Chair's Column

HHJ Edward Hess

Chair of the Editorial Board,
Deputy National Lead Judge,
Financial Remedies Court

The FRJ website

I am delighted to see from a perusal of the latest statistics on the use of the range of FRC-related resources on the FRJ website (www.financialremediesjournal.com) that the vision of providing the 'go to' place for financial remedies practitioners has become a reality, with 408,847 views of the website in 2023 and, based on the first 5 months, heading towards in excess of 500,000 in 2024. There are also now 6,375 X (formerly Twitter) followers. Amongst the website views are of course a large number of views and downloads of the journal itself, and I am pleased to commend the summer issue as containing some very important contributions on a wide range of topics.

The future of MCA 1973, s 25

All financial remedies lawyers await with interest the report, or 'scoping paper', from the Law Commission – due in the months ahead – on the possible reform of s 25, shorthand for the possible reform of the entire way that the court is enjoined to approach the distribution of assets and income on divorce. The Law Commission exercise, from my observation being conducted with great care and skill by Professor Nicholas Hopkins and his team, will no doubt wish to consider the strong and contrary views expressed on this subject in this edition by Baroness Deech ('Reform of Financial Provision on Divorce') and Sam Hillas KC ('A Reply to Baroness Deech's Argument for Reform'). Does our current structure promote unpredictable exercises of discretion which unacceptably drive up costs to the benefit only of the lawyers involved and thus require urgent and radical reform *or* have the developments in judge-made case law in recent decades ensured that the law is reasonably settled to enable the vast majority of cases to be dispatched by specialist judges relatively swiftly? This issue includes an excellent interview with Baroness Hale, in which she describes herself as a 'very good friend' of Baroness Deech, but expresses real concern about her proposals in this area: 'it is likely that the people who would be most adversely affected by a much more cut and dried, rigid approach to things would be those people – usually women – who have compromised their place in the [external] workplace … in order to do what on the whole is in everybody's interests: to look after their homes, their families, to have children, to help to bring them up'. It will be interesting to see what the Law Commission makes of all this, but it will ultimately be a matter for politicians in the autumn and beyond.

Pensions on divorce

The Galbraith Tables, the brainchild of Jonathan Galbraith, the CEO of Mathieson Consulting, were launched some two years ago and made their appearance in the very first issue of the FRJ. The subsequent period has seen their adoption into *At A Glance* and a gradual familiarisation with what they set out to do. A policy decision was made not to attempt to update the tables every month or every quarter, but they have to accommodate significant long-term financial changes such as the now well-established increased interest rates which have followed events in autumn 2022. Hence the production of the second version of the Galbraith Tables. Those interested in this subject are recommended to look at the article in this issue by Jonathan Galbraith and Chris Goodwin, 'Galbraith Tables v2: Why they Have Changed'.

The PRFD

I must declare an interest as a former DJ (PRFD), but the history of this institution, its rise and its fall, is very much interwoven with the developments and changes in family law over the decades and thus should be of interest to historians of family law. This issue's contribution from Sir James Munby and Sir Nicholas Mostyn, 'The Origin, History and Present Status of the Principal Registry of the Family Division', charts the developments from 1857 to the present day, explaining and exploring what happened to it when the Family Court was established in 2014. The statutory changes which took effect in 2014 contrived to leave in theoretical place the roles of DJ (PRFD) and the Senior District Judge of the PFRD, such that the FPR continue to include many references to them, even though these species are extinct, apart from a number of holders of the title DDJ (PRFD). This article explains where the vestigial remains of this institution exist in the present day and what has happened in practice to the various records and registers once entrusted to the institution – divided between the RCJ and the CFC. The article intriguingly identifies the

ongoing obligation on the PRFD (under FPR 12.38) to maintain a register of wards of court – but, if there ever was such a register kept, nobody seems to know who kept it or where it was kept and certainly nobody is keeping it now. If any reader has any information on what happened to it, please let me know!

