

*THE LAW REFORM COMMISSION*

AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

(LRC 1 - 1980)

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FIRST REPORT ON FAMILY LAW

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CRIMINAL CONVERSATION, ENTICEMENT AND  
HARBOURING OF A SPOUSE OR CHILD, LOSS OF  
CONSORTIUM, PERSONAL INJURY TO A CHILD,  
SEDUCTION OF A CHILD, MATRIMONIAL PROPERTY  
AND BREACH OF PROMISE OF MARRIAGE

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PART I





REPORT NO. 1 - 1980: FAMILY LAW

In this Report, the Law Reform Commission make final recommendations regarding the matters covered in four of their Working Papers:

Working Paper No. 4 - 1978, The Law Relating to Breach of Promise of Marriage

Working Paper No. 5 - 1978, The Law Relating to Criminal Conversation and the Enticement and Harboursing of a Spouse

Working Paper No. 6 - 1979, The Law Relating to Seduction and the Enticement and Harboursing of a Child

and

Working Paper No. 7 - 1979, The Law Relating to Loss of Consortium and Loss of Services of a Child.

The Report also contains recommendations on another matter on which the observations of the public were not sought in previous Working Papers: in their further analysis of the property questions relating to broken engagements to marry, the Commission came to the view that it would also be appropriate at this time to make recommendations relating to matrimonial property.

Published with the Report are a draft Bill and Explanatory Memorandum. The Bill gives effect to the recommendations made in this Report.

On central questions of principle, the Commission, after due consideration in the light of comments made upon the Working Papers, do not recommend any fundamental change. The theme that runs throughout Working Papers No. 5 to No. 7 is that of protection of the family against damage to the continuity and stability of relationships among its members. This is consistent with the provisions of Article 41 of the Constitution, in particular section 1.2, wherein the State guarantees "to protect the Family in its constitution and authority" and section 3.1, wherein the State pledges itself "to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack." Moreover, the protection of the privacy of family relations is a policy that has received recognition in our Constitutional jurisprudence.

Much of the comment that has been made in public discussion of the subjects covered in Working Papers No. 5 to No. 7 has concentrated on the discreditable aspects of the tort of criminal conversation (which the Commission propose to abolish) without reference to the merits of protecting the family through the process of the civil law.

This report will contain a brief discussion of some aspects of the matters first discussed in the Working Papers mentioned above. No attempt will be made to re-argue the advantages and disadvantages to the central recommendations: the Working Papers contain this analysis and there is little point in going over the same

ground again. The order of discussion follows the sequence of the draft Bill.

#### Criminal Conversation

In Working Paper No. 5, the Commission proposed that the tort of criminal conversation be abolished<sup>1</sup>. The Commission considered that "the rather barbarous theoretical basis of the action"<sup>2</sup>, which savours of a proprietary interest in one's spouse, offends against modern notions. Moreover, the action no longer confers any ulterior legal benefit upon the plaintiff. The Commission noted that it could be argued that the criteria by which damages for criminal conversation are awarded are offensive to contemporary standards in that they reduce the question of the emotional damage suffered by the plaintiff and of the value of his spouse to commercial considerations. As against this, the Commission considered that it might be said that the question of compensation - which may arise in a negligence or fatal accident case, for example - always involves what, from one point of view, might be considered to be an offensive process of estimating in monetary terms a person's value. In this context, it was noteworthy that compensation of up to £1,000 is allowed in fatal accident cases for mental distress and that the concepts of solatium in Scots law and dommage moral in French law are firmly established.

The fact that the action has somewhat dubious historical origins, however, is not necessarily a reason for our law to deny a right of action for adultery if such an action would serve a sound policy purpose judged by the standards

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<sup>1</sup> W.P. No. 5, p. 56.

<sup>2</sup> English Law Commission's Working Paper No. 9, Matrimonial and Related Proceedings - Financial Relief, para. 132 (1967).

of today, namely, the protection of family relations and of stable family life. Accordingly, the Commission recommended that there should be a family action for adultery (independently of any proceedings for divorce a mensa et thoro<sup>3</sup>) available to either spouse for the benefit of the members of the family, comprising each spouse and the children (including legally adopted children and children to whom either spouse is in loco parentis).<sup>4</sup> It was proposed that damages should be capable of being awarded (in part or in whole) to the plaintiff's children, and, in appropriate cases, to the adulterous spouse<sup>5</sup>, the Court being required to assess the damages payable to each member of the family. Where the plaintiff spouse condoned or connived at or, by wilful neglect or misconduct, conduced to, the adultery, the Commission recommended<sup>6</sup> that the Court should have a discretion as to the amount of damages (if any) to be awarded to that spouse. Finally, it was recommended<sup>7</sup> that there

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<sup>3</sup> Id., p. 59.

<sup>4</sup> Id., p. 56.

<sup>5</sup> Id., p. 61.

<sup>6</sup> Id.

<sup>7</sup> Id., p. 60.



should be a rebuttable presumption that the defendant was aware that the plaintiff's spouse was married; the presumption would be rebutted only where the defendant showed that he or she neither knew nor had any reasonable cause to believe that the person was married.

In Working Paper No. 6, it was proposed (on p. 13) that, in the family action for adultery, the evidence of adultery should be corroborated.

The Commission, after due consideration, are satisfied that these recommendations are desirable and should be given legislative effect. In respect of two specific aspects, however, the Commission recommend certain modifications.

The first modification relates to the question whether the family action for adultery should be available where the spouses are not residing together at the time of the adultery. The Commission consider that it would be advisable to limit the right to take an action to cases where the spouses are ordinarily residing together. The essence of the wrong is damage to the continuity and privacy of the family: where the spouses are no longer residing together, these elements will generally be of far less force. It is true that this limitation may make it more difficult in certain instances for a spouse to prove that adultery has been committed; the action for enticement would, however, be available in at least some of these cases.

The second modification relates to the members of the family for whose benefit the action may be taken. The Commission consider that, apart from the spouses, only those children who are ordinarily residing with the family should be entitled to benefit. The damage to children living away from home would be likely to be less severe in many cases than that suffered by the children who are living with the spouses. The Commission consider that a "child" in this context should be defined as meaning a person who is under the age of eighteen years and who is not or has not been married. (Under the Commission's proposals in respect of the age of majority, made in Working Paper No. 2<sup>8</sup>, the age of majority would be reached at eighteen years or on marriage if under the age of eighteen.)

The third modification is in relation to the proposal that the Court should be given a discretion as to the amount of damages (if any) to be awarded to the plaintiff spouse where he or she has "by wilful neglect or mis-conduct conducted to the adultery". The Commission consider that the requirement that the neglect or misconduct be "wilful" is unduly restrictive, and accordingly have deleted the word "wilful" from the draft Bill.

#### Enticement of a Spouse

In Working Paper No. 5, the Commission recommended<sup>9</sup> that the present action for enticement of a spouse should be retained as

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<sup>8</sup> W.P. No. 2 - 1977, The Law Relating to the Age of Majority, the Age for Marriage and Some Connected Subjects, paras 2.38, 2.45.

<sup>9</sup> W.P. No. 5, p. 67.

a family action for damages, with certain amendments. It was proposed<sup>10</sup> that the action should be available to either spouse for the benefit of the members of the family unit, to be defined as comprising each spouse and the children (including legally adopted children and children to whom either spouse is in loco parentis.)

As with the family action for adultery, it was recommended<sup>11</sup> that damages should be capable of being awarded separately to each of the children and in appropriate cases to the enticed spouse. In this regard, it was recommended<sup>12</sup> that the Court should be required to assess the damages payable to each member of the family. A proposal was made<sup>13</sup>, again similar to that in respect of the action for adultery, to the effect that the Court should have a discretion as to the amount of the damages (if any) to be awarded to the plaintiff spouse where he or she had condoned, or connived at or, by wilful neglect or misconduct, conduced to, the enticement.

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<sup>10</sup> Id.

<sup>11</sup> Id., pp. 67-68.

<sup>12</sup> Id., p. 73.

<sup>13</sup> Id.

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The Commission, after due consideration, are of the view that these recommendations are desirable and should be given legislative effect. Certain specific modifications, however, appear to the Commission to be required. These modifications are in effect the same as those proposed in respect of the action for adultery, so they may be mentioned briefly.

Firstly, the action for enticement of a spouse should be available only where both spouses are ordinarily residing together at the time of the enticement. Secondly, the damages should be capable of being awarded only to the spouses and the children who are ordinarily residing with them at the time of the enticement. Thirdly, the uncorroborated evidence of one witness should not be sufficient to sustain a finding of enticement.

Harbouring of a Spouse

In Working Paper No. 5, the Commission recommended that the action for harbouring a spouse should be abolished, "as it is in modern circumstances totally unreal".<sup>14</sup> After due consideration, the Commission is satisfied that this recommendation should be implemented, and

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<sup>14</sup> Id.

accordingly the draft Bill contains a provision (section 3) abolishing the action for harbouring a spouse.

Loss of Consortium and Loss of the Services of a Child

In Working Paper No. 7, the Commission recommended<sup>15</sup> that the actions for loss of consortium and for loss of services of a child should be replaced by single family actions for the benefit of all the members of the family unit residing together. It was proposed<sup>16</sup> that the members of the family unit should be defined as comprising the parents and the children (including legally adopted children and children to whom either parent was in loco parentis). The Commission recommended<sup>17</sup> that the damages,

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<sup>15</sup> W.P. No. 7, pp. 37-39, 42.

<sup>16</sup> Id., pp. 38-39, 42.

<sup>17</sup> Id., pp. 39-40, 42.

which should be subject to no specified monetary limitation in the legislation, should cover:

- (a) all reasonable expenses and other financial losses incurred by the members of the family of the victim;
- (b) mental distress resulting to the members of the family;
- (c) damage to the continuity, stability and quality of the relationships between members of the family.

It was proposed<sup>18</sup> that the defence of the contributory negligence of the victim should be available to the defendant in proceedings brought against him by members of the family. The Commission recommended<sup>19</sup> that only one action should be capable of being brought, and that the Court should be empowered to award such damages to each of the members of the family resident together as the Court considered fit.

After due consideration, the Commission are satisfied that these recommendations are desirable. The draft Bill gives effect to the proposals, by amending the present action for loss of consortium<sup>20</sup> and by creating a new action for damages for

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<sup>18</sup> Id., pp. 40, 42.

<sup>19</sup> Id., pp. 39-42.

<sup>20</sup> Cf. Part IV of the draft Bill. The definition of consortium in section 2(1) is to a large extent based on the definition mentioned in the Canadian decision of Kunzl v Schiefer, 25 D.L.R. (2d) 344 (Ont. C.A., 1960) and the judgment of Kingsmill Moore, J., in O'Haran v Divine, 100 I.L.T.R. 53 (Sup. Ct., 1964).

personal injury to a child.<sup>21</sup> The right of the injured spouse or child to take separate proceedings in respect of the wrong causing his or her injuries is, of course, not affected by the Commission's proposals. Moreover, the draft Bill<sup>22</sup> does not affect such right as actually exists of an employer to sue for loss of the services of an employee, irrespective of marital status or age. Nor does it affect the right of a parent who is the employer to sue for loss of the services of a child who either is or has been married or is aged eighteen years or over, provided, of course, the parent can establish the necessary element of loss of services required of any claimant employer.

#### Seduction of a Child

In Working Paper No. 6, the Commission proposed<sup>23</sup> that the existing action for seduction of a child should be abolished, and replaced by a single family action for seduction. Under the proposed new law, the Commission recommended<sup>24</sup> that it should no longer be necessary for plaintiffs to prove a service relationship between themselves and the seduced child. It was proposed<sup>25</sup> that the action should be available for the benefit of all members of the family unit, to be defined as comprising the parents and the children

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<sup>21</sup> Cf. Part V of the draft Bill. It is worthy of note that, save for the actions for adultery and enticement of a spouse, the draft Bill, in providing for family actions, gives the children of unmarried parents a right of compensation to the same extent as children of married parents. Thus, in relation to the action for loss of consortium, it is not a precondition of entitlement to recover compensation that the parent be a married parent. Conversely, the unmarried parent will have a right of action for damages for personal injury to a child (as well as for seduction, enticement and harbouring a child) to the same extent as a married parent.

<sup>22</sup> Cf. section 14(6) of the draft Bill, and the definition of "Child" in section 2(1) of the draft Bill.

<sup>23</sup> W.P. No. 6, p. 62.

<sup>24</sup> *Id.*, pp. 62-63.

<sup>25</sup> *Id.*, p. 63.

(including adopted children and children to whom either parent was in loco parentis), and that the Court should award damages to each of the members of the family residing together as it considered fit.

The Commission recommended<sup>26</sup> that the child's action should be merged in the family action, thus allowing damages to be awarded for the benefit of the child where the circumstances so warranted. It was proposed<sup>27</sup> that the action should be limited to the case where the seduced child was under the age of eighteen years at the time of the seduction and unmarried at that time and at the time of the hearing, and where the seduction resulted in pregnancy. The Commission proposed<sup>28</sup> that the evidence of a child in the action for seduction should be corroborated. Finally, the Commission recommended<sup>29</sup> that the existing law relating to damages should be retained (except in so far as concerned any change necessitated by the abolition of the requirement of a service relationship).

After due consideration, the Commission are of the view that these proposals are in general desirable, subject to the modifications proposed below.

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26 Id.  
27 Id., p. 64.  
28 Id., p. 13.  
29 Id., pp. 65-66.



