non-molestation orders are provided for in **clause 13**. They are defined as orders containing either or both of the following provisions: a provision prohibiting a person from molesting an associated person and a provision prohibiting the molestation of a relevant child (defined in **clause 3** as any child who is living or might reasonable be expected to live with either party to the proceedings, any child in relation to whom an order under the *Adoption Act 1976* or the *Children Act 1989* is in question in the proceedings, and any other child whose interests the court considers relevant). Molestation itself is not defined in the Bill following the recommendation of the Law Commission that it should not be so. It took the view that the concept is well defined and recognised by the courts. Molestation goes wider than actual violence to encompass serious pestering and harassment. An order could be expressed so as to refer to molestation in general, to particular acts of molestation or to both [**clause 13(6)**] and could be made for a specified period or until further order [**clause 13(7)**] but will cease if the family proceedings in which it was made are withdrawn [**clause 13(8)**].

Non-molestation orders could be made either on application to the court or the court could make such an order by its own motion in other family proceedings. Where persons are associated by reasons of their having agreed to marry no application could be made after three years from the termination of the agreement to marry.

The criteria for granting such orders are set out in **clause 13(5)**. The court would have to have regard to all the circumstances including the need to secure the health, safety and well-being of the applicant and of any relevant child.

C. Occupation Orders

Occupation orders are provided for in **clauses 7** to **12**. They replace ouster and exclusion orders. The provisions of the Bill are complicated and the availability of each particular form of occupation order depends on the property rights entitlement of the applicant. In respect of orders regulating occupation of the dwelling-house the court would be required by **clauses 7(6)** and **(7)** to have regard to all the circumstances including the respective housing needs and housing resources of the parties and any relevant child, the respective financial resources of the parties and the likely effect of any order, or the decision of the court not to make an order, on the health, safety and well-being of the parties and any relevant child. The court

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[23] see page 24

would be required to make an order if the applicant or any relevant child is likely to suffer significant harm if the order is not made subject to the proviso that an order would not be made if the respondent or any relevant child would suffer from significant harm if the order were made and that harm is as great or greater than that likely to be suffered by the applicant. "Harm" is defined in **clause 32** as ill-treatment or the impairment of health and, in relation to a child under 18 years, impairment of development.

By **clause 9** the court could make an occupation order in relation to cohabitants, former cohabitants and former spouses where the applicant has no entitlement to occupy the dwelling-house. In making such an order the court would be required to have regard to the factors discussed above and the following further matters. In relation to cohabitants and former cohabitants, the nature of their relationship, the duration of the cohabitation and whether there are children of the relationship and, in relation to former cohabitants and former spouses, the length of time that has elapsed since the parties ceased to live together and in the case of former spouses, the length of time that has elapsed since the marriage was dissolved or annulled. The court would also be required to take into account the existence of any pending proceedings relating to the dwelling-house.

The proposed availability of occupation orders to cohabitants has recently aroused some controversy in the press.[24] It has been suggested that cohabitants are now being placed on the same legal footing as spouses and that this is a novel development in this area. Concern has been expressed that the proposals might undermine marriage. Other groups such as Families Need Fathers are worried that cohabitants in a relationship of relatively short duration could secure occupation of a home that did not belong to him or her.[25]

Personal protection remedies in cases of domestic violence were extended to cohabitants living together as husband and wife by the *Domestic Violence and Matrimonial Proceedings Act 1976*. The present Bill also specifically limits the availability of orders to cohabitants living together as husband and wife. This is a question of fact for the court to decide. However, the making of occupation orders under the Bill is not limited to cases of domestic violence and orders could be sought by cohabitants where the relationship has broken down but there has been no violence. In this respect the Bill seeks to provide an order to cohabitants that was previously unavailable to them. The factors that the court would be required to have regard to in making an occupation order where the cohabitant has no pre-existing rights to occupy the dwelling-house are described above. It is not possible to determine exactly how applicants would be dealt with by the courts in practice until a body of case law has developed. It should be noted that the Bill does not create a legal status of "cohabitant" for all purposes.