Congratulations

Many congratulations to Sam Hillas KC, FRJ Editorial Board member and regular contributor to the FRJ, for her award as Pro Bono King's Counsel of the Year at the recent Advocate Pro Bono Awards. The judges commented: 'Your willingness to do whatever is necessary to give pro bono clients the best possible outcome is truly inspiring'. I think we can all agree with this sentiment and note her magnificent contribution in this area. In an era and an area of law where legal aid is fairly non-existent, this is absolutely vital work. Not everybody is prepared to do the work, so it is important to celebrate those who are.

Reform of Financial Provision on Divorce

Baroness Deech

What's the problem?

After much hesitation and delay, both from the government and the profession, it seems that at last the Law Commission will set to reforming the law of financial provision on divorce. The significant problems of this area were addressed, but not completely resolved, in the Law Commission report *Matrimonial Property Needs & Agreements*.[1] The report covered the difficulties, stress, uncertainty and expense of the English/Welsh law relating to the division of assets and ongoing maintenance awards on divorce. The current law is s 25 Matrimonial Causes Act 1973, which has not been reviewed by Parliament for nearly fifty years despite radical changes in society and families. It has been the subject of calls for reform from the Law Commission, Resolution[2] and the Centre for Social Justice.[3] Reform is urgent because the law is uncertain. It has become largely judge-made law, which bears little resemblance to the statute. Judicial discretion has led to unpredictability and conflicting decisions, which make it hard for parties to negotiate and lead to disproportionate costs. Legal aid has been removed and parties of modest means are left unrepresented with little guidance as to the right outcome.

One could say that it goes so far as to contravene the rule of law. Lord Bingham's definition was that the law must be accessible and, so far as possible, intelligible, clear and predictable.[4] The English law of financial provision is none of these. The outcome varies from judge to judge and era to era. The result is unpredictable. The principles change every time the Supreme Court has the opportunity to give judgment in – usually – a case concerning wealth. Even the most experienced of solicitors and barristers cannot predict the award. The uncertainty pushes couples to settle for fear of what a judge might unpredictably order, and that is not in accordance with the rule of law. The law is occasionally altered with retrospective effect, such as when many years after the divorce the claimant spouse returns to court for a fresh or increased order based on new situations. Valid contracts, that is pre-nuptial agreements, are set aside on grounds that may not seem fair or justifiable. Section 25 Matrimonial Causes Act 1973 has been interpreted out of all recognition and s 25A of that Act (clean break) is frequently ignored. It is also unsatisfactory that there should be such a difference between the law of England/Wales and of Scotland, and England/Wales and the rest of the western world especially when there are so many international marriages.

Our Private Member's Bill

Now that there is hardly any legal aid and, indeed, even when it was available, costs associated with uncertainty are a deplorable waste of resources that ought to be preserved. The vested interests of barristers who act for the very few extremely wealthy couples, and who have opposed all reform, should not be permitted to block reform for the average and the many.[5] I have been arguing for reform since 1977,[6] shortly after I started teaching family law. Once Baroness Shackleton, with her wealth of experience in practice, joined in calling for reform, things moved quickly and in April 2023 the Ministry of Justice asked the Law Commission to review the law. I fear that it will be a long drawn-out process over years – will it happen in my lifetime? – and that even if the Law Commission reports that thorough reform is needed, there is no guarantee that the government of the day will implement its recommendations. Before we even get to that stage, there is more delay caused by the Law Commission's decision to carry out a scoping review, reporting later this year. This is really unnecessary given that so much is known about the law and its problems[7] and about other countries that have managed to reform it with little difficulty, Scotland being the best example.

Baroness Shackleton and I have introduced in the Lords in successive years the Divorce (Financial Provision) Bill[8] which would implement provisions very similar to those pertaining in Scottish law, and in the laws of most European and North American states. It would introduce as a fair starting point the equal division of all the property and pensions acquired by the couple *after* marriage; provision for short-term maintenance for an ex-spouse and longer maintenance for children; flexibility to allow the home to be retained for the carer and children; and binding pre-nuptial agreements. This is intended to facilitate mediation, reduce litigation and costs, and recognise equal partnership in marriage. We have born in mind the likely move to more

technology in family law settlements, necessitating a law that works with online and AI use. This is the model we hope the Law Commission will recommend.