Firstly, the Commission consider that the action should not lie where the seduced child has been married before the seduction but is no longer married at that time. Under the Commission's proposals in Working Paper No. 2<sup>30</sup>, all minors will reach majority on marriage (if under the age of eighteen years at that time). It appears to the Commission that, where the person who has thus reached full age ceases to be married while still under the age of eighteen, this is not a sufficient reason for reactivating the right of action for seduction.

Secondly, the Commission are of the view that it would be preferable for the law to require that the uncorroborated evidence of one witness is not sufficient to sustain a finding of seduction, whether or not that witness is the seduced child. This proposal would bring the law into line with what has been proposed in respect of actions for the enticement of a spouse and for the enticement and harbouring of a child and in respect of actions for adultery.

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<sup>30</sup> W.P. No. 2, paras. 2.38, 2.45.

Thirdly, the Commission consider that the legislation should abolish a master's common law action for seduction of his female servant, and limit a parent's right of action to that contained in Part VI of the Bill. It would be anomalous, in the Commission's view, to retain the right of action at common law in either case. Accordingly, section 16(10) of the draft Bill provides that no action for damages for seduction may be brought except under the Bill.

#### Enticement and Harboursing of a Child

In Working Paper No. 6, the Commission recommended<sup>31</sup> that the actions for the enticement and harboursing of a child should be retained and that the following rules should apply:

- (1) the requirement of a service relationship should be abolished;
- (2) the actions should be in the nature of single family actions, as in the case of actions for seduction;
- (3) the child's right of action should be merged in the family action, as in the case of actions for seduction;
- (4) the actions should be limited to cases of children under the age of eighteen years who are not married;
- (5) the present law regarding damages should be retained (except in so far as concerns any change necessitated by the abolition of a service relationship);
- (6) the Court should be required to have regard to the welfare of the child as 'the paramount consideration' in assessing damages or granting discretionary relief.

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<sup>31</sup> W.P. No. 6, pp. 69-72.

It was proposed<sup>32</sup> that the evidence of a child in these actions should be corroborated.

After due consideration, the Commission are satisfied that these proposals are desirable. The draft Bill gives effect to them, subject to the two modifications mentioned below. It will be noted that the Bill provides that no action for enticement or harbouring of a child may be brought by any person where the child has reached the age of eighteen years. Under present law the action is available, in theory at least, until the child reaches full age, after which it would appear that no action may be taken. It should also be noted that, whilst the actions of a master for enticement or harbouring of a servant will be abolished, the wider action by an employer for the procurement or inducement of breach of contract will not be affected by the Bill.

The two modifications that seem desirable are as follows:

Firstly, the recommendation regarding the welfare of the child (paragraph 6 supra) has been limited so as to require the Court, in assessing damages, to have regard to the extent, if any, to which the welfare of the child has been affected by the enticement or wrongful harbouring.<sup>33</sup> Secondly, the Commission are of the view that the legislation should provide that the wrongful taking of a child and keeping it from those entitled to its custody should fall with the definition of enticement, even where the child who is taken has been in no sense willing to go. The classic example of the type of case envisaged here is where a baby is snatched from his or her pram. Another type of case would be where a child is wrongfully taken from the custody of a parent by a parent who is not entitled to the child's custody or by someone acting on his or her behalf.

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<sup>32</sup> Id., p. 13.

<sup>33</sup> Cf. section 19(5) of the draft Bill.

Position of Employers

A brief mention may be made of the position of employers under the proposals in relation to actions for the loss of services to an employee and for damages for the seduction, enticement and harbouring of an employee. Reference has already been made to this matter when dealing with the specific actions but a general comment on the effect of the proposals appears desirable.

There seems to the Commission to be no good reason why an employer should continue to have a right of action for the seduction, enticement or harbouring of an employee, based as they are on the antiquated notion of a chattel interest of a master in his servant. The more developed tort of wrongful procurement or inducement of a breach of contract of employment should not, however, be affected by the Bill. Moreover, the right of an employer under existing law to sue for damages for the loss of services of an employee (outside the context of seduction, enticement and harbouring) will not be affected by the Bill.

The policy of the Bill in relation to seduction, enticement and harbouring of children is to provide a remedy to the family of the child where damages to the continuity and stability of family relationships can be established. There will be no necessity to prove loss of services. Against this policy background, the changes to the law in relation to the employer's rights of action can best be understood.

Questions Between Spouses as to Property

The law relating to the property relationships between spouses is a matter within the Commission's First Programme for Law Reform.<sup>34</sup> The subject is, of course, a wide-ranging one, which extends beyond the scope of the present Report. Certain aspects of the law are, however, appropriate to consider now, since they reflect, so far as the spouses are concerned, issues similar to those regarding the property relations of engaged persons.

In the course of preparing the draft Bill, the Commission became conscious of the anomaly that would result from reforming the law regarding the property relationships of formerly engaged persons whilst not at the same time also reforming the law regarding the property relationships of married persons. It would mean that the law regarding the former would be certain, but regarding the latter it would remain uncertain in a number of important respects. On one view it does not appear to the Commission to be desirable that married persons should be placed in a less satisfactory legal position than formerly engaged couples (some of whom may have been cohabiting in a relationship not dissimilar to that of marriage).

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<sup>34</sup> First Programme of Law Reform, para. 12.

This anomaly could be dealt with in one of two ways. Firstly, the Commission might have made no recommendations concerning the law as to the property relationships of married persons, pending the publication of a detailed Working Paper on family property. (The matters covered in the draft Bill do not appear to the Commission to be sufficiently detailed to warrant, in isolation, the publication of a separate Working Paper.) Secondly, the Commission could make proposals on the subject that appear desirable and incorporate them in the draft Bill. The Commission have favoured the second approach. No objection was made in any submission received by the Commission to the proposal that formerly engaged persons should be treated in broadly the same manner by the law as married persons, so far as property matters are concerned. The Commission consider that the proposals made below regarding married persons are consistent with this general policy. If the Oireachtas takes a different view, appropriate amendments may, of course, be made to the draft Bill.

The Commission consider that two changes should be made in the law regarding the property relations of the spouses.

Firstly, it proposes that section 12 of the Married Womens Status Act 1957<sup>35</sup> be repealed and reenacted in a more extended form,

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<sup>35</sup> No. 5 of 1957. For an account of judicial analysis of this provision, see A. Shatter, Family Law in the Republic of Ireland pp. 272 ff. (1977). Subsequent decisions include M. v M., High Ct., Finlay, P., 19 October 1978 (unreported) and P. v R., High Ct., McMahon, J., 12 January 1979 (unreported). For an account of the position in Northern Ireland, see the Office of Law Reform's Consultative Document on Reform of Family Law in Northern Ireland, paras. 28-37, 39(h) (March 1977). The position in England is analysed by P. Bromley, Family Law, pp. 440 ff. (5th ed., 1976) and S. Cretney, Principles of Family Law, ch. 8 (3rd ed., 1979).

designed to ensure that the Court can do justice in cases that might be regarded as falling outside the present scope of section 12, as where the defendant spouse has disposed of the property before application is made to the Court and has not made just and equitable payment to the plaintiff in respect of the property.<sup>36</sup> Furthermore, it appears desirable to the Commission for the section to be extended to parties to a void marriage, or a voidable marriage that has been annulled under the law of the State, or a marriage that has been annulled or dissolved under the civil law of any other State and that is, by reason of that annulment or dissolution, no longer a subsisting valid marriage under the law for the time being in force in the State.<sup>37</sup> In regard to applications by parties to a void, voidable or dissolved marriage, a three year limitation period appears to be desirable.

The second proposed change to the law regarding the property relations of spouses is contained in section 22 of the draft Bill, which provides that, where a spouse, whether directly or indirectly, makes a contribution in money or money's worth to the acquisition, improvement or maintenance of the family home, then, subject to any agreement, arrangement or understanding between the parties, he or she will acquire a beneficial interest (or an enlarged share in the beneficial interest) of such an extent as appears just and equitable to the Court. In this regard a "contribution in money or

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<sup>36</sup> Section 20 of the draft Bill (which gives effect to this recommendation) is largely modelled on statutory changes made in Northern Ireland and England: cf. the Matrimonial Causes (Property and Maintenance) Act 1958, section 7 (6 & 7 Eliz. 2, c. 35) and the Law Reform (Husband and Wife) Act (Northern Ireland) 1964, section 3 (c. 23). Account has also been taken of recent amendments to the law in Ontario and Australia.

<sup>37</sup> Cf. the English Matrimonial Proceedings and Property Act 1970, section 39 (c. 45) and the Matrimonial Causes (Northern Ireland) Order 1978, Article 55.

<sup>38</sup> "Family home" will have the same meaning as in section 2 of the Family Home Protection Act 1976 (no. 27).

money's worth" should include, inter alia, the contribution made by each spouse to the welfare of the family, including any contribution made by looking after the home or caring for the family. Under present law, the position is that, normally, where a man purchases property in the name of his wife or transfers property to his wife, it is presumed that he intends to make a gift of the property to the wife. This is because of the equitable presumption of advancement. As the presumption appears to have applied only where a husband made the purchase, it may well involve discrimination proscribed by the Constitution. In England the presumption has lost much of its force.<sup>39</sup>

This proposal would constitute a significant reform in matrimonial property law. It is difficult, if not impossible, to reconcile the various cases on this subject in England, in Northern Ireland and in the State. Indeed the state of the case law relating to matrimonial property in England in 1970 was described by one commentator as "chaotic".<sup>40</sup>

Most disputes that have come before the Courts have concerned the ownership of the family home. The Courts have considered themselves obliged to adopt a somewhat restrictive policy in determining the respective beneficial interests of the spouses in the home: whereas a monetary contribution will be recognised as being capable of conferring a beneficial interest on the spouse who so contributes, the less tangible but no less real and economically valuable contribution of looking after the home and caring for the family has not generally been regarded as conferring a beneficial interest on the spouse making that contribution. Under the proposed Bill, the Court will be given a broad equitable discretion in determining the respective beneficial interests of the spouses in the family home.<sup>41</sup>

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<sup>39</sup> Cf. S. Cretney, Principles in Family Law, 229-230 (3rd ed., 1979).

<sup>40</sup> Puxon, Matrimonial Proceedings and Property Act 1970, General Note to section 37, Current Law Statutes Annotated 1970.

<sup>41</sup> The Bill also ensures that the position of a purchaser of property from a spouse will not be adversely changed by reason only of the fact that the vendor is a spouse.



The Commission deliberated at some length on the question whether the provisions of section 22 of the Bill should be extended so as to cover all property (including property other than the family home). Having regard to the broad range of policy and legal issues that such a step would involve, the Commission **do** not propose that such an **extension** should be made at present. This matter can best be dealt with in the context of community of property between husband and wife, on which the Commission intend to publish a Working Paper in due course.

#### Breach of Promise of Marriage

In Working Paper No. 4, the Commission recommended<sup>42</sup> that the action for breach of promise of marriage should be abolished. In its place, the Commission recommended<sup>43</sup> that there be enacted provisions specifying the rights of the parties to the engagement and others in respect of certain property matters.

With regard to gifts from third persons to parties to be married, it was proposed that there should be a presumption of an intention to benefit both parties jointly. In the absence of a contrary intention, wedding presents from third persons should be returnable if the marriage did not, for whatever reason, take place.<sup>44</sup>

The Commission recommended<sup>45</sup> that gifts between parties to an intended marriage should be presumed to be conditional and thus returnable if the marriage did not take place, except where this was due to the death of the donor. It was proposed<sup>46</sup> that engagement rings should be subject to the same rule as other gifts. (Under existing law, a man who breaks the

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<sup>42</sup> W.P. No. 4, p. 40.

<sup>43</sup> Id.

<sup>44</sup> Id., p. 41.

<sup>45</sup> Id., p. 42.

<sup>46</sup> Id.

engagement may not seek the return of the ring; where a woman breaks the engagement, she may not insist on retaining the ring.)

The Commission also recommended<sup>47</sup> that, where it appeared that either party to an engagement to marriage that had been terminated had been unjustly enriched by the other party or had been substantially and unjustly enriched by a third person, the Court should be empowered to make such order for restitution or compensation as appeared to be just in all the circumstances. In making any determination the Court should not have regard to the question of the responsibility of either party for the termination of the engagement except where there had been violence, fraud or deceit by one of the parties.<sup>48</sup>

The Commission recommended<sup>49</sup> that the Court should be empowered to award compensation to a "jilted" party for sizeable expenses and outlay "thrown away" because of the breach of promise. It was proposed<sup>50</sup> that, where an agreement to marry was terminated, any rule of law relating to the rights of husbands and wives in relation to property should apply in relation to any property in which either or both of the parties to the agreement had a beneficial interest while the agreement was in force.

Where either party to an engagement to marry contributed in money or money's worth to the purchase or improvement or maintenance of property (including any payments in respect of rent or in respect

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<sup>47</sup> Id., p. 43.

<sup>48</sup> Id.

<sup>49</sup> Id., p. 46.

<sup>50</sup> Id., p. 43.

a mortgage) in which or in the proceeds of sale of which either or both of them has or have a beneficial interest, the Commission recommended<sup>51</sup> that the party so contributing should, if the contribution was of a substantial nature or increased the value of the property and subject to any agreement to the contrary between them, be treated as having acquired a share (as the case might be), in that beneficial interest of such an extent as might have been agreed or, in default of agreement, of such an extent as might in all the circumstances appear just to the Court before which the question of the existence or extent of the beneficial interest arose.