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[24] see, for example, Anger at Bill to 'sabotage' marriage - *Daily Mail* 23.10.95

[25] pp 20-27, Written Evidence, HL Paper 55 of 1994-95

The Government's *Notes on Clauses* for the Commons stages of the Bill make the following remarks about the criteria relevant to non-entitled applicants as set ou in **clause 9(4)**:

> This subsection sets out the criteria to which the court is to have regard in exercising its power to grant occupation rights under subsection (2). It requires the court to consider the criteria prescribed in section 7(6) in relation to regulatory orders together with three qualifying criteria specific to non-entitled applicants. These take into account:
>
> - the nature and duration of the parties' relationship;
> - how recently they parted; and
> - the existence of any proceedings between them for financial provision or relating to the legal or beneficial ownership of the dwelling house.
>
> It implements the recommendation in paragraph 4.13 of the Law Commission's Report, and part of the second recommendation in paragraph 4.18.
>
> There are no specified criteria in relation to non-entitled applicants under the current system. However, the Law Commission felt that statutory criteria would help clarify the circumstances in which an order should be made and offer some consistency. The Commission was of the view that criteria such as specifying a fixed time since the breakdown of the relationship of former spouses or cohabitants was likely to be too.restrictive. It thus recommended a more discretionary approach which would allow the court to make orders which reflect what might be the parties' legitimate expectations according to the circumstances of each individual case. This is consistent with the approach adopted in Scotland under the Matrimonial Homes (Family Protection)(Scotland) Act 1981 where the court is directed to consider all the circumstances of the case, including the time for which the parties have been living together and whether there are any children of the relationship.
>
> In paragraph 4.18 of their Report, the Law Commission recommended that occupation and regulatory orders should effectively be considered in two stages, although in most cases where a non-entitled applicant is applying for rights of occupation and an order regulating or extending such rights the process would in practice be telescoped. The court would first consider the non-entitled applicant's request for an occupation order and then for the regulatory order. The Law Commission thought that it was desirable to ensure that the qualifying criteria for the grant of occupation rights to non-entitled applicants did not obscure the applicant's case for a regulatory order in a situation of overwhelming need. The Commission considered that there may, for example, be cases in which the applicant's case for an occupation order is not particularly strong (perhaps because she has lived with the respondent only for a matter of weeks) but in which her need is so great that it would nevertheless be just for her application to be granted (perhaps because she is ill, has the respondent's baby to care for and nowhere else to go).

Clause 9(8) provides that orders in such circumstances would be of a limited duration up to a maximum of six months. Extensions for further specified periods of up to six months would be possible. In its report the Law Commission said that "in the case of non-entitled applicants, an occupation order is essentially a short term measure of protection intended to give them time to find alternative accommodation, or, at most, to await the outcome of an

application for a property law remedy".[26]

Clause 10 makes provision for orders to be made in circumstances where neither spouse or cohabitant or former spouse or former cohabitant has a right to occupy the dwelling-house.

Additional provisions could be included in certain occupation orders by the court on making the order or at any time thereafter under **clause 11**. These include repair and maintenance obligations, discharge of rent or mortgage payments etc, payments by one party to the other, directions as to possession and use of furniture, obligations to take reasonable care of that furniture and obligations to take reasonable steps to secure the dwelling-house and its contents. In deciding whether and how to exercise its powers under this clause the court would be required to have regard to all the circumstances of the case including the financial needs and financial resources of the parties and the financial obligations which they have or are likely to have in the foreseeable future including financial obligations to each other and any relevant child.

D. Ex Parte Orders

Non-molestation orders and occupation orders could be made *ex parte* (ie without notice to the respondent) in cases where the court considers it just and convenient to do so [**clause 16**]. In determining whether to exercise its powers the court would be required to have regard to all the circumstances including any risk of significant harm to the applicant or a relevant child if the order is not made immediately, whether it is likely that the applicant will be deterred or prevented from pursuing the application if an order is not made immediately and whether there is reason to believe that the respondent is deliberately evading service of the proceedings. The respondent would be afforded an opportunity to make representations relating to the *ex parte* order at a hearing as soon as just and convenient. At present *ex parte* orders regulating the occupation of a dwelling-house are extremely rare.

E. Undertakings

Clause 17 seeks to provide for the acceptance by the court of undertakings from any party to the proccedings. This would be likely to be done where the parties wanted to avoid the antagonism of a full hearing. Undertakings would be enforceable in the same way as a court order, except that no power of arrest may be attached to an undertaking and the court could

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[26] para 4.7

not accept an undertaking in circumstances where a power of arrest is appropriate.

F. Powers of arrest

Clause 18 and **Schedule 2** seek to provide for the court's powers to arrest for breach of, and to attach a power of arrest to, an occupation or non-molestation order.

G. Emergency Protection of Children

Clause 23 and **Schedule 3** seek to amend the Children Act 1989 to enable the court to make an ouster order for the protection of children when making an emergency protection or interim care order, which will permit the removal of a suspected abuser from the home instead of having to remove the child.