Reform pre-nups at the very least

The 2014 report by the Law Commission contained a draft bill on pre-nuptial agreements. While one could suggest that it contained too many discretionary provisions that might thwart certainty, nevertheless it would have been an improvement had it been brought into law. Pre-nuptial agreements have become more acceptable and common since then, especially in international marriages, but the uncertainty as to whether they are enforceable has given rise to very costly litigation to determine whether or not they are valid.[9] This defeats the purpose, even though more than ten years have passed since the groundbreaking *Radmacher* judgment.[10] There seems to be a gradual move to more acceptance of them. Certainly, if there is any more delay in reforming financial provision law, immediate introduction of a pre-nuptial agreements bill would remove much of the trouble because it would enable couples to make their own arrangements and bypass the law to a significant extent. The argument put forward by the government that one cannot reform family law piecemeal and that therefore pre-nuptial agreements have to wait is simply untenable.[11] At the very least the Law Commission should reiterate its pre-nuptial agreements proposal.

No-fault divorce was introduced in 2022.[12] There is no point in bringing in no-fault divorce with the aim of removing the bitterness and deception alleged in fault-based divorce when the same elements, writ large, dominate financial provision law. Increasing numbers are turning to arbitration and mediation in order to avoid the courts.

The kids aren't alright

The position of the children involved in divorce is not sufficiently considered in the law. Baroness Shackleton and I want maintenance for children to continue to the age of 21, given that so many continue into higher education, and to shift the focus of financial settlement towards the support and housing of children. The enormous legal costs attaching to disputed financial cases sometimes dissipate the very assets that should be preserved for the children. Examples include a monthly award of £177 for a child which racked up £150,000 in costs.[13] There are many accounts of cases where nearly all the assets are wasted on the costs of litigation.[14] In *M* v *M* each spouse emerged with £5,000 of liquid assets having incurred nearly £600,000 of costs.[15] In *ND* v *GD* costs of £483,000 exceeded the amount in dispute between the couple and represented 18% of their wealth.[16] The eponymous case of *A Wife v A Husband*[17] was a small money case which involved 7 years of litigation and £1.5m in costs. There are many more accounts of disproportionate costs and expressions of judicial disapproval of them. While some couples do litigate unreasonably, the judicially created uncertainty escalates costs. One judge at a financial dispute resolution hearing might estimate the award to a wife to be £Xm, and shortly thereafter another would estimate £2Xm, and the varying approaches of different judges are well known. Issues that should have been resolved years ago recur: the effect of premarital cohabitation; conduct; childlessness; future earnings; extraordinary contribution; length of marriage and others.

Full marks for Scotland

Scottish law has received an excellent review from an inquiry into its 30-year history, *Built to Last*.[18] I hope the Law Commission will take on board the Scottish provisions. The principles it should aim for are: s 25(2) Matrimonial Causes Act 1973 should be replaced; only matrimonial property including pensions should be available for sharing at the end of a marriage; pre- and post-nuptial agreements should be binding with certain conditions; as a starting point property should be shared equally; limited term periodical payments; and support for children up to the age of 21.

If a more formulaic approach of the sort proposed were adopted it would lend itself more readily to online use, as trialled in Australia;[19] and would be of assistance to couples who have no legal representation. They amount to about 40%, a proportion that is rising.[20] It would save costs, leaving fewer issues over which to negotiate or litigate, and would provide a useful starting point for mediation. It would be fairer, being based on equal division and on equality of the sexes as former partners. It might dispel the widespread feeling of unfairness generated by existing law.[21]

There is no European state with a law as discretionary and stereotyped as English/Welsh law. They often have community of property systems and no or short-term maintenance, as well as binding pre-nuptial agreements. The comparable laws of New Zealand, Australia and the USA resemble the Scottish model, not the English.[22]

Will the Law Commission grasp the nettle?