Finally, the Commission recommended<sup>52</sup> that, where an agreement to marry is terminated, either party or any person concerned should be able to apply to the Court to determine the rights of the parties in relation to property in which either or both had a beneficial interest while the agreement was in force, provided that the application (which the Court might hear otherwise than in public) is made within three years of the termination of the agreement.

After due consideration, the Commission are satisfied that the main principles embodied in these proposals are desirable, subject to a small number of modifications.

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51 Id.

52 Id.

The principal modification relates to the proposal regarding unjust enrichment. The Commission are of the view that it would be better to frame the legislative provisions in somewhat different terms. Firstly, where a party to an agreement to marry that is terminated has received from a third party a substantial benefit other than a gift, the Court should be able to make such order (including an order for compensation) as appears to it just and equitable in the circumstances<sup>53</sup>. This draft is somewhat different from that proposed in Working Paper No. 4.<sup>54</sup> The purpose is to lay less stress on the parties' conduct in respect of the termination of the engagement. Secondly, where either party to the terminated agreement to marry has incurred a substantial expenditure by reason of the agreement to marry, the Commission consider that he or she should be permitted to apply to the Court for the recovery of the expenditure and that the court be empowered to make such order as appears to it just and equitable. Again, it appears to the Commission to be desirable to place less emphasis on conduct.

#### Miscellaneous

##### (a) Jurisdiction and Court Proceedings

The Commission consider that the jurisdiction for proceedings under the proposed Act should be exercised by the High Court and by the Circuit Court. Where the rateable value of the land to which the

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<sup>53</sup> Cf. section 27 of the draft Bill.

<sup>54</sup> Cf. section 4 of the General Scheme of a Bill in W.P. No. 4, at p. 50.

proceedings relate exceeds £200 or the value of the personal property to which the proceedings relate exceeds £15,000 and the proceedings are brought in the Circuit Court, that Court may, if the defendant so requires, transfer the proceedings to the High Court.

The question whether proceedings under the Bill should be in public is one that has caused much trouble to the Commission.<sup>55</sup> On the one hand, it can be argued that publicity could in some cases cause needless distress to the families involved in the litigation; on the other hand, the deterrent effect of certain of the actions might be entirely lost or seriously impaired by lack of publicity. The issue is basically one of public policy on which the Oireachtas should make the decision. The Commission's approach, which must be subjective, is that the Court should be given a discretion, on application to it by either party, to hold the proceedings otherwise than in public where the proceedings are taken

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<sup>55</sup> Section 45(1) of the Courts (Supplemental Provisions) Act 1961 (no. 39) provides that proceedings in "matrimonial matters" and "minor matters" (inter alia) may be heard otherwise than in public. Specific provisions relating to privacy of proceedings are also contained in section 12(4) of the Married Women's Status Act 1957 (no. 5), sections 56(11) 119 and 122 of the Succession Act 1965 (no. 27), sections 1(3)(c) and 7 of the Marriages Act 1972 (no. 30), section 25 of the Family Law (Maintenance of Spouses and Children) Act 1976 (no. 11), section 10 of the Family Home Protection Act 1976 (no. 27) and section 3 of the Illegitimate Children (Affiliation Orders) Act 1930 (no. 17) (as amended by section 28(1) of the Family Law (Maintenance of Spouses and Children) Act 1976 (no. 11)). See A. Shatter, Family Law in the Republic of Ireland, pp. 14-16 (1977).

under Part III (actions for damages for adultery and for enticement of a spouse), IV (actions for damages for loss of consortium), VI (actions for damages for seduction of a child) and VIII (questions between spouses as to property).

(b) Consequential Amendments

Some consequential amendments to the Civil Liability Act 1961<sup>56</sup> are required. These are primarily of a technical nature, but one of them may be mentioned, since it raises an issue of general importance. Certain actions are specified as "excepted" causes of action in the 1961 Act: in other words, these actions will not survive the death of the plaintiff or the defendant for the benefit or detriment of his estate, as the case may be.

At present, actions for defamation, criminal conversation, enticement of a spouse and seduction are "excepted" causes of action. The reason for making an action an "excepted" cause of action seems to be that it is considered that the injury is primarily of a dignitary nature, which it would not be appropriate to permit to pass to the personal representative.

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<sup>56</sup> No. 41 of 1961.

The whole question of "excepted" causes of action raises difficult and important issues of policy, which require detailed consideration.<sup>57</sup> Since the issues range well beyond the scope of the present Report, the Commission recommend that the 1961 Act be amended to take account of the new actions proposed in this Report, on the understanding that the larger questions of policy relating to "excepted" causes of action will be examined by the Commission in due course.

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<sup>57</sup> Cf. Salmond on the Law of Torts, p. 441 (17th ed., by R.F.V. Heuston, 1977), J. Fleming, The Law of Torts p. 660 (5th ed., 1977), Explanatory Memorandum to the Bill of the Civil Liability Act 1961, paras. 8-13 (Roinn Dli agus Cirt, Lunasa, 1961).





PART II





## FAMILY LIFE PROTECTION BILL 1980

## ARRANGEMENT OF SECTIONS

## PART I

## PRELIMINARY

## Section

1. Short title and commencement.
2. Interpretation.

## PART II

ABOLITION OF ACTIONS FOR CRIMINAL CONVERSATION  
AND FOR HARBOURING OF A SPOUSE

3. Abolition of actions for criminal conversation  
and for harbouring of a spouse.

## PART III

ACTIONS FOR DAMAGES FOR ADULTERY AND FOR ENTICEMENT  
OF A SPOUSE

4. Action for damages for adultery.
5. Damages in action for adultery.
6. Effect of connivance, condonation etc.
7. Effect of conduct of adulterous spouse.

- 8. Presumption of knowledge.
- 9. Action for damages for enticement of a spouse.
- 10. Damages in action for enticement of a spouse.
- 11. Effect of connivance, condonation, etc.

PART IV

ACTION FOR DAMAGES FOR LOSS OF CONSORTIUM

- 12. Action for damages for loss of consortium.
- 13. Damages in action for loss of consortium.

PART V

ACTION FOR DAMAGES FOR PERSONAL INJURY TO A CHILD

- 14. Action for damages for personal injury to a child.
- 15. Damages in action for personal injury to a child.

PART VI

ACTION FOR DAMAGES FOR SEDUCTION OF A CHILD

- 16. Action for damages for seduction of a female child.
- 17. Damages in action for seduction of a female child.

PART VII

ACTIONS FOR DAMAGES FOR ENTICEMENT AND FOR HARBOURING OF A CHILD

- 18. Actions for damages for enticement and harbouring of a child.

- 3 -

19. Damages in actions for enticement and harbouring of a child.

## PART VIII

## QUESTIONS BETWEEN SPOUSES AS TO PROPERTY

20. Determination of questions between spouses as to property.
21. Limitation period in respect of applications under section 20.
22. Contributions by a spouse in money or money's worth to the acquisition, improvement or maintenance of property.

## PART IX

## ABOLITION OF ACTION FOR BREACH OF PROMISE OF MARRIAGE

23. Engagements to marry not enforceable at law.
24. Gifts to engaged couples by other persons.
25. Gifts between engaged couples.
26. Property of engaged couples.
27. Application to the court in case of substantial benefit.
28. Recovery of substantial expenditure incurred by a party to a broken engagement.
29. Limitation period for action under this Part.

PART X

MISCELLANEOUS

30. Jurisdiction of courts.
31. Amendments to Civil Liability Act 1961.
32. Abolition of action for enticement and saving.
33. Repeals.
34. Transitional provision and saving.

## FAMILY LIFE PROTECTION BILL 1980

## BILL

Entitled

An Act -

- (1) to abolish -
  - (a) actions for criminal conversation;
  - (b) actions for the harbouring of a spouse;
  
- (2) to create a right of action for damages against a person who commits adultery with the spouse of another:
  
- (3) to reform the law relating to -
  - (a) enticement of a spouse;
  - (b) loss of consortium;
  - (c) personal injury to a child;
  - (d) seduction of a child;
  - (e) enticement of a child;
  - (f) harbouring of a child;
  
- (4) to repeal and re-enact with extensions section 12 of the Married Women's Status Act 1957 (determination of questions between husband and wife as to property); and to make provision with respect to contributions by spouses to the acquisition, improvement or maintenance of the family home.

- (5) to abolish actions for breach of promise of marriage and to make provision with respect to the property of, and gifts to and between, persons who have been engaged to be married; and
- (6) for connected purposes.

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

PART I

PRELIMINARY

Short title 1.-(1) This Act may be cited as the Family Life Protection  
and  
commence- Act 1980.  
ment

- (2) This Act shall come into operation on the        day of  
1981.

Inter- 2.-(1) In this Act, except where the context otherwise requires -  
pretation  
"act" includes default or other omission;  
"action" includes any proceeding (other than a criminal proceeding)  
in a court established by law;  
"child" means a person under the age of eighteen years who is  
not or has not been married;



"consortium" includes marital or parental affection, assistance, care, comfort, companionship and love as between spouses and as between parent and child, and, in addition, in the case of spouses, the sexual life between them;

"court" shall be construed in accordance with section 30;

"enticement" means -

(a) in relation to a spouse, wrongfully inducing that spouse to leave or remain apart from the other spouse;

(b) in relation to a child -

(i) wrongfully taking that child away from the parent or parents of that child or wrongfully detaining or causing that child to be detained;

(ii) wrongfully inducing that child to leave or remain apart from the parent or parents of that child;

"family home" has the meaning assigned thereto by section 2 of the Family Home Protection Act 1976;

"member of the family" means -

(a) in Part III

(i) each of the spouses;

(ii) a child of both spouses or of either spouse;

(iii) a child adopted by both spouses under the Adoption Acts 1952 to 1976 or in relation to whom both spouses are in loco parentis; and

(iv) a child adopted by either spouse under the Adoption Acts 1952 to 1976 or in relation to whom either spouse is in loco parentis;

(b) in Parts IV, V, VI and VII -

- (i) each of the parents;
- (ii) the spouse of either of the parents;
- (iii) a child of either parent or of both parents  
or of the spouse of either parent;

"parent" includes -

- (a) a natural parent;
- (b) an adopter under the Adoption Acts 1952 to 1976;
- (c) a person in loco parentis;

"personal injury" includes any disease and any impairment of a person's physical or mental condition and "injured" and "injury" shall be construed accordingly;

"seduction" includes rape and "seduced" shall be construed accordingly;

"wrong" means a tort or breach of contract, whether the act is committed by the person to whom the wrong is attributed or by one for whose acts that person is responsible, and whether or not the act is also a crime, and whether or not the wrong is intentional;

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(2) In this Act -

- (a) a reference to a section is to a section of this Act, unless it is indicated that a reference to some other enactment is intended;
- (b) a reference to a subsection, paragraph or subparagraph is to the subsection, paragraph or subparagraph of the provision in which the reference occurs, unless it is indicated that reference to some other provision is intended;
- (c) a reference to any other enactment shall, except where the context otherwise requires, be construed as a reference to that enactment as amended by or under any other enactment, including this Act.

## PART II

ABOLITION OF ACTIONS FOR CRIMINAL CONVERSATION AND FOR  
HARBOURING OF A SPOUSE

Abolition of  
actions for  
criminal  
conversation and  
for harbouring  
of a spouse

- 3.- After the commencement of this Act, no action shall lie -
- (a) for criminal conversation; or
  - (b) for the harbouring of a spouse.

## PART III

ACTIONS FOR DAMAGES FOR ADULTERY AND FOR ENTICEMENT OF  
A SPOUSE

Action for  
damages  
for  
adultery

- 4.-(1) An action for damages for adultery may be brought by a spouse against any person -
- (a) who has since the celebration of the marriage committed adultery with the other spouse at a time when both spouses were ordinarily residing together; and
  - (b) who knew that the other spouse was then married.

(2) An action for damages for adultery may be brought independently of an action for divorce a mensa et thoro.

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(3) The action shall be for the benefit of the plaintiff spouse and the other members of the family (including the adulterous spouse) ordinarily residing with the plaintiff spouse.

(4) Only one action for damages for adultery may be brought against the same person in respect of the adultery.

(5) The plaintiff shall furnish the defendant with particulars of the members of the family for whose benefit the action is brought.

(6) In an action for damages for adultery, the uncorroborated evidence of one witness shall not be sufficient to sustain a finding of adultery.

(7) An action for damages for adultery shall not be brought after the expiration of three years from the date of the adultery.

(8) No action for damages for adultery shall be brought otherwise than under this Act.

Damages in  
action for  
adultery

5.-(1) The damages in an action for damages for adultery shall be the total of such amounts, if any, as the court shall, having regard to all the circumstances, consider proportioned to the damage suffered by each member of the family by whom or for whose benefit the action is brought.

(2) The amount awarded to each member of the family by virtue of this section shall be indicated separately in the award.

(3) It shall be sufficient for a defendant, in paying money into court in the action, to pay it in one sum as damages for all the members of the family without apportioning it between them.

(4) The Court may direct that the whole or any part of the damages awarded -

(a) to a child shall be settled in such manner as the court thinks proper for the benefit of the child;

(b) to the plaintiff's spouse shall be settled in such manner as the court thinks proper for the benefit of that spouse.

Effect of  
connivance,  
condonation  
etc.

