

Divorce A Mensa Et Thoro and Related Matters

In December 1983, the Commission published its Report on [*Divorce A