I hope the Law Commission will look at the matter of principle addressed by other countries, namely, ending the status of the ex-wife (usually) as a supplicant asking for her needs to be met by her ex-husband, and turn instead to treating her as an equal partner in the venture of marriage. The default position of many judges and academics seems to be that women are less employable once married. This is at odds with government calls for women to take up to half the positions on boards, in the judiciary, universities and so on. It contrasts with the attitude of other western countries. It has been argued that maintenance has to be long lasting and generous in England/Wales because social support for women is insufficient. Yet the Global Gender Gap Index has the UK at above average, and ahead of many states that have financial provision laws resembling those recommended here.[23] The complex affairs of the very wealthy will no doubt always present difficulties and require the services of lawyers, but others should be assisted by this new approach. Judgments and recent academic writings[24] place great emphasis on the contribution made by a wife as the rationale for ongoing maintenance – styled compensation – after the end of the marriage. This takes one back to the arguments of more than 50 years ago when 'irretrievable breakdown' became the sole ground for dissolution, sweeping away with it in theory any reason for ongoing spousal support. This much was admitted by Leo Abse MP, a driver of reform, and incidentally a relative of mine.[25] The resistance to divorce

reform in the late 1960s was on ideological grounds (the 'innocent' wife losing her status) but also, when it was clear that that position was not sufficiently convincing, the arguments switched to the inadequacy of support for the wife after divorce. That dichotomy is revived today: on the one hand, family law should reflect the independence and autonomy of spouses and the equality of women within marriage; on the other hand, the assumption that she has always to be protected financially through a man's resources. The economic position of women and the opportunities available to them have changed significantly over those 50 years and it is alarming to see the neo-feminists of today chipping away unthinkingly at the grounds of women's equal standing.

The contribution made by ex-wives as a rationale for maintenance is based not only on an untested model but is also associated both with the ideas that a woman should expect to rely on providing womanly services as a *quid pro quo* and with the commodification of men's role in marriage. He is only good for financial support, it seems. The use of stereotypes in this debate reflects their use in court. Taken at face value, the typical wife's contribution through housework and childcare in marriage indeed attracted compensation, there and then, through the support provided by the typical husband throughout their joint lives, the housing, clothing, support, holidays and every affordable need of the wife and children. She is paid, if that is how it is to be regarded, every day. Sadly, however, the message being given out by those who are too young to remember the many waves of feminism before the current one, is that the best that a woman can do is attach herself to a man and count on him for support for all time. Moreover the rewards are regressive. The better off the husband the less burden the wife may have taken on and the more she will already have been compensated by way of being provided with necessaries and more. It is in the poorer families that the wife cannot afford the luxury of staying at home and has to have a job, but is unlikely to receive any award of significance on dissolution. Universal Credit will be reduced pound for pound by the maintenance award. Even the benefits system requires women to be available for work when the children are quite young. It is noteworthy that the departure from this stereotype often occurs where a wife who is wealthier than her ex-husband might find herself giving a great deal to him, an outcome the judges seem reluctant to contemplate very often.[26] Unless the principle is addressed, the status of a wife will remain as that of a needy supplicant, not a partner in the financial dissolution. Moreover, in our law there continues to be no support for the many women, and men, who truly deserve support because they have given lifelong care, the sisters, the daughter-carers of parents, who usually have no claim. It is hard to understand why a sexual relationship, even brief and childless, is taken as the passport to financial claims throughout family law and state provisions, but not the caring relationship. Significantly, academic writers' focus on the need to support ex-wives is blind to the needs of single women in jobs where they are paid less than men, or have smaller pensions, and the single mothers where the father is not supporting the child. This pressure for lifelong support for divorced women is hardly feminist at all in its focus only on women who attached themselves to a man.[27]

English exceptionalism

In relation to theoretical hardship resulting from reform, no answer from opponents has ever been given to the question why England/Wales is alone in the western, Antipodean and North American world in its treatment of spousal dependency and unequal division.[28] The proposed Scottish-style reforms would offer an off-the-peg solution. They would end the attitude of some barristers that, since we all look better in Savile Row suits, there must be no Marks & Spencer ready-made. By legislating for equal partnership it would also bring an end to the demeaning situation that continues to be adopted in English law and society, namely that the status of the woman is forever determined by the man she marries. Simone de Beauvoir captured this in 1949 when she wrote that 'man defines woman not in herself but as relative to him … she is defined and differentiated with reference to men … women live … attached through residence, housework, economic condition and social standing to certain men'.[29] I hope the Law Commission will be brave.