6.-(1) Where it appears to the court in an action for damages for adultery that the plaintiff spouse has connived at, condoned or, by neglect or misconduct, conduced to the adultery of the other spouse, the court -

(a) shall take into account such connivance, condonation, neglect or misconduct in determining the amount of damages, if any to be awarded to the plaintiff spouse; and

(b) may -

(i) refuse to award any damages; or

(ii) award reduced damages,

to the plaintiff spouse.

(2) Nothing in subsection (1) shall affect the award of damages to a member of the family other than the plaintiff spouse.

Effect of  
conduct of  
adulterous  
spouse

7.- In an action for damages for adultery, the court shall take into account the extent, if any, to which the adulterous spouse was, by reason of his or her conduct, responsible for the adultery and may -

- (a) refuse to award any damages; or
- (b) award reduced damages,

to that spouse.

Presumption  
of knowledge

8.- Where in an action for damages for adultery it is proved that the defendant committed adultery with the plaintiff's spouse, it shall be presumed that the defendant knew that the spouse was a married person, but this presumption may be rebutted if the defendant shows that he or she did not know and could not reasonably have known that the plaintiff's spouse was married.

Action for  
damages  
for  
enticement  
of a  
spouse

9.--(1) An action for damages may be brought by a spouse against any person for the enticement of the other spouse by that person at a time when both spouses were ordinarily residing together.

(2) In an action for damages for the enticement of a spouse it shall not be necessary to prove that the enticed spouse performed any act of service for any other member of the family.

(3) The action shall be for the benefit of the plaintiff spouse and the other members of the family (including the enticed spouse) ordinarily residing with the plaintiff spouse at the time of the enticement.

(4) Only one action for damages for enticement of a spouse may be brought against the same person in respect of the enticement.

(5) The plaintiff shall furnish the defendant with particulars of the members of the family for whose benefit the action is brought.

(6) In an action for damages for enticement of a spouse the uncorroborated evidence of one witness shall not be sufficient to sustain a finding of enticement.

(7) An action for damages for enticement of a spouse shall not be brought after the expiration of three years from the date of the enticement.

(8) No action for damages for enticement of a spouse shall be brought otherwise than under this Act.

Damages in  
action for  
enticement  
of a  
spouse

10.-(1) The damages in an action for damages for enticement of a spouse shall be the total of such amounts, if any, as the court shall consider proportioned to the damage suffered by each member of the family for whose benefit the action is brought

(2) The damages recoverable by virtue of this section shall include damages -

(a) in respect of expenses reasonably incurred and financial losses suffered by any member of the family in consequence of the enticement;



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(b) in respect of mental distress suffered by any member of the family in consequence of the enticement; and

(c) in respect of damage to the continuity, stability and quality of the relationship with the enticed spouse.

(3) The amount awarded to each member of the family by virtue of this section shall be indicated separately in the award.

(4) It shall be sufficient for a defendant, in paying money into court in the action, to pay it in one sum as damages for all the members of the family without apportioning it between them.

(5) The court may direct that the whole or any part of the damages awarded -

(a) to a child shall be settled in such manner as the court thinks proper for the benefit of the child;

(b) to the plaintiff's spouse shall be settled in such manner as the court thinks proper for the benefit of that spouse.

Effect of  
connivance,  
condonation  
etc.

11.-(1) Where it appears to the court in an action for damages for the enticement of a spouse that the plaintiff spouse connived at, condoned, or, by neglect or misconduct, conduced

to the enticement, the court -

(a) shall take into account such connivance, condonation, neglect or misconduct in determining the amount of damages, if any, to be awarded to the plaintiff; and

(b) may -

(i) refuse to award any damages; or

(ii) award reduced damages,

to the plaintiff.

(2) Nothing in subsection (1) shall affect the award of damages to a member of the family other than the plaintiff spouse.

#### PART IV

##### ACTION FOR DAMAGES FOR LOSS OF CONSORTIUM

Action for  
damages for  
loss of  
consortium

12.--(1) Where -

(a) personal injury (not resulting in death) is caused by the wrong of another person to a spouse or parent (hereinafter in this Part referred to as the injured person): and

(b) in consequence of that injury any other member of the family suffers the total or partial loss of the consortium of the injured person,

an action for damages for loss of that consortium may be brought against that other person by any other member of the family.

(2) In an action for damages for loss of consortium, it shall not be necessary to prove that the injured person

performed any act of service for any other member of the family.

(3) The action shall be for the benefit of the members of the family ordinarily residing with the injured person at the time of the injury.

(4) Only one action for damages for loss of consortium may be brought against the same person in respect of the loss of consortium.

(5) The plaintiff shall furnish the defendant with particulars of the members of the family for whose benefit the action is brought.

(6) An action for damages for loss of consortium shall not be brought after the expiration of three years from the date of the injury.

(7) No action for damages for loss of the consortium of an injured person shall be brought otherwise than under this Act.

Damages in  
action for  
for loss  
of  
consortium

13.-(1) The damages in an action for loss of consortium shall be the total of such amounts, if any, as the court shall consider proportioned to the damage suffered by each member of the family for whose benefit the action is brought.

(2) The damages recoverable by virtue of this section shall include damages -

- (a) in respect of expenses reasonably incurred and financial losses suffered by any member of the family (other than the injured person) in consequence of the injury;
- (b) in respect of mental distress suffered by any member of the family (other than the injured person) in consequence of the injury or loss of consortium; and
- (c) in respect of damage to the continuity, stability and quality of the relationship with the injured person.

(3) The amount awarded to each member of the family by virtue of this section shall be indicated separately in the award.

(4) It shall be sufficient for a defendant, in paying money into court in the action, to pay it in one sum as damages for the members of the family without apportioning it between them.

1961, No.41 (5) For the purpose of subsection (1) of section 34 of the Civil Liability Act 1961, the plaintiff in an action for damages for loss of the consortium of an injured person shall be deemed to be responsible for the contributory negligence if any, of that injured person.

#### PART V

##### ACTION FOR DAMAGES FOR PERSONAL INJURY TO A CHILD

Action for  
damages for  
personal  
injury to  
a child

14.-(1) Where personal injury (not resulting in death) is caused to a child (hereinafter in this Part referred to as the injured child) by the wrong of another person, an action for damages for the injury may be brought against that other person by any other member of the family.

(2) The action shall be for the benefit of the members of the family ordinarily residing with the injured child at the time of the injury.

(3) Only one action for damages for personal injury to a child may be brought under this Act against the same person in respect of the injury.

(4) The plaintiff shall furnish the defendant with particulars of the members of the family for whose benefit the action is brought.

(5) An action for damages under this Part for personal injury to a child shall not be brought after the expiration of three years from the date of the injury.

(6) No action for damages for personal injury to a child shall be brought by any member of the family of the child otherwise than under this Act.

(7) Nothing in this Act shall affect the injured child's cause of action against the person who commits or is otherwise responsible for the wrong.

Damages in  
action for  
personal  
injury to  
a child

15.-(1) The damages in an action for damages for personal injury to a child shall be the total of such amounts, if any, as the court shall consider proportioned to the damage suffered by each member of the family for whose benefit the action is brought.

(2) The damages recoverable by virtue of this section shall include damages -

(a) in respect of expenses reasonably incurred and financial losses suffered by any member of the family (other than the injured child) in consequence of the injury;

(b) in respect of mental distress suffered by any member of the family (other than the injured child) in consequence of the injury; and

(c) in respect of damage to the continuity, stability and quality of the relationship with the injured child.

(3) The amount awarded to each member of the family by virtue of this section shall be indicated separately in the award.

(4) It shall be sufficient for a defendant, in paying money into court in the action, to pay it in one sum as damages for the members of the family without apportioning it between them.

(5) For the purpose of subsection (1) of section 34 of the Civil Liability Act 1961, the plaintiff in an action for damages for personal injury to a child shall be deemed to be responsible for the contributory negligence, if any, of that child.

#### PART VI

##### ACTION FOR DAMAGES FOR SEDUCTION OF A CHILD

Action for  
damages for  
seduction of  
a female  
child

16.-(1) An action for damages for the seduction of a female child may be brought against any person who has

seduced her, if she becomes pregnant in consequence of the seduction.

(2) No action under this section shall be brought if the female child seduced marries after the seduction; and, if an action under this section has been commenced and the female child seduced marries before the determination of the action, the action shall abate.

(3) In an action for damages for the seduction of a female child, it shall not be necessary to prove that the child seduced performed any act of service for any other member of the family.

(4) The action may be brought by either parent of the female child seduced or if there is no parent or, if at the expiration of six months from the date of the seduction no action has been brought by a parent, by any other member of the family.

(5) The action shall be for the benefit of the female child seduced and the members of the family ordinarily residing with the seduced child at the time of the seduction.

(6) Only one action for damages for seduction of a female child may be brought against the same person in respect of the seduction.

(7) The plaintiff shall furnish the defendant with particulars of the members of the family for whose benefit the action is brought.

(8) In an action for damages for the seduction of a female child, the uncorroborated evidence of one witness shall not be sufficient to sustain a finding of seduction.

(9) An action for damages for the seduction of a female child shall not be brought after the expiration of three years from the date of the seduction.

(10) No action for damages for seduction shall be brought otherwise than under this Act.

Damages  
in action  
for  
seduction  
of a  
female  
child

17.-(1) The damages in an action for the seduction of a female child shall be the total of such amounts, if any, as the court shall consider proportioned to the damage suffered by each member of the family for whose benefit the action is brought.

(2) The damages recoverable by virtue of this section shall include damages -

(a) in respect of expenses reasonably incurred and financial losses suffered by any member of the family in consequence of the seduction;



(b) in respect of mental distress suffered by any member of the family in consequence of the seduction; and

(c) in respect of damage to the continuity, stability and quality of the relationship between the seduced child and the other members of the family.

(3) The amount awarded to each member of the family by virtue of this section shall be indicated separately in the award.

(4) It shall be sufficient for a defendant, in paying money into court in the action, to pay it in one sum as damages for all the members of the family without apportioning it between them.

#### PART VII

#### ACTIONS FOR DAMAGES FOR ENTICEMENT AND FOR HARBOURING OF A CHILD

Actions for  
damages for  
enticement  
and  
harbouring of  
a child

18.- (1) An action for damages -

(a) for the enticement of a child;

(b) for the wrongful harbouring of a child,

may be brought against any person who entices or wrongfully harbours the child, as the case may be.

(2) In an action for damages -

(a) for the enticement of a child; or

(b) for the wrongful harbouring of a child,

it shall not be necessary to prove that the child in respect of whom the action is brought performed any act of service for any other member of the family.

(3) The action may be brought by either parent or if there is no parent or, if at the expiration of six months from the date of the enticement or the beginning of the wrongful harbouring no action has been brought by a parent, by any other member of the family.

(4) An action for the enticement of a child or for the wrongful harbouring of a child shall be for the benefit of the child enticed or wrongfully harboured and the members of the family ordinarily residing with the enticed or wrongfully harboured child at the time of the enticement or wrongful harbouring.

(5) Only one action for damages may be brought against the same person for the enticement or the wrongful harbouring.

(6) The plaintiff shall furnish the defendant with particulars of the members of the family for whose benefit the action is brought.

(7) In an action for damages for the enticement of a child or for the wrongful harbouring of a child, the uncorroborated evidence of one witness shall not be sufficient to sustain a finding of enticement or wrongful harbouring, as the case may be.

(8) An action -

(a) for the enticement of a child; or

(b) for the wrongful harbouring of a child,

shall not be brought after the expiration of three years from the date of the enticement or of the wrongful harbouring, as the case may be.

(9) No action for damages -

(a) for the enticement of a child; or

(b) for the wrongful harbouring of a child,

shall be brought otherwise than under this Act.

Damages  
in actions  
for  
enticement  
and  
harbouring  
of a  
child

19.- (1) The damages in an action for damages for the enticement or wrongful harbouring of a child shall be the total of such amounts, if any, as the court shall consider proportioned to the damage suffered by each member of the family for whose benefit the action is brought.

(2) The damages recoverable by virtue of this section shall include damages -

- (a) in respect of expenses reasonably incurred and financial losses suffered by any member of the family in consequence of the enticement or wrongful harbouring;
- (b) in respect of mental distress suffered by any member of the family in consequence of the enticement or wrongful harbouring; and
- (c) in respect of damage to the continuity, stability and quality of the relationship between the enticed or wrongfully harboured child and the other members of the family.

(3) The amount awarded to each member of the family by virtue of this section shall be indicated separately in the award.

(4) It shall be sufficient for a defendant, in paying money into court in the action, to pay it in one sum as damages for all the members of the family without apportioning it between them.

(5) In an action for ~~damages~~ for the enticement or wrongful harbouring of a child the court in assessing damages shall have regard to the extent, if any, to which the welfare of the child has been affected by the enticement or wrongful harbouring.

## PART VIII

## QUESTIONS BETWEEN SPOUSES AS TO PROPERTY

Determination  
of questions  
between  
spouses  
as to  
property

20.-(1) This Part applies to the determination of any question arising between one spouse and the other as to the title to or possession of any property or as to the beneficial interest of either spouse in any property.

(2) Either spouse (in this section referred to as the plaintiff spouse) or any person concerned may apply in a summary manner to the court to determine the question, and the court -

- (a) may make such order, with respect to the property in dispute and as to the costs consequent upon the application, as may in the circumstances appear just and equitable to the court;
- (b) may -
  - (i) direct such inquiries; and
  - (ii) give such directions,
 in relation to the application as the court may consider appropriate.
- (c) may order that the property to which the application relates be sold or partitioned; and

(d) may make such other order or give such other directions (whether or not of the same nature as those mentioned in the preceding paragraphs) as the court may consider appropriate.