VII Main issues arising during the Lords Proceedings

A. Family Court

The Bill is intended to provide a unified set of remedies in all the courts dealing with domestic violence case. On Second Reading Baroness David said:[27]

> First, I must say that it is altogether satisfactory that the jurisdiction of the courts will operate in the same way as under the Children Act 1989. One of the great advantages of that Act and the rules made under it is that they introduce a basically unified system for dealing with family matters relating to children which applied throughout all the courts. The different levels of court will have the same powers save that the magistrates' court will have some more limited powers than county courts and the High Court in relation to occupation orders. And it will be possible to transfer cases to a different level of court where this is necessary because of the complexity of the case and/or the need to hear the application with others affecting the parties in different courts. This is seen as being consistent with the eventual introduction of a family court for which many of us have been asking for a very long time. I am sure that the noble Baroness, Lady Faithfull, will support me in this. These arrangements should make it very much easier for those needing to go to law; and, I hope, also cheaper.

In reply the Lord Chancellor said that the believes that there is, in effect, a family court at present:[28]

> Perhaps I may say a word about the family court. I believe that we have one. There are, of course, questions relating to what the family court should do in all circumstances. I hope to address matters such as mediation which arise out of the Green Paper that I produced some time ago in relation to the grounds for divorce. Work on that is proceeding as fast as the nature of the problem permits.
>
> I am also very conscious of the point that was made by the noble Baroness, Lady Fisher of Rednal, the noble Lord, Lord Mishcon, and others, that there is a need for inter-agency co-operation. That is perhaps true right across the field with which we are concerned. There are state agencies in these fields, and there are also many voluntary agencies.
>
> I believe that it is extremely important to build

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[27] HL Deb vol 561 c1264 - 23.2.95

[28] c1269

on the tremendous amount of expertise and effort that comes from the voluntary organisations in this field. Many serve with a sense of real commitment as their primary reason for being in those organisations. It is very necessary to do what one can to co-ordinate these matters. I am busily engaged on trying to see what arrangements can be made in respect of mediation. As noble Lords will know, there is more than one organisation in that field. If there is any question of trying to extend my operations in that area, a degree of co-operation is a necessary basis for further progress.

The Children Act-particularly with its jurisdictional provisions-in effect set up a family court, because it allowed these proceedings to be taken either in the family proceedings court at the magistrates' level or in the county court, presided over by judges who have made special studies, and, finally, the Family Division. The result is that at every level one gets the necessary family jurisdiction.

As I said earlier, it does not necessarily mean that everything that everybody wants should be available in a family court. An example would be mediation. My noble and learned friend Lord Hailsham of Saint Marylebone, when he held office, commissioned some research on mediation. One of the conclusions drawn by that Newcastle study was that, on the whole, court annexed mediation probably gave not quite such good results as non-court annexed mediation.

B. Definition of Associated Persons

There was concern about the exclusion of two of the categories recommended by the Law Commission from the definition of "associated persons". In addition there was discussion as to whether the Law Commission's recommendation itself was sufficiently embracing as it did not include the new partner of someone who has broken off a relationship with a former partner and who may be threatened by a former partner.

On Second Reading Lord Archer of Sandwell made the following comments about the exclusion of persons who have or had agreed to marry[29]:

First, it is said that it may be difficult for a court to establish whether persons fall into the categories. I must say I find that surprising. Courts have been deciding whether people have agreed to marry since long before the case of *Bardell v. Pickwick*, and they have been deciding whether parties have had a sexual relationship since before the establishment of the divorce court in 1857.

The second reason is that the categories may not be in such a vulnerable position as other categories. I have discussed the matter with experienced practitioners in the field. They say that often it is precisely those in these situations, where the hopes of one party are frustrated at the outset, where passions are least restrained. They also say that intervention at this early stage may head off more serious problems later. We await with interest the discussion of that issue in Committee.

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[29] HL Deb vol 561 c1259 - 23.2.95

In Committee Baroness David moved an amendment which sought to include fiancés and former fiancés within the definition of "associated persons". She said:[30]

What I am aiming to do in this amendment is to put back into the Bill one of the conditions in Clause 2 of the Law Commission Bill. The first four conditions in the Bill before us are the same as for the Law Commission Bill, but I wish to add the fifth paragraph in the Law Commission Bill, which states that associated persons will be those that have at any time agreed to marry each other, whether or not the agreement has been terminated.