Notes

1 Law Com 343 (2014); D Hodson 'The Law Commission proposals: a wasted opportunity' *Family Law* (2014), www.familylaw.co.uk/articles/the-law-commission-proposals-a-wasted-opportunity-passing-the-reform-buck-and-continued-unpredictability-for-future-settlements
2 https://resolution.org.uk/news/call-for-early-legal-advice-to-soften-blow-of-divorce/
3 *Every Family Matters* (Centre for Social Justice, 2nd edn, 2010).
4 Tom Bingham, *The Rule of Law* (Penguin, 2010).
5 www.bbc.co.uk/programmes/m000zt7b. I have been dismayed at the bitter and sometimes personal hostility displayed by lawyers when I urge reform.
6 Ruth Deech, 'The Principles of Maintenance' (1977) 7 *Family Law* 229.
7 The Nuffield Foundation Bristol University *Fair Shares* project, www.bristol.ac.uk/media-library/sites/law/news/2023/Fair%20Shares%20report%20-%20final.pdf showed that couples of modest means muddled through their financial settlements and are in need of legal advice.
8 https://bills.parliament.uk/bills/2564/publications
9 *S v H* [2020] EWFC B16; *Ipekci v McConnell* [2019] EWFC 19; *Brack v Brack* [2018] EWCA Civ 2862, and many more.
10 *Radmacher v Granatino* [2020] UKSC 42.
11 *Hansard*, HL Deb, 25 April 2023, vol 829, col 1098.
12 The Divorce Dissolution and Separation Act 2020.
13 *JM v KK* [2021] EWFC 54.
14 The litigation costs of £7m–£8m were described as 'apocalyptic' in *Xanthopoulos v Rakshina* [2022] EWFC 30; in *ABX c SBX* [2018] EWFC 81 the assets were under £2m, costs £1.1m; in *HRH Prince Louis of Luxembourg v HRH Princess Tessy of Luxembourg* [2018] EWFC 77 the majority of the liquid assets were spent on costs of £500,000 and the child maintenance award was £4,000 pa; there was no money in *AJ v DM* [2019] EWHC 702 (Fam) and an enormous amount of legal costs; *Piglowska v Piglowska* [1999] 2 FLR 7643, HL where the assets were £127,400 and costs £128,000; *WG v HG* [2018] EWFC (Fam) 84, award to wife £4.05m, her costs £900,000; *MB v EB (No 2)* [2019] EWHC 3676 (Fam), award to husband £485,000, his costs £650,000, wife's £600,000; *WC v HC* [2022] EWFC 40, costs were 13% of the total assets.
15 *M v M* [2020] EWFC 41.
16 *ND v GD* [2021] EWFC 53.

17 [2023] EWFC 200.

18 J Mair, E Mordaunt and F Wasoff, *Built to Last: The Family Law (Scotland) Act 1985* (Nuffield Foundation, 2016).

19 See P Parkinson (n22 below).

20 www.gov.uk/government/statistics/family-court-statistics-quarterly-july-to-september-2023/family-court-statistics-quarterly-july-to-september-2023