(3) Any right of a plaintiff spouse to apply to the court in any question between the plaintiff spouse and the other spouse (in this section referred to as the defendant spouse) shall include the right to make such an application where it is claimed by the plaintiff spouse that the defendant spouse had in his or her possession or under his or her control -

(a) money to which, or to a share of which, the plaintiff spouse was beneficially entitled (whether by reason that it represented the proceeds of property to which, or to an interest in which, the plaintiff spouse was beneficially entitled, or for any other reason); and

(b) property (other than money) to which, or to an interest in which, the plaintiff spouse was beneficially entitled,

and that either that money or other property has ceased to be in the possession of the defendant spouse or under the control of that spouse or that the plaintiff spouse does not know whether it is still in the possession or under the control of the defendant spouse.

(4) Where, on an application made to the court under subsection (2) as extended by subsection (3), the court is satisfied -

(a) that the defendant spouse has had in his or her possession or under his or her control money or other property as mentioned in paragraph (a) or paragraph (b) of subsection (3); and

(b) that the defendant spouse has not made to the plaintiff spouse, in respect of that money or other property, such payment or disposition (not being a testamentary disposition) as would have been just and equitable in the circumstances,

the power to make orders under subsection (2) shall be extended in accordance with subsection (5).

(5) Where subsection (4) applies, the power to make orders under subsection (2) as extended by subsection (3) shall include power for the court to order the defendant spouse to pay to the plaintiff spouse -

(a) in a case falling within paragraph (a) of subsection (3) such sum in respect of the money to which the application relates, or the plaintiff spouse's share thereof, as the case may be; or

(b) in a case falling within paragraph (b) of subsection (3), such sum in respect of the value of the property to which the application relates, or the plaintiff spouse's interest therein, as the case may be,

as to the court appears just and equitable in the circumstances.

(6) Where, on an application made to the court under subsection (2), it appears to the court that there is any property that -

(a) represents the whole or part of the money or the property in question; and



(b) is property in respect of which an order could have been made under that subsection if an application had been made by the plaintiff spouse thereunder in a question as to the title to or possession of that property,

the court (either in substitution for or in addition to the making of an order in accordance with subsection (5)) may make any order under subsection (2) in respect of that property that it could have made on such an application as is mentioned in paragraph (b).

(7) In any proceedings under this section, a person (other than the plaintiff spouse or the defendant spouse) who is a party thereto shall, for the purposes of costs or otherwise, be treated as a stakeholder only.

(8) The provisions of this section are without prejudice to the rights conferred by section 2 of the Married Women's Status Act 1957.

957, No. 5

(9) In this section a reference to a spouse includes a reference to -

(a) either of the parties to a void marriage, whether or not that marriage has been annulled under the law of the State;

- (b) either of the parties to a voidable marriage that has been annulled under the law of the State;
- (c) either of the parties to a marriage that has been annulled or dissolved under the civil law of any other State and that is, by reason of that annulment or dissolution, no longer a subsisting valid marriage under the law for the time being in force in the State.

Limitation  
period in  
respect of  
applications  
under  
section 20

21.-(1) An application under section 20 by a party to a marriage (such as is mentioned in subsection (9) of that section) that has been annulled or in respect of which there has been a dissolution shall not be made more than three years after the date of the annulment or dissolution.

(2) An application by a party to a void marriage that has not been annulled shall not be made more than three years after the parties have ceased to be ordinarily resident together.

Contributions  
by a spouse in  
money or  
money's worth  
to the  
acquisition,  
improvement or  
maintenance of  
property

22.-(1) Where either spouse makes, whether directly or indirectly, a contribution in money or money's worth to the acquisition of the family home, the party who makes the contribution shall, subject to any agreement or arrangement between the spouses to the contrary, express or implied, be treated as having then acquired by virtue of that contribution a beneficial interest in the family home -

(a) of such an extent as may have been then agreed or arranged; or

(b) in default of such agreement or arrangement, of such an extent as may in the circumstances appear just and equitable to the court before which the question of the existence or extent of the beneficial interest of either spouse or both spouses arises (whether in summary proceedings under section 20 between the spouses or in any other proceedings).

(2) Where either spouse makes, whether directly or indirectly, a contribution in money or money's worth to the improvement or maintenance of the family home in which either or both of them has or have a beneficial interest, the party who makes the contribution shall, if the contribution increases the value of the property, and subject to any agreement or arrangement between the spouses to the contrary, express or implied, be treated as having then acquired by virtue of that

contribution a share or an enlarged share, as the case may be, in that beneficial interest -

(a) of such an extent as may have been then agreed or arranged; or

(b) in default of such agreement or arrangement, of such an extent as may in the circumstances appear just and equitable to the court before which the question of the existence or extent of the beneficial interest of either spouse or both spouses arises (whether in summary proceedings under section 20 between the spouses or in any other proceedings).

(3) Nothing in this Act shall affect the application of

1844, c. 90 (a) the provisions of section 10 of the Judgments (Ireland) Act 1844 (lis pendens not to affect purchasers etc. unless duly registered):

1882, c. 39 (b) the provisions of section 3 of the Conveyancing Act 1882 (notice - restriction on constructive notice); or

1976, No. 27 (c) the provisions of section 3 of the Family Home Protection Act 1976 (alienation of interest in family home),

to a purchaser of the family home by reason of the fact that the vendor is a spouse.

(4) For the purposes of subsections (1) and (2) a contribution in money or money's worth to the acquisition, improvement or maintenance of the family home includes -

- (a) any payment in respect of rent or in respect of a mortgage; and
- (b) the contribution made by each spouse to the welfare of the family, including any contribution made by looking after the home or caring for the family.

PART IX

ABOLITION OF ACTION FOR BREACH OF PROMISE OF MARRIAGE

Engagements to marry not enforceable at law

23.- An agreement between two persons to marry one another that has been entered into after the commencement of this Act shall not under the law of the State have effect as a contract, and no action shall be brought in the State for breach of such agreement, whatever the law applicable to the agreement.

Gifts to engaged couples by other persons

24.- Where two persons have agreed to marry one another and any property is given as a wedding gift to either or both of them by any other person, it shall be presumed, in the absence of evidence to the contrary that the property so given was given -

- (a) to both of them as joint owners; and

(b) subject to the condition that it should be returned at the request of the donor or his personal representative if the marriage for whatever reason does not take place.

Gifts between  
engaged  
couples

25.- Where a party to an agreement to marry makes a gift of property (including an engagement ring) to the other party to the agreement, it shall be presumed, in the absence of evidence to the contrary, that the gift -

(a) was given on condition, express or implied, that it should be returned to the donor on request if the marriage does not take place for any reason other than the death of the donor; or

(b) was given unconditionally, if the marriage does not take place on account of the death of the donor.

Property of  
engaged  
couples

26.-(1) Where an agreement to marry is terminated, the rules of law relating to the rights of spouses in relation to property acquired by either or both of them, or in which either or both of them has or have a beneficial interest, including the rules contained in section 22 (as if in that section "any property" were substituted for "the family home" wherever the latter words occur) shall apply, in relation to any property acquired by either or both of the parties to the agreement (or in which either or both of those parties had a

beneficial interest) while the agreement was in force, as they apply in relation to property acquired by a spouse or by both spouses, or in which either or both spouses has or have a beneficial interest.

(2) Where an agreement to marry is terminated, section 20 shall apply, as if the parties were married, to any dispute between them or claim by one of them as to the title to or possession of any property or as to the beneficial interest in any property.

(3) In the application of section 22 (as extended by subsection (1)) in relation to any property acquired by either or both of the parties to an agreement to marry one another (or in which either or both those parties had a beneficial interest) while the agreement was in force, subsection (4) of that section shall be read as if paragraph (b) of that subsection had been omitted therefrom.

Application to  
the court  
in case of  
substantial  
benefit

27.- Where an agreement to marry is terminated and it appears to the court on an application to it in a summary manner by a person other than a party to the agreement that one party to the agreement has received a substantial benefit (not being a gift to which section 24 applies) from the plaintiff in consequence of the agreement, the court may make such order (including an order for compensation) as appears to it just and equitable in the circumstances.

Recovery of substantial expenditure incurred by a party to a broken engagement

28.- (1) In this section - "substantial expenditure" means substantial expenditure incurred by reason of an agreement to marry - (a) by a party to the agreement; or (b) by another person on behalf of that party, and in respect of which the party by whom or on whose behalf that expenditure was incurred has not benefitted.

(2) Where an agreement to marry is terminated and an application is made to the court in a summary manner -

- (a) by a party to the agreement; or (b) by another person on behalf of that party,

for the recovery of substantial expenditure, the court may make such order as appears to it just and equitable in the circumstances.

Limitation period for action under this Part

29.- An action under this Part shall not be brought after the expiration of three years from the date of the termination of the agreement to marry.

PART X

MISCELLANEOUS

Jurisdiction of courts

30.- (1) The jurisdiction conferred on a court by this Act may be exercised by the High Court. (2) Subject to subsection (3), the Circuit Court shall concurrently with the High Court, have all the jurisdiction of



the High Court to hear and determine proceedings under this Act.

(3) Where the rateable value of the land to which the proceedings relate exceeds £200 or the value of the personal property to which the proceedings relate exceeds £15,000 and the proceedings are brought in the Circuit Court, that Court shall, if a defendant so requires, transfer the proceedings to the High Court, but any order made or act done in the course of such proceedings before such transfer shall be valid unless discharged or varied by order of the High Court.

(4) If any party so requests, the court may hear proceedings under Part III, IV, VI or VIII otherwise than in public.

Amendments to  
Civil  
Liability  
Act 1961

31.- (1) Section 6 of the Civil Liability Act 1961 is hereby repealed and replaced by the following section -

"6.- In this Part "excepted cause of action" means an action for defamation or for adultery or for the enticement of a spouse or for seduction or for the enticement or wrongful harbouring of a child."

1964, No. 17

(2) Subsection (2) of section 35 of the Civil Liability Act 1961 (as amended by section 4 of the Civil Liability (Amendment) Act 1964) is hereby repealed and replaced by the following subsection -

"(2) For the purposes of subsection (1) of section 34, the contributory negligence -

- (a) of a nominal plaintiff, or  
 (b) (where the action is brought for  
 the loss of the services of an  
 employee) of an employee,

shall subject to paragraph (a) of subsection (1) of this section neither bar recovery nor reduce the damages awarded; but the provisions of section 21 shall apply in favour of the defendant against the said nominal plaintiff or ~~employee~~, as the case may be."

Abolition of  
 action for  
 enticement  
 and saving

32.- (1) No action for enticement shall be brought otherwise than under this Act.

(2) Nothing in this Act shall affect any right of action for inducing a breach of a contract of employment or for procuring a breach of any such contract.

Repeals  
 1869, c. 68  
 1957, No. 5

33.- Section 2 of the Evidence Further Amendment Act 1869 and section 12 of the Married Women's Status Act 1957 are hereby repealed.

Transitional  
 provision  
 and  
 saving

34.- (1) No action shall be brought under Part III, IV, V, VI or VII in respect of any events or matters that happened or arose before the commencement of this Act.

(2) Nothing in this Act shall have effect in relation to any action that has been commenced before the commencement of this Act.

PART III





## FAMILY LIFE PROTECTION BILL 1980

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EXPLANATORY MEMORANDUM

## PURPOSE OF THE BILL

1. The purpose of this Bill is to put into legislative form a series of proposals made by the Law Reform Commission on criminal conversation, on the enticement and harbouring of a spouse, on the loss of the consortium of a spouse, on the loss of services of a child, on the seduction, enticement and harbouring of a child, and on breach of promise of marriage. The Bill was drafted following the issue by the Commission for comment and criticism of the following Working Papers:
  - (1) Working Paper No. 4 - 1978 (9 November 1978) on the Law relating to Breach of Promise of Marriage;
  - (2) Working Paper No. 5 - 1978 (8 December 1978) on the Law relating to Criminal Conversation and the Enticement and Harbouring of a Spouse;
  - (3) Working Paper No. 6 - 1979 (5 February 1979) on the Law relating to Seduction and the Enticement and Harbouring of a Child;
  - (4) Working Paper No. 7 - 1979 (29 March 1979) on the Law relating to Loss of Consortium and Loss of Services of a Child.
  
2. The proposals in the Bill are set out in the long title First, it is proposed to abolish the present actions for

## 2.

criminal conversation and for the harbouring of a spouse. Second, it is proposed to create a new action for adultery. Third, it is proposed to create new actions for enticement of a spouse and for loss of the consortium of a spouse or parent. Fourth, it is proposed to create new actions for personal injury to a child, for the seduction of an unmarried female child under the age of eighteen, and for the enticement and harbouring of any unmarried child under that age. Fifth, it is proposed to repeal and re-enact in substantially extended form section 12 of the Married Women's Status Act 1957 (which relates to the determination of questions between husband and wife as to property) and to apply the extended provisions to the property of engaged couples who have terminated their agreement to marry. Sixth, it is proposed to clarify and put in statutory form the law as to direct and indirect contributions in money or money's worth by a spouse to the acquisition, improvement or maintenance of the family home. Seventh, it is proposed to abolish the action for breach of promise of marriage and to deal with the property of engaged couples and with gifts to and between persons who have been engaged to be married.