Why I am convinced that this paragraph should be put back in the Bill is really because of what Mrs. Justice Hale said to us when she gave evidence, and I do not think I can do better than to cite what she said because that puts my case completely:

"The next point is including the two categories that we proposed but the Government has decided not to adopt, and I certainly hope that you would give very careful consideration [that is, the Committee] to reinserting at least one of those and preferably both. I was glad to see that so many of your respondents have also taken the same view. The point about which I am particularly concerned and it is the point to which the President of the Family Division refers to in his evidence, when he says he understands I am going to make a point and he agrees with it, it is this point-that is the question of couples who have been engaged to marry one another. It seems to me that the fact that this can sometimes be disputed and/or difficult to prove, is not a sufficient reason to deny relief in the very many cases when it is not in dispute or is easy to prove. Usually an agreement to marry is quite easy to prove and is frequently not at all in dispute. The relationship may have been at least as long and the emotions just as intense as many cohabitations or even marriages, and the need for protection or a remedy just as great. I also find it something of an affront to those quaintly old-fashioned couples who do not live together before they marry, that they should be denied a remedy given to those who do live together, either before or with no thought of marriage. They may also have acquired a property, which is intended to be their matrimonial home when they marry, and there is a strong case for allowing occupation orders between them at least if they are jointly entitled, or in favour of the one who is entitled-so as to sort out what is to happen to that house in the short term before it can be disposed of, or whatever. I could even see a case for extending all of the occupational remedies to them, on the basis that if they have obtained a house that was intended to be their matrimonial home, it ought to be possible to deal with it, whatever the position is as to its legal ownership or tenancy."

I was also supported in my wish to put this back into the Bill by the evidence that we had from Victim Support. It said:

"We welcome the fact that the Bill widens the list of categories of those who may apply for Orders. However, we very much regret the fact that two categories recommended by the Law Commission-those who at any time had agreed to marry each other and those who have or have had a sexual relationship with each other-were rejected. The reasons for our concerns are as follows"

and this applies to my amendment-

"Those who had agreed to marry:

We are concerned that this omission may disproportionately affect members of some ethnic minority groups where formal agreements to marry are customary and where cohabitation may not be involved."

That makes the case that I want to put. I beg to move.

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[30] Special Public Bill Committee Deb 24 April 1995, c4

In reply the Lord Chancellor suggested that a compromise solution might be possible on report and the amendment was withdrawn. He said:[31]

As your Lordships know, I have taken the view that this amendment is not appropriate. I believe that it would introduce into the Bill a category of persons who could have considerable difficulties in relation to definition and proof as part of the domestic violence jurisdiction. I believe that the important point as regards that jurisdiction is that it may often be needed in emergency situations. If it is difficult for the court to establish a jurisdiction, it is likely to affect the speed with which a remedy may be granted. That would defeat an important object of the domestic violence legislation-a fast remedy for the protection of an applicant.

I believe that it is not necessary for those who have agreed to marry to be included as a separate category within the Bill. Many people who could fall under this category will already be included within the wide range of other applicants able to apply for remedies, particularly the categories of cohabitants or the parents of a child. Those who do not fall within the categories in the Bill are, of course, able to apply for remedies under the law of tort. In my view, the law of tort is more suitable in this context than the domestic violence jurisdiction. In particular, the parties would never have lived together and thus a potential applicant will have a separate residence so that the regulation of property rights is likely to be less relevant. There is also the consideration that parties may not be in such a vulnerable position as others who are resident in the same household as their attacker, and may have nowhere else to go. However, if they are in such a position, the law of tort will be available to them.

As the noble Baroness has mentioned, some of the witnesses spoke in favour of extending this, including Mrs. Justice Hale, who suggested that this would require careful consideration. Mrs. Justice Hale I think accepted that there would be circumstances in which this category would be quite difficult to prove, and that is the problem that I have in accepting the amendment. The amendment, in its present form anyway, cannot distinguish between cases where the proof is difficult and cases where it is not. I think it is particularly important that the Family Law Bar Association and Judge Fricker, who are extremely familiar with the day-to-day operation of this jurisdiction, were-as I understood their evidence-against this.

During the evidence, one witness-and I have Judge Fricker in mind here-argued very cogently that if family law remedies were stretched to cover wider issues, it was likely to have an adverse effect on family law, and I think that that is true.

I noticed that in moving her amendment the noble Baroness referred to a situation in which there was a formal agreement to marry. It seems to me that there may be seeds of a possible compromise in this if the amendment could make it clear that it applied only to cases in which the proof of the agreement was very easy. Formal agreement to many would be one way of doing it, but I am not sure whether that would necessarily by the only way.