21 See the typical comments by *Guardian* and *Daily Mail* readers here: www.theguardian.com/lifeandstyle/2019/mar/16/five-lessons-having-an-amicable-divorce; www.theguardian.com/lifeandstyle/2017/mar/19/divorce-women-risk-poverty-children-relationship; www.theguardian.com/law/2015/mar/11/woman-wins-right-seek-money-ex-husband-30-years-after-break-up-dale-vince; www.theguardian.com/uk-news/2015/feb/24/judge-ex-wife-millionaire-work; www.dailymail.co.uk/news/article-4204214/Court-order-makes-man-pay-ex-wife-s-mistakes.html#comments; www.dailymail.co.uk/news/article-10531601/Men-raw-deal-divorce-cases-according-women-splitting-from.html#comments; www.dailymail.co.uk/tvshowbiz/article-4097646/CBB-s-Jamie-O-Hara-reveals-s-struggling-pay-ex-wife-Danielle-Lloyd-s-15-000-month-maintenance.html#comments

22 For comparative material, see J Scherpe, 'A comparative overview of the treatment of non-matrimonial assets, indexation and value increases' (2013) 25 CFLQ 61; J Scherpe, 'Marital Agreements and Marital Property' (2012) 42 *Family Law* 865; J Scherpe, *Marital Agreements, Private Autonomy in Comparative Perspective* (Hart, 2012); J Scherpe, 'Towards a Matrimonial Property Regime for England and Wales', in *Fifty Years in Family Law* (eds R Probert and C Barton; Intersentia, 2012); New Zealand's Property (Relationships) Act 1976 contains a presumption of equal division limited to the 'relationship property'. This has recently been reviewed by the New Zealand Law Commission in the *Review of the Property (Relationships) Act 1976* (2016) whose recommendations if implemented would bring New Zealand law even closer to the provisions of the Divorce (Financial Provision) Bill 2021. Australia has modernised an online approach www.familyproperty.com.au/ explained by P Parkinson, 'Family Property division and the new technologies' [2020] *Ex Curia* 25. *Your Europe* an official website of the European Union, summarises the various laws of the EU states, europa.eu/youreurope/citizens/family/couple/divorce-separation/index_en.htm. US states laws are handily summarised at www.maritallaws.com/laws/alimony. Some states have community of property, many have alimony calculators, with less judicial discretion, only six allow for permanent alimony and some are moving in the direction of the Divorce (Financial Provision) Bill. Florida is an interesting example, and the history of the reform movement is set out at www.myfloridalaw.com/alimony/florida-alimony-reform/

23 www.statista.com/statistics/244387/the-global-gender-gap-index/#:~:text=The%20Global%20Gender%20Gap%20Index%2C%20is%20a%20framework%20for%20capturing,14%20indicators%20from%20these%20categories. The cost of childcare in England is far too high but financial provision law tends to apply similarly to women with or without children, caring for the children themselves or with help, in or out of work.

24 Invariably by women who themselves are pursuing a career.

25 E.g. *Hansard*, HC Deb, 24 January 1969, col 819; 12 June 1969, col 2017.

26 E.g. *Stack v Dowden* [2007] UKHL 17; *Radmacher v Granatino* [2010] UKSC 42; *Kianoosh Azarmi-Movafagh v SorourBassiri-Dezfouli* [2021] EWCA Civ 1184.

27 As Baroness Hale said at the launch of Cambridge Women in Law on 27 September 2019, few women can make it on their own and her most important advice was to pick the right partner www.thetimes.co.uk/article/lady-hale-pick-the-right-partner-to-be-supreme-at-law-bg0nk699v

28 It reminds me of the old joke: mother watches the passing-out parade and comments 'look at my son, the only one in step!'

29 Simone de Beauvoir, 'Introduction', in *The Second Sex* (Penguin, 1949).

A Reply to Baroness Deech's Argument for Reform

Samantha Hillas KC

St John's Buildings

Conceived as a companion piece to Baroness Deech's article calling for reform of s 25(2) MCA 1973,[1] it soon became clear that writing this was a harder task than I envisaged. That is not because the article is not well written, researched or persuasive. My difficulties were two-fold and circular. Given that I am probably one of those self-interested barristers so denounced in the article,[2] my first problem was whether my *bona fides* would hold up. Secondly, in my opinion, there is little substance to the case for reform advanced. But then I would say that, wouldn't I? My problem was therefore how to convey that without a line-by-line take down of a 3,000-word article, which would likely be both dull to the reader and considered impolite.