3. The proposed new statutory actions for adultery, for enticement of a spouse, for loss of the consortium of a spouse or parent, for personal injury to a child, for seduction of a female child and for enticement and wrongful harbouring of a child will be family actions. In other words, the actions will enure for the benefit of the members of the family (living together as a family unit) of the adulterous, enticed or injured spouse, of the injured parent and of the injured, seduced, enticed or wrongfully harboured child, as the case may be. In the case of the actions for loss of consortium of a spouse or parent and for personal injury to a child, the injured person will not be able to recover damages as a member of the family. The reason for this is that the spouse, parent or child injured will be entitled to recover

damages in his or her own personal capacity for the injuries sustained. On the other hand, in the case of actions for adultery, for enticement of a spouse or child, for seduction of a female child and for wrongful harbouring of a child, the adulterous, enticed, seduced or wrongfully harboured person will be a member of the family to whom or in respect of whom damages may be awarded.

4. In the case of the new actions for enticement of a spouse, for loss of consortium of a spouse or parent and for enticement, seduction or wrongful harbouring of a child, it will not be necessary to establish loss of the services of the spouse, parent or child, as the case may be.

#### PART I OF THE BILL

##### PRELIMINARY

5. Part I (sections 1 and 2) contains the formal provisions, namely the short title (Family Life Protection Act 1980), the commencement date and the interpretation section (section 2). The long title sets out seriatim the proposals in the Bill.
6. "Child" is defined as meaning a child under the age of 18 years who is not or has not been married. In other words a child, for the purpose of the various family actions to be established in the proposed Act, will mean a child who has not reached the new age of majority recommended by the Law Reform Commission in its Working Paper - No. 2 (11 November 1977). The recommendation in that Paper is that the law should be changed so that a person will reach majority on attaining the age of 18 years or on marriage before reaching that age. At present any person who has reached the age of eighteen or who is or

has been married may make a will and may also appoint a testamentary guardian. (See s. 77 of the Succession Act 1965 (No. 27).)

"Consortium" is defined so as to provide for the case of loss of consortium suffered by a spouse of the injured person and by a child or member of the family of the injured person. The definition is to a large extent based on a definition mentioned in the Canadian case of Kungl v Schiefer (1960) 25 D.L.R. (2nd) 344 per Schroeder J.A. (See Law Reform Commission Working Paper - No. 7 (p. 1) and judgment of Kingsmill Moore J. in O'Haran v Divine (1964) 100 I.L.T.R. 53 cited therein at pp. 3, 4.) At present, only a spouse may recover damages for loss of consortium.

"Enticement" will mean, in relation to a spouse, wrongfully inducing that spouse to leave or remain apart from the other spouse and, in relation to a child, wrongfully inducing that child to leave or remain apart from its parent or parents and wrongfully taking away or detaining that child. Thus, to constitute "enticement" there must be a wrongful act. The giving of shelter to a battered wife or child will not therefore constitute "enticement". Also, harbouring, in relation to a child, will mean wrongful harbouring. (The action for harbouring of a spouse is being abolished - section 3).

"Member of the family" will cover (in the case of an action for adultery or for enticement of a spouse) the spouses and children, including adopted children and children to whom either spouse or both spouses is or are in loco parentis. In the case of actions for loss of consortium, for personal injury to a child and for seduction, enticement or wrongful harbouring of a child, "member of the family" will include each of the parents (including an adopter under the



Adoption Acts 1952 to 1976 and a person in loco parentis), the spouse of a parent, a child (including an adopted child) and a child to whom a person is in loco parentis. The definition of "wrong" follows that contained in section 2(1) of the Civil Liability Act 1961 and will cover a tort or a breach of contract. "Seduction" will include rape. The definition of "personal injury" also follows that contained in section 2(1) of the Civil Liability Act 1961.

#### PART II OF THE BILL

##### ABOLITION OF ACTIONS FOR CRIMINAL CONVERSATION AND FOR HARBOURING OF A SPOUSE

7. Section 3 proposes to abolish the action for criminal conversation and the action for harbouring of a spouse. The section implements the recommendation contained in the Law Reform Commission Working Paper No. 5 - 1978 (pp. 56, 72, 73).

#### PART III OF THE BILL

##### ACTIONS FOR DAMAGES FOR ADULTERY AND FOR ENTICEMENT OF A SPOUSE

Section 4 of the Bill - subsections (1), (3) and (4) - establishes the action for adultery, hitherto unknown to our law although provided for (where the adultery was that of the wife) in England and Wales by section 33 of the Matrimonial Causes Act 1857, in the common law of Scotland

and, in Northern Ireland, by section 18 of the Matrimonial Causes Act (Northern Ireland) 1939. Prior to 1857 in England, and 1939 in Northern Ireland, the common law remedy of an action by a husband for criminal conversation with his wife was available. The right to claim damages for adultery with a man's wife was abolished in England by section 4 of the Law Reform (Miscellaneous Provisions) Act 1970 and in Northern Ireland by Article 57 of the Matrimonial Causes (NI) Order 1978. In Scotland, the right of a husband to claim damages (including solatium) from his wife's paramour by way of reparation was abolished by the Divorce (Scotland) Act 1976. The proposed new action for adultery, which will be available to either spouse, will be a family action for the benefit of the members of the family (including the adulterous spouse) ordinarily residing together at the time of the adultery. Moreover, the defendant must know that the adulterous spouse was married - sections 4(1) and (3). (As regard "knowledge" by the defendant, see section 8 of the Bill and para. 12 infra).

It is being made clear in section 4(2) that the new action may be brought independently of an action for legal separation (i.e. divorce a mensa et thoro). This was the position in England, Scotland and Northern Ireland before the action for adultery was abolished in each of those jurisdictions. The arguments in favour of the provision in section 4(2) are set in chapter 5 (p. 57 et seq.) of Working Paper No. 5 - 1978. The provision in section 4(2) is being included so that there may be no doubt as to the position. (Cp. section 33 of the English Matrimonial Causes Act 1857, section 18 of the Matrimonial Causes Act (N.I.) 1939 and section 10(1)(b) of the Divorce (Scotland) Act 1976.) Subsection 4(5) of the Bill is a procedural provision and is self-explanatory.

9. In an action for adultery, evidence of the adultery must be corroborated by some other material evidence in support of the evidence of the adultery - section 4(6). A provision similar to that contained in the subsection is to be found in section 9(5) (enticement of a spouse), section 16(8) (seduction of a female child) and section 18(7) (enticement and wrongful harbouring of a child). Although a complaint may be received as enhancing the reliability of the testimony of an adulterous or enticed spouse or of a seduced or enticed child, the complaint is not corroboration in the legal sense because corroboration (where required) must come from a source independent of the witness to be corroborated. (As to corroboration, see Law Reform Commission Working Paper No. 6 - 1979 at p. 11 et seq.) The limitation period for actions for adultery will be three years from the date of the adultery - section 4(7); and it will not be possible to bring adultery actions otherwise than under the proposed Act - section 4(8).
10. Section 5 of the Bill provides for the damages that may be awarded in an action for adultery. The section follows in general section 49 of the Civil Liability Act 1961, which deals with damages in a fatal injuries case. The court may order that the whole or any part of the damages awarded to a child or to the adulterous spouse shall be settled in such manner as the court thinks proper for the benefit of the child or the spouse - subsection (4). This will allow the court to establish a trust for the rearing and education of a child of tender years or for the maintenance of an adulterous spouse. Settlements for the children and for the adulterous wife were provided for in the English Matrimonial Causes Act 1857 (section 33) and in the Northern Ireland Matrimonial Causes Act 1939 (section 18). In order to arrive at the total of the damages, the court is to award such amount to each member

of the family (including the adulterous spouse) as the court considers proportioned to the damages suffered by each member of the family for whom or on whose behalf the action is brought - subsection (1). Subsection (2) requires the amount awarded to each member of the family to be indicated separately in the award. However, it will be sufficient for a defendant who elects to lodge money in court to lodge it in one sum: he will not have to apportion the money between the members of the family - subsection (3).

11. Section 6 deals with the effect of connivance, condonation etc. by the plaintiff spouse. Where that spouse connives at, condones, or, by neglect or misconduct, conduces to the adultery, the court will be able to take such conduct into account in fixing the amount of damages to be awarded to that spouse; and the court may refuse to award any damages or may award reduced damages to that spouse - subsection (1). However, this will not affect the award of damages to any other member of the family - subsection (2). On the other hand, where the conduct of the adulterous spouse was a contributing factor in the adultery, the court must take into account the extent to which that spouse was responsible for the adultery and may reduce the amount of damages, if any, to be awarded to that spouse or may award no damages - section 7. (As to the effect of adultery committed by an applicant spouse under the Family Law (Maintenance of Spouses and Children) Act 1976, see section 5(3) of that Act.)
12. Section 8 establishes a presumption that the defendant knew that the spouse with whom the adultery was committed was married. The presumption may be rebutted if the defendant shows - on a balance of probabilities - that he or she did not know and could not reasonably have known that the spouse was married. In the present action for criminal

conversation it is immaterial whether the defendant knew or did not know that the plaintiff's wife was married.

13. Sections 9 to 11 deal with the action for the enticement of a spouse. The provisions in these sections, other than that contained in section 10(2), correspond with the provisions in sections 4, 5 and 6 in regard to adultery. Section 10(2) provides that the damages recoverable shall include damages in respect of expenses, mental distress and damage to the continuity, stability and quality of the relationship with the enticed spouse. (These damages, which may be described as "special damages", are provided for in all the other family actions (except that for adultery).) There are no corresponding sections for sections 7 and 8, which are relevant only in an adultery case. It is to be noted from sections 4(1) and 9(1) that the actions for adultery with a spouse and for enticement of a spouse are to be brought by the other spouse and not by any other member of the family. As in the case of adultery, the spouses must be ordinarily residing together at the time of the adultery or the enticement; and the members of the family for whose benefit the action may be brought must be ordinarily resident with the plaintiff spouse at that time. As in the case of the proposed actions for loss of consortium, for seduction of a child and for enticement or harbouring of a child it will not be necessary to prove loss of service - subsection (2) of section 9. It should be noted that section 32 of the Bill proposes to abolish actions for enticement, other than the statutory actions for enticement of a spouse and for enticement of a child.

## PART IV OF THE BILL

## ACTION FOR DAMAGES FOR LOSS OF CONSORTIUM

14. Section 12 provides for the action for loss of the consortium of a spouse or parent. Consortium is defined in section 2(1) of the Bill. Where, as the result of a wrongful act, personal injury (not resulting in death) is caused to a spouse or to a parent (as defined in section 2(1)) and the injury results in loss to the members of the family of the consortium of the injured person, an action for damages may be brought against the wrongdoer by those members of the family ordinarily residing with the injured spouse or the injured parent at the time of the injury. Loss of consortium may be partial or total - subsection (1). (As indicated in the Law Reform Commission Working Paper No. 7 - 1979 at pp. 2 - 4, there is some doubt about the existing position.) At present an action for loss of consortium is confined to a spouse, although it is not clear whether loss of the consortium of a husband is actionable. (See Law Reform Commission Working Paper No. 7 - 1979 at p. 4 et seq.) It is now proposed that any member of the family (other than the injured spouse or parent) will be able to sue for loss of the consortium of that spouse or parent. As in the case of the actions for adultery, enticement of a spouse, personal injury to a child, seduction of a female child and enticement and harbouring of a child, the proposed action for loss of consortium will be a family action. As mentioned supra, the action is now available only to the spouse of the injured person. Subsection (2) of section 12 proposes that, in an action for loss of consortium, it will not be necessary to establish loss of the services of the injured person. A similar proposal is being made in respect of the actions for seduction of a female child and for enticement or wrongful

harbouring of a child - sections 16(3) and 18(2). The remaining provisions (subsections (3), (4), (5), (6) and (7) of section 12 correspond with the similar provisions in section 4 (action for adultery) and in section 9 (action for enticement of a spouse).

15. Section 13 provides in subsection (1) for damages to be awarded to each member of the family (other than the injured person) for whose benefit the action for loss of consortium is brought. Subsection (2) provides that the damages to be awarded shall include damages (a) in respect of expenses and financial losses incurred by any member of the family of the injured spouse or parent; (b) in respect of mental distress suffered by any member of the family; and (c) in respect of damage to the continuity, stability and quality of the relationship of the members of the family with the injured spouse or parent. (Damages for mental distress in a fatal injuries case are provided for in section 49(1) of the Civil Liability Act 1961, as amended by the Civil Liability (Amendment) Act 1964.) Subsection (3) provides that the amount awarded to each member of the family is to be indicated separately in the award, while subsection (4) allows the defendant in paying money into court in the action to pay it in one sum as damages for the members of the family, without apportioning it between them. (Cp. sections 5(2) and (3), 10(3) and (4), 15(3) and (4), 17(3) and (4) and 19(3) and (4) of the Bill. See also section 49(1)(c) and (3) of the Civil Liability Act 1961.)
16. Subsection (5) of section 13 provides for the identification of the plaintiff with the injured spouse or parent so that the defendant will be able to plead the contributory negligence of that spouse or parent in an action for damages for loss of consortium. In other words, for the purpose

of determining contributory negligence, the plaintiff in the action will be deemed to be responsible for the acts of the injured spouse, in the same way as he is now responsible in a fatal injuries action for the acts of the deceased person - section 35(1)(b) of the Civil Liability Act 1961. The provision in the Bill (which gives effect to the recommendation of the Law Reform Commission in Working Paper No. 7 - 1979 at pp. 40, 41) represents a change in the existing law. Under section 35(2) of the 1961 Act the contributory negligence of a nominal plaintiff or of a wife, child or servant is immaterial in the case of an action for loss of consortium or for loss of services. However, as the wife, child or servant is, for the purposes of the 1961 Act, in the same position as a concurrent wrongdoer, the defendant may claim contribution from the wife, child or servant, as the case may be. Prior to the 1961 Act the contributory negligence of the wife, child or servant was also immaterial but there was no right to contribution. It should be noted that section 31(2) of the Bill proposes to repeal subsection (2) of section 35 of the 1961 Act and to substitute for that subsection a new subsection limited to an action by a nominal plaintiff and an action for loss of the services of an employee - actions with which, of course, the present Bill is not concerned. (See paras. 18 and 51 infra.)