It would certainly help to solve my problem if the noble Baroness were able to propose an amendment which excluded the category of case which Mrs. Justice Hale freely accepted was involved-the category where it would be quite difficult to prove whether or not there has been an agreement to marry, and your Lordships will not require me to outline the sort of cases in which that might be very difficult to prove. In the case of quite a long relationship, the real question is: did itamount to an agreement to marry? If you have to try to analyse that over a lengthy relationship, I think that your Lordships will see what the problem is. If that is a preliminary to the jurisdiction, it could be very awkward for the nature of this jurisdiction.

My short answer to this amendment is that it involves introducing into the qualifications categories which may be very difficult to establish in fact in particular cases, and thus would destroy

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[31] c4-6

the summary nature of the remedy which is involved here.

On report the Lord Chancellor successfully introduced an amendment to extend the categories of "associated persons" to persons who have agreed to marry one another (whether or not that agreement has been terminated[32]. Orders will be available only if there is evidence of an agreement to marry which by **clause 15** should be written evidence of the agreement to marry; or the agreement to marry is evidenced by the gift of an engagement ring or a ceremony before witnesses. In the latter case this would not necessarily be a betrothal ceremony but a marriage ceremony that was not valid for the purposes of English law and is hoped to ensure the protection of certain members of ethnic minority groups.

C. Tort of Harassment

The protection of the Bill extends only to "associated persons" as defined in **Clause 2**. It will not, therefore, offer protection in cases of "stalking" if there is no association between the stalker and his victim. At Committee stage the Lord Chancellor said that he considered the development of a new branch of tort in this area to be important. He said:[33]

I have certain proposals in mind relating to privacy which could have an effect on some of this area if by any chance it were to progress by legislation. Even if it did not progress by that method, it might progress by other methods which would have some effect.

I think that the general area of tort that is in issue here may well be a matter for the Law Commission to look at more systematically, and I would certainly wish to consider that as a possibility because I think the judiciary may well develop this area. It is always difficult because it depends on the cases that they get and how suitable they are for making developments. But I certainly have in mind that this is an area of tort law which should not be neglected either by the judiciary, if that happens, or alternatively by promoting legislation after study by the Law Commission,

D. Children

A new clause (now **clause 14***)* was introduced at Committee stage as a provision similar to that in section 10(8) of the *Children Act 1989* to require that children should only be able to apply for a non-molestation or occupation order with leave of the court, and that leave should only be granted if the child has sufficient understanding to make the application. This requirement will not extend to young people aged 16 or 17 who are believed to be likely to

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[32] HL Deb vol 564 c1061-2 - 25.5.95

[33] Special Public Bill Commitee Deb 24 April 1995, c5

have sufficient understanding to make application under the Bill and who may, in any event, be married[34].

E. Undertakings

In Committee the Lord Chancellor introduced a new clause (now **Clause 17**) which seeks to allow courts to accept undertakings from a respondent (ie an alleged perpetrator of violence) without making a non-molestation or an exclusion order. This is already common practice in the county courts but magistrates' courts do not have this power at present. Undertakings are promises make to a court which technically have the status of a court order. They avoid the need for a contested hearing which may further deepen bad feeling between the parties. The clause seeks to ensure that all relevant courts will now have the same powers in line with the idea that the Bill provides a unified set of remedies in cases of domestic violence.

Other amendments made during the Lords proceedings were largely of a technical nature.

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[34] c10

VIII Implementation

Detailed rules of court will be necessary for the implementation of the Bill when enacted [see **clause 27**]. It is envisaged that it may take one or two years for these rules to be in place.

IX Legal Aid

The Government has estimated that the provisions of the Bill, when fully implemented, could result in some small savings to the legal aid fund but the Lord Chancellor has said that he has no plans to publish the analysis of the legal aid implications of the Bill.[35]

[35] HC Deb vol 252 c693W - 20.1.95

Appendix

Lords Debates

Second Reading - HL Deb vol 563 c.1254ff 23 February 1995.

Special Public Bill Committee - PBC Deb 24 April 1995 and HL Paper 55 of 1994-95.

Report State - HL Deb vol 564 c.1061ff 25 May 1995.

Third Reading - HL Deb vol 565 c.220ff 20 June 1995.

Commons Debates

Second Reading Committee - SRC Deb 26 June 1995.

Committee Stage - SC Deb 'B' 4 July 1995.

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Research Paper 95/105 **Section Code: HAS**

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