Problem 1 – my *bona fides*

Do I have self-interest in separating parties' instructing lawyers to resolve financial issues at the end of their relationship? Yes, I do. That is my job.

But do I have self-interest in preserving a system which, according to the article, is unfair and arguably contravenes the rule of law? Of course not. Like every other barrister I know, I became a barrister because I want fairness and justice to prevail. If change is required to achieve fairness and justice then sign me up.

The reality is that my professional interests would in fact best be served by a radical overhaul of the entire legal basis of the area of law in which I practise, as is proposed. That would keep my younger colleagues in chambers busy well beyond my own retirement and, just as the law was settling down, statute would have to be changed again to reflect the societal norms then prevailing (which, according to the article, is the purpose of the reforms proposed now).

I now have almost 30 years' experience of financial remedies work, be it in one capacity or another. I work for very rich people who have paid me very well and I work free of charge for people with no money at all.[3] My practice has encompassed legal aid and private work both as a solicitor and a barrister, over a wide geographical area, at every level of court from the magistrates to the Supreme Court and involving assets from the few to the plenty.

Hoping all of this resolves the first problem, let us now turn to the theory.

Problem 2 – the theory

The ill to be cured

The ill that Baroness Deech seeks to cure is the asserted unpredictability of outcome in financial remedy cases. It is said this arises from the exercise of judicial discretion which 'has led to unpredictability and conflicting decisions' and 'which bears little resemblance to the statute'. The consequence of that, the theory goes, is increased fees for those who can afford to pay lawyers and confusion for those of modest means who would have previously qualified for legal aid but are now forced to act in person.

The cure

It is argued that the remedy to cure this ill is statutory change: to repeal the statutory criteria set out in s 25(2) MCA 1973 and replace them with another set of statutory criteria as set out in the seven sections of the proposed Divorce (Financial Provision) Bill referenced in the article[4] ('the Bill').

The intended consequences of reform

It would appear from the article that there are three main intended consequences of reform: predictability of outcome; a consequential reduction in costs spent in financial remedy cases; and a necessary feminist repositioning of women as equal partners to a marriage. Let us look at each of those in turn.

(1) Predictability

There is of course a world of difference between what is described as 'unpredictability' and *flexibility* and it would be a mistake to confuse the two. In *GW v RW*[5] Nicholas Mostyn QC (as he then was) said 'the law in this area is not moribund but must move to reflect changing social values'. The important developments in the law relating to financial provision – *White*[6] (outlawing gender discrimination); *Miller; McFarlane*[7] (sharing, needs, compensation); *Radmacher*[8] (pre-nuptial agreements); *GW v RW* (cohabitation moving seamlessly to marriage) – have all been decided to reflect changing societal norms and against the backdrop of s 25(2) MCA 1973.

'We are the original common law jurisdiction based on discretion, fairness criteria and flexible judge led law'.[9] If

judicial discretion is the enemy of predictability – as argued in the article – it is not clear to me how the Bill intends to circumvent this.

In fact, what is clear on my reading of the Bill is that the new statutory criteria would require judges to continue to make all sorts of decisions in the event of a dispute. This would include deciding what is 'matrimonial property' for sharing purposes; deciding the extent to which mingling affects the sharing of otherwise non-matrimonial assets; deciding whether the cost of determining those issues is proportionate; deciding whether there are any relevant factors relating to conduct or contributions or the needs of children under the age of 21 which would affect the outcome; deciding the validity and enforceability of any nuptial agreement; et cetera, et cetera, et cetera.

All of which sounds very familiar.

In any event and by way of challenge to the essential premise, is it right to say that outcomes in financial remedy cases are presently unpredictable?

In his 'The Financial Remedies Court: The Road Ahead',[10] Peel J said that:

> 'I firmly believe that financial remedies law is not, or should not be, as complex as sometimes it is made out to be. Dare I suggest that the law, centred on familiar principles of sharing and (most commonly) needs, within the overarching section 25 matrix, is reasonably settled. The vast majority of cases, dealt with by specialist judges, can be dispatched relatively swiftly.'