## PART V OF THE BILL

ACTION FOR DAMAGES FOR PERSONAL INJURY  
TO A CHILD

17. Section 14(1) of the Bill proposes the creation of a new action in respect of personal injury to a child (as defined in section 2(1)). Subsections (2), (3), (4), (5) and (6) of section 14 correspond with similar provisions in section 4 (action for adultery), section 9 (action for enticement of a spouse) and section 12 (action for loss of consortium) of the Bill. Subsection (7) of section 14 is designed to ensure that the injured child's own right of action for the personal injury will be preserved.
  
18. The damages in an action for personal injury to a child are dealt with in section 15, the provisions of which correspond with those contained in section 13 (damages in action for loss of consortium). The plaintiff in an action for personal injury to a child will be deemed to be responsible for the acts of the child - section 15(5) - in the same way as a plaintiff in an action for loss of consortium will be responsible for the acts of the injured spouse or parent. (See para. 16 supra for a commentary on section 13(5) of the Bill and para. 51 infra in regard to the proposal in section 31(2) of the Bill to repeal and replace section 35(2) of the Civil Liability Act 1961.)

## PART VI OF THE BILL

## ACTION FOR DAMAGES FOR SEDUCTION OF A CHILD

19. In Working Paper No. 6 - 1979 (at p. 62 et seq.) the Law Reform Commission recommended that a new action for the seduction of a female child should be established. The action was to be a family action for the benefit of the seduced child and the members of her family. This recommendation is implemented in sections 16 and 17 of the Bill.
20. Section 16(1) provides for the creation of the new action for the seduction of a female child. (As to the definition of "seduction", "seduced" and "child" see section 2(1) of the Bill and para. 6 supra.) No action will lie unless (a) the child becomes pregnant in consequence of the seduction and (b) is not married at the time of the hearing of the action, or has never been married. If the action has been commenced and if the child marries thereafter, the action will abate - subsection (2). As in the case of the new actions for enticement of a spouse, for loss of consortium of a spouse or parent and for enticement and wrongful harbouring of a child (sections 9(2), 12(2) and 18(2)), it will not be necessary to establish loss of services - subsection (3). Under subsection (4), the action may be brought by either parent of the child or (if there is no parent or if, after the expiration of six months from the date of the seduction, no action has been brought by a parent) by any other member of the family. (Cp. section 48(3) of the Civil Liability Act 1961.) The action will be for the benefit of the seduced child and the members of the family residing with her at the time of the seduction - subsection (5). The provisions in

subsections (6) and (7) correspond with the similar provisions in section 4 (action for adultery), section 9 (action for enticement of a spouse), section 12 (action for loss of consortium) and section 14 (action for personal injury to a child). Subsection (8), which provides for corroboration in the case of seduction, corresponds with section 4(6) (adultery), section 9(5) (enticement of a spouse) and section 18(7) (enticement and wrongful harbouring of a child). (As to corroboration, see para. 9 supra.) Subsection (9) of section 16 provides for a limitation period of three years, while subsection (10) provides that no action for damages for seduction may be brought otherwise than under this Act. This latter subsection, in effect, means that the action for the seduction of a servant is being abolished, in the same way as the action for the enticement of a servant is being abolished by section 32. However, the action for the loss of the services of a servant (otherwise than by seduction) is not being interfered with any more than is the action for inducing or procuring a breach of a contract of employment.

21. Section 17 of the Bill provides for damages in an action for the seduction of a female child. The provisions in section 17(1), (2), (3) and (4) correspond with similar provisions in section 15(1), (2), (3) and (4) (personal injury to a child).

## PART VII OF THE BILL

ACTIONS FOR DAMAGES FOR ENTICEMENT AND HARBOURING  
OF A CHILD

22. In Working Paper No. 6 - 1979 the Law Reform Commission recommended that the actions for enticement and wrongful harbouring of a child should be retained but that the law should be amended so as, inter alia, to remove the requirement of a service relationship. (See pp. 69 et seq. and p. 74 of the Working Paper.)
23. Section 18(1) and section 18(2) of the Bill provide for the actions for the enticement of a child and for the wrongful harbouring of a child. Enticement in relation to a child is defined in section 2(1) as wrongfully inducing the child to leave or remain apart from its parent or parents or wrongfully taking away or detaining the child. Harbouring, which is not defined, means wrongful harbouring. The object is to protect people who for humane or charitable reasons entice or harbour a child where the child is being battered or maltreated at home. (See para. 6 supra.)
24. Subsection (2) of section 18 abolishes the requirement of a service relationship and corresponds with section 9(2) (action for enticement of a spouse), section 12(2) (action for loss of consortium) and section 16(3) (action for seduction of a female child). Subsections (3) to (8) correspond with sections 16(4) to (9) (action for seduction of a female child). Subsection (9) of section 18 provides that no action for enticement or wrongful harbouring of any child shall be brought otherwise than under this Act. (See definition of "child" in section 2(1) of the Bill and para. 6 supra.)

25. Section 19 provides for the damages in actions for enticement and wrongful harbouring of a child. Subsections (1), (2), (3) and (4) correspond with sections 17(1), (2), (3) and (4) (seduction of a female child).
26. Subsection (5) of section 19 makes it necessary for the court in assessing damages in an enticement or wrongful harbouring case to have regard to the extent, if any, to which the welfare of the child has been affected by the enticement or wrongful harbouring. The subsection is designed to cover, inter alia, the case where the mental or physical health of the child has been damaged because of the enticement or wrongful harbouring. It is to be noted that enticement covers the wrongful taking or wrongful detention of a child. (See section 2(1) of the Bill and para. 6 supra.)

#### PART VIII OF THE BILL

##### QUESTIONS BETWEEN SPOUSES AS TO PROPERTY

27. Part VIII of the Bill provides for the determination of questions between spouses as to property or as to the beneficial interest of either spouse in property. It is proposed (1) to repeal, and replace in an extended form, section 12 of the Married Womens Status Act 1957 (determination of questions between husband and wife as to property) and (2) to clarify and put in statutory form the law in regard to contributions by a spouse in money or money's worth to the acquisition, improvement or maintenance of the family home. Section 12 of the 1957 Act is a

re-enactment, with modification and in modern form, of section 17 of the Married Women's Property Act 1882, which was repealed by the 1957 Act (section 19 of and the Schedule to the latter Act). Section 17 of the 1882 Act and the law as to the beneficial interests of spouses in property have been the subject of much commentary and judicial interpretation in England and in Northern Ireland; and the same is true in this jurisdiction. Unfortunately, it is difficult to reconcile the various statements (judicial and other) that have been made.

28. In addition to the re-enactment in extended form of section 12 of the Married Women's Status Act 1957 and the statement in statutory form of the law as to contributions by a spouse to the acquisition, improvement or maintenance of the family home the Bill also proposes to extend to the property of engaged couples the rules of law that govern the property of married couples. (See Working Paper No. 4 - 1978 at pp. 8, 12, 44, 45 and 48.) This involves the application to the property of engaged couples of provisions similar to those contained in section 2 of the English Law Reform (Miscellaneous Provisions) Act 1970 (property of engaged couples) and section 37 of the English Matrimonial Proceedings and Property Act 1970 (contributions by spouse to the improvement of property). Section 37 of the latter Act is limited to contributions to the improvement of property, whereas section 22 of the Bill covers contributions to the acquisition, improvement or maintenance of the family home. Prior to these two English Acts of 1970, section 17 of the 1882 Act was extended by section 7 of the English Matrimonial Causes and Property Act 1958 and by section 3 of the Northern Ireland Law Reform (Husband and Wife) Act 1964. One of the objects of these Acts was to allow the courts to determine questions as to money or other property

(to which a husband or wife was beneficially entitled) that had ceased or might have ceased to be in the possession or under the control of the wife or husband, as the case might be. Where the respondent spouse to an application had money or property of the applicant spouse but has parted with it, the courts in England and Northern Ireland may order that spouse to pay appropriate sums to the applicant in respect thereof. In addition, the provisions in section 7 of the English Act 1958 and section 3 of the Northern Ireland Act 1964 put beyond doubt the power of the court under section 17 of the 1882 Act to order a sale of any property in dispute. A further extension of section 17 of the 1882 Act was made in section 39 of the English Matrimonial Proceedings and Property Act 1970 so as to cover the property of parties to a void, voidable or dissolved marriage. A similar provision was enacted for Northern Ireland in Article 55 of the Matrimonial Causes (Northern Ireland) Order 1978. However, the provisions of section 37 of the 1970 Act (contributions by spouse to improvement of property) have not so far been enacted for Northern Ireland. It would appear from the recent High Court decisions, from the Northern Ireland Court of Appeal decision in McFarlane [1972] N.I. 59 and from some of the English decisions that, where the spouse makes a direct contribution to the acquisition of property, he or she thereby obtains a beneficial interest in the property, unless there is a contrary intention. If the contribution is indirect there must be an agreement or arrangement that the contributor should acquire a beneficial interest. The same rule appears to apply in the case of contributions to the improvement of property. The object of section 22 of the Bill is to set out in statutory form the law as to contributions to the acquisition and maintenance of the family home as well as contributions to the improvement of the family home. It is to be noted that, under section 22(3) of the Bill, contributions in respect of the family home

will include the respective contributions of the spouses to the welfare of the family, including any contributions made by looking after the home or caring for the family. (See section 5(1)(f) of the English 1970 Act and Article 27(f) of the Northern Ireland Matrimonial Causes Order 1978, both of which are confined to financial provision and property adjustment orders made in connection with decrees of nullity, judicial separation and divorce).

29. Section 20 of the Bill provides for the determination in a summary way of questions between spouses as to property. It will replace section 12 of the Married Women's Status Act 1957. The new section has been framed following consideration of the various amendments of the law that have been made in Australia, in Ontario, in England and in Northern Ireland.
30. By reason of subsection (1) (which follows section 12(1) of the Married Women's Status Act 1957), section 20 of the Bill will apply to disputes between spouses as to the title to or possession of any property or as to the beneficial interest of either spouse in any property. Subsections (2) and (5) provide for the orders and directions that may be given by the court. The court may order that the property to which the application relates be sold or partitioned, thus removing a doubt that at present exists. (See section 78 of the Australian Family Law Act 1975, sections 4 to 7 of the Ontario Family Law Reform Act 1978, section 7 of the English Matrimonial Causes (Property and Maintenance) Act 1958 and section 3 of the Northern Ireland Law Reform (Husband and Wife) Act 1964.) Subsections (3) and (4) allow the court to determine questions as to money or other property (to which the plaintiff spouse was beneficially entitled) that has ceased, or that may have ceased, to be in the possession or under the control of the defendant spouse.



The powers of the court under subsections (2) to (5) are very extensive and in effect allow the court to make such orders as the facts of the particular situation require. Subsection (6) allows the court in an application under subsection (2) (in relation to property in respect of which an order could have been made under that subsection) to make such order in addition or in substitution for an order under subsection (5). This latter subsection allows the court to order the defendant spouse to pay to the plaintiff such sum in respect of the money or the value of the property in question as to the court appears just or equitable in the circumstances.

31. Subsection (7) of section 20 provides that, in any proceedings under section 20, a person (other than a spouse) who is a party to the proceedings will for the purposes of costs or otherwise be treated as a stakeholder only. The subsection, which is a re-enactment of section 12(5) of the Married Womens Status Act 1957, will protect trustees and others who hold "matrimonial" money or property in a fiduciary capacity.
32. Subsection (8) of section 20 (which is a re-enactment of subsection (6) of section 12 of the Married Womens Status Act 1957) provides that the provisions of section 20 of the Bill are without prejudice to section 2 of the 1957 Act. Subsection (1) of this latter section makes a married woman capable of acquiring, holding and disposing of any property and of contracting etc. as if she were unmarried; and the subsection applies as between a married woman and her husband as it applies as between her and any other person. Section 12(6) of the 1957 Act was designed to ensure that the rights given to a married woman under section 2 of that Act would not in any way be impaired by the provisions of section 12 of the Act. Among these rights was the general right to sue her husband in tort.

33. Subsection (9) of section 20 of the Bill allows the parties to a void marriage (whether or not the marriage has been annulled in the State) to avail themselves of the other provisions of section 20. The same will apply to the parties to a voidable marriage that has been annulled in the State and to a marriage that has been annulled or dissolved abroad (i.e. outside the jurisdiction) if the decree of annulment or dissolution is recognised in the State. (See section 39 of the English Matrimonial Proceedings and Property Act 1970 and Article 55 of the Matrimonial Causes (Northern Ireland) Order 1978.)
34. Section 21 specifies the limitation period (three years from the date of the annulment or dissolution) in the case of annulled or dissolved marriages coming within the provisions of section 20(9). If the marriage is void and has not been annulled, the period will be three years from the date the parties have ceased to be ordinarily resident together. Section 21 is based on Article 55 of the Northern Ireland Order 1978, referred to supra in para. 33.
35. Section 22 proposes to set out in statutory form the law in regard to direct and indirect contributions in money or money's worth (e.g. work and labour) by a spouse to the acquisition, improvement or maintenance of the family home. Contributions will include contributions made by either spouse to the general welfare of the family. (As to the existing law, see paras. 27 and 28 supra and 37 and 38 infra.) The provisions of the section are subject to any agreement, arrangement or understanding between the parties. Normally, where a man purchases property in the name of his wife or transfers property to his wife, it is presumed that he

intends to make a gift of the property to the wife. This is because of the equitable doctrine or presumption of advancement. As the presumption appears to have applied only where a husband made the purchase, it may well involve discrimination, which is, of course, proscribed by the Constitution. In England the presumption, which rarely arises, has become quite easy to rebut.

36. The presumption of advancement also seems to apply as between engaged couples, if and when the marriage takes place. In the law of succession the doctrine of advancement (i.e. the bringing into hotch-pot) applied only as between children of an intestate. It was provided for originally under the Statute of Distribution 1695 (7 Will. 3 c. 6), and it does not appear to have been applied in the case of partial intestacies. Section 63 of the Succession Act 1965 (which repealed the 1695 Act) now provides for the enlargement and statement in statutory form of the doctrine. The enlarged doctrine applies not only to shares on intestacy but also to shares under a will, thus embodying the present rule against double portions, which is, in essence, the same as the doctrine of advancement.
37. Under existing law, if property is acquired by one spouse with the aid of a determinable contribution from the other spouse, each spouse is deemed to have an equitable interest in the property proportioned to his or her contribution. This is the ordinary rule where property is acquired by one person with the aid of the contribution of another person. However, where the contribution is made by one person towards the improvement of the property of another, the contributor acquires an interest in the property only if there is an agreement or, in the case of spouses, an

arrangement or understanding to that effect: When the contribution to the acquisition of property cannot be determined, the court makes such order as is just and then it usually applies the rule that equality is equity (i.e. it favours equal sharing). Similar rules would be difficult to apply in improvement case where there is sizeable inflation in property values. It is accordingly proposed in section 22 of the Bill that, in the case of a contribution by one spouse to the acquisition, improvement or maintenance of the family home, the court be allowed, in the event of a dispute, to make such order as may, in the circumstances, appear just and equitable - subsections (1) and (2). This means that the share acquired by the contributing spouse will not as hitherto be proportioned to the cost or value of the contribution. Accordingly, the criterion adopted in section 22 (namely, what appears just and equitable to the court) is the criterion already adopted in section 20(5). (Cp. section 12 of the Married Women's Status Act 1957.)

38. As has been indicated in para. 28 supra, section 37 of the English Matrimonial Proceedings and Property Act 1970 is confined to contributions by a spouse to the improvement of the property, whereas sections 22(1) and (2) of the Bill provide for contributions to the acquisition, improvement and maintenance of the family home. However, under the English Act of 1970 (section 5) and under the Northern Ireland Matrimonial Causes Order (Article 27), the court in making financial provision orders and property adjustment orders in connection with divorce, nullity and judicial separation cases must have regard to the contributions made by each of the parties to the welfare of the family, including any contributions made by looking after the home or caring for the family.
39. Subsection (3) of section 22 of the Bill provides that payments made in respect of rent or in respect of a mortgage and general contributions to family welfare shall also be

taken into account in determining the shares of each of the spouses in the property concerned. Contributions provided for in section 22 may be direct or indirect. An indirect contribution would arise where, for example, the wife pays out of her earnings the cost of the food and the housekeeping expenses, thus enabling the husband to pay the mortgage charges on their home. It must be stressed that section 22 is not designed to replace the existing law as to contributions by one spouse to the acquisition of any property by the other spouse. Neither is it designed to replace the existing law as to contributions to the maintenance or improvement of any property in which either spouse or both spouses has or have a beneficial interest. The object of section 22 is to put in statutory form for the first time what is more or less the existing law as to contributions in respect of the acquisition, maintenance and improvement of the family home. The section leaves the existing rules of law (which are, of course, non-statutory) in regard to the acquisition etc. of any property as they are, and application of these rules may be the subject of an application to the court under section 20 of the proposed Act in the same way as at present under section 12 of the Married Women's Status Act 1957.

## PART IX OF THE BILL

ABOLITION OF ACTION FOR BREACH OF PROMISE  
OF MARRIAGE

40. Part IX of the Bill (sections 23 to 29) proposes to abolish breach of promise actions and to make specific provision with regard to the property of, and gifts to and between, persons who have been engaged to be married. The object is to implement the recommendations of the Law Reform Commission as contained in Working Paper No. 4 - 1978 (November 1978). The recommendations are summarised in chapter 4 (pp. 47, 48) of the Paper, and the General Scheme of a Bill to give effect to the recommendations is contained in chapter 5 (pp. 49 to 52) of the Paper.
41. Section 23 of the Bill provides that an agreement to marry entered into on or after the commencement of the Act shall have no legal effect and that no action for breach of any such agreement may be brought, irrespective of the law applicable to the agreement. Accordingly, even if an agreement to marry constitutes a valid legal contract in the place where it is made, it will not be enforceable in the Irish courts. In other words, the lex fori and not the lex loci contractus will apply to any and every promise to marry.
42. Section 24 of the Bill deals with gifts to engaged couples by other persons. Where a third person gives property as a wedding present to either or both parties to an agreement to marry, it will be presumed, if there is no evidence to the contrary, that the gift was made to both parties as joint owners, and subject to the condition that it will be returned

if the marriage, for any reason, does not take place. (See Working Paper No. 4 - 1978 at pp. 40, 41, 42, 47 and 49. (As to joint ownership by spouses, see section 21 of the Family Law (Maintenance of Spouses and Children Act 1976 (property in household allowance).)

43. Section 25 provides for gifts of property between engaged persons. If the marriage does not take place for any reason other than the death of the donor, it will be presumed, in the absence of evidence to the contrary, that the gift was given on condition that it be returned if the marriage does not take place for any reason other than the donor's death. If the marriage does not take place because of the donor's death, it will be presumed that the gift was made unconditionally. It is to be noted that "property" includes an engagement ring. (In England under the Law Reform (Miscellaneous Provisions) Act 1970 special provision is made for the engagement ring. Section 3(2) of that Act provides that it is to be presumed that an engagement ring was given as an absolute gift. This presumption may be rebutted by proving that the ring was given on condition that it should be returned if the marriage for any reason does not take place.)
44. Section 26 of the Bill proposes that, where an agreement to marry is terminated, the rules of law (including the rules contained in section 22 (as amended in order to cover any property) relating to the rights of spouses as respects property acquired, improved or maintained by either or both of them shall apply in relation to property acquired, improved or maintained by either or both parties to the agreement while the agreement was in force. The rules contained in section 22 will not, in their application to the property of engaged couples, include the rule regarding a contribution made "by each spouse to the welfare of the family" - subsection (3) of

section 26. The law as to the rights of spouses in relation to acquisition, improvement or maintenance of property is set out in paras 27, 28, 37 and 38 supra. As has been indicated, the presumption of advancement seems to apply as between engaged couples if and when the marriage takes place. (See paras. 35 and 36 supra. As to the Law Reform Commission's recommendations see pp. 6, 12, 44, 45, 48 and 51 of Working Paper No. 4 - 1978.)

45. Section 27 of the Bill provides for the making of orders by the court where one party to an agreement to marry has received a substantial benefit (other than a wedding gift) from a third person. The order of the court may be an order for compensation or such other order as to the court appears just and equitable in the circumstances. The subsection is intended to cover cases where, for example, a close relative of one of the parties to an agreement to marry has, while the agreement is in force, expended a substantial amount of money on the improvement of the prospective matrimonial home of the parties. It is not necessary to provide for a substantial benefit received by one party to the engagement to marry from the other party. This is because of the application to the property of engaged couples of the rules of law (including the rules contained in section 22 of the Bill) that apply to the property of spouses. (See sections 22 and 26 of the Bill in regard to a contribution by a spouse or by a party to an agreement to marry to the acquisition etc. of property. See also the commentary on those sections in paras. 27, 28, 37, 38 and 44 supra.)
46. Section 28 of the Bill provides for the recovery of "substantial expenditure" incurred by or on behalf of a party to an agreement to marry that has been terminated. The expenditure must have been incurred in connection with the prospective marriage and no benefit must have accrued to



the party incurring the expenditure - subsection (1). Where the party who has not benefitted, or another person on behalf of that party, applies to the court for the recovery of the expenditure, the court may make such order as appears to it to be just and equitable in the circumstances - subsection (2). The object of the section is to provide for cases where money has been "thrown away" as a result of the termination of an agreement to marry. One party may, for example, have been involved in considerable travelling expenses from a foreign country in the expectation that a marriage would take place. (As to the Law Reform Commission's recommendations in this matter, see Working Paper No. 4 - 1978 at pp. 46 to 48 and 50.)

47. Section 29 of the Bill provides for the limitation period (three years) in respect of actions under Part IX of the Bill. The period is the same as that in respect of the various family actions being created in the Bill, and it will begin to run on the termination of the agreement to marry. (See Law Reform Commission Working Paper No. 4 - 1978 at p. 52.) Actions under Part IX of the Bill may arise under sections 24 to 28. Of course, no action may be brought for breach of an agreement to marry - section 23.

#### PART X OF THE BILL

##### MISCELLANEOUS PROVISIONS

48. Section 30 of the Bill provides for the jurisdiction of the courts and follows, with the necessary modifications, section 10 of the Family Home Protection Act 1976. Subsection (1) provides that the jurisdiction conferred on a court by the proposed Act may be exercised by the High Court. Subsection (2) provides that, subject to the

right of a defendant under subsection (3) to have the proceedings transferred to the High Court in certain cases, the Circuit Court shall have concurrent jurisdiction with the High Court. The defendant's right to have proceedings transferred from the Circuit Court to the High Court is limited to cases where the rateable value of any land in question exceeds £200 or where the value of the personal property involved exceeds £15,000. Subsection (4) provides for the hearing otherwise than in public of any proceedings under the proposed Act.

49. Section 31 provides for amendments to section 6 of the Civil Liability Act 1961. These amendments are consequential or earlier provisions of the Bill.
50. Subsection (1) of section 31 proposes to substitute a new definition of "excepted cause of action" in section 6 of the 1961 Act so that excepted causes of action will in future comprise defamation, adultery, enticement of a spouse, seduction and enticement or wrongful harbouring of a child. An excepted cause of action does not survive for the benefit of the estate of a deceased plaintiff or against the estate of a deceased defendant. Actions for breach of promise and for criminal conversation are being abolished in the Bill and are accordingly omitted from the proposed list of excepted causes of action. Also, the action for adultery and the action for enticement or wrongful harbouring of a child are being included. The latter cause of action is excluded from the list in section 6 of the 1961 Act for reasons that are not entirely clear.
51. Subsection (2) of section 31 of the Bill proposes to repeal and replace section 35(2) of the Civil Liability Act 1961 (which makes a nominal plaintiff or the plaintiff's wife, child or servant a concurrent wrongdoer for contributory

negligence purposes). In effect the references to loss of the consortium or services of a wife and to loss of the services of a child are being deleted and a new subsection limited to a nominal plaintiff or an employee (where the action is for loss of the services of the employee) is being substituted for the said section 35(2). (See Law Reform Commission Working Paper No. 7 - 1979 at pp. 40-41 and fn. 51.) In the case of loss of consortium and in the case of personal injury to a child, the plaintiff is being made responsible for the contributory negligence of the injured spouse, parent or child-- sections 13(5) and 15(5). (See paras. 16 and 18 supra.)

52. Section 32 of the Bill proposes in subsection (1) to abolish any action for enticement other than the proposed statutory actions being created in Part III and VII of the Bill. In effect, this means that an action for enticement of an employee will no longer lie. However, for the avoidance of doubt, the action for inducing or procuring a breach of contract of employment is being preserved - subsection (2). (See Lumley v Gye (1853) 2 Ellis and Elackburn 216-270 and 95 Revised Reports (1852-1854) 501-538.)
53. Section 33 of the Bill proposes to repeal section 2 of the Evidence Further Amendment Act 1869 (Lord Denman's Act) and section 12 of the Married Women's Status Act 1957. Section 2 of the 1869 Act provides that no plaintiff in an action for breach of promise shall recover a verdict unless his or her testimony "shall be corroborated by some other material evidence in support of such promise". As the action for breach of promise of marriage is being abolished by section 23 of the Bill, section 2 of Lord Denman's Act will have nothing on which to operate and should, therefore, be repealed. As regards the proposed

repeal of section 12 of the 1957 Act, the position is that this section is being re-enacted in extended form in section 20 of the Bill.

54. Section 34 of the Bill is a transitory and saving provision. Because of subsection (1) none of the new family actions for adultery, enticement etc. may be brought in respect of events or matters that happened or arose before the commencement of the proposed Act. Subsection (2) is designed to ensure that, where an action has been commenced, nothing in the proposed legislation will affect the action. In other words, the action may be continued as if the proposed legislation had never been enacted.