In my experience, specialist financial remedy practitioners may from time to time be disappointed with the outcome of a contested financial remedy matter, but cases in which the outcome is not one which could have been *predicted* are, in reality, few and far between.

That is exactly why financial dispute resolution hearings are so successful. Whether via a private FDR conducted by a specialist financial remedy practitioner or a court-led FDR conducted by a financial remedies judge, parties to a financial remedy case will, in the ordinary course of events, receive a clear, objective indication of likely outcome and how settlement might be achieved.

(2) Costs

In any jurisdiction, there will always be people who want to litigate cases and spend a lot of money doing so. It is unfair to blame the lawyers for this.

I can do no better than to quote from Baroness Hale in the interview published in this issue of the *Financial Remedies Journal*[11] about resolving financial remedies cases:

> 'of course it does need both goodwill and common sense on *both* sides. And the thing about family cases is that people's emotions are involved, people's self-esteem is involved. And they also have their own ideas about what's fair … which are governed by all sorts of things in their personalities and backgrounds. And that makes it hard for some people to accept what one hopes is sensible advice about how the case should be settled. There used to be a perception that family lawyers wanted to fight cases and I think there are probably people who still think that's the case but most of the research that goes into what solicitors do suggests that they are very settlement focused.'

I respectfully suggest that a change in statute law would have little or no effect on those litigants who want to fight. We will be simply creating another set of rules for them to fight over.

Furthermore, I struggle to see how creating another set of statutory rules for litigants in person to follow will ease the burden on them trying to navigate the system. Unless the government of the day reverses its decades-long trend of dismantling legal aid, the legal profession will no doubt continue to step up and do its best to serve those who cannot afford legal fees. We will continue to support Advocate, the pro bono charity, we will continue to volunteer at law centres, we will continue to train others to volunteer, we will continue do our best to educate through writing papers, speaking at conferences, recording podcasts. At the other end of the spectrum, however, we will continue to be settlement-focussed, ensuring that only the most complex cases litigate.

(3) A feminist repositioning of women as equal partners

The theory goes that, in England and Wales, we are entirely out of step in failing to address the 'principle addressed by other countries, namely, ending the status of the ex-wife (usually) as a supplicant asking for her needs to be met by her ex-husband, and turn instead to treating her as an equal partner in the venture of marriage'.

As a consequence, the clear message being sent by our lawmakers is 'that the best that a woman can do is attach herself to a man and count on him for support for all time.'

If that is the message being sent, then no one is paying attention because that it is not something I recognise from my own practice. Spousal periodical payments orders are becoming rare (joint lives orders rarer still) and will be ordered only in those cases where needs require it (as would be the case in the new Bill), where there is insufficient capital from which to meet those needs (ditto) and anything other than a term order has to be justified (ditto). This is clear from the Nuffield Foundation's *Fair Shares* Report,[12] which debunks a number of myths about the prevalence of orders for spousal periodical payments. All the new Bill adds is an arbitrary cut off after 5 years, and even that is extendable.

Further, I am afraid the 'Bill as feminist revolution' theory rather falls down for me when the article suggests that ongoing, post-separation PPs are unnecessary because wives are 'rewarded' enough every day of the marriage for their contribution towards housework and childcare, with their husbands paying for their housing, clothing and holidays. Moreover, it is argued, the 'rewards' are regressive: the wife of a rich man probably does even less around the house or by way of looking after children, but will receive more 'reward' during the marriage than the wife of a poor man.

For the avoidance of any doubt, I reject as illogical the argument that, in objecting to that transactional and utterly outdated view of marital partnerships I am, according to the article, a 'neo-feminist … chipping away unthinkingly at the grounds of women's equal standing'. On the contrary, I subscribe to the view that there is no room for gender discrimination when resolving financial remedy claims and that (as set out below) if *either* spouse is disadvantaged financially by choices made during a marriage, there ought to be sufficient flexibility built into the system to ensure a levelling up when that marriage comes to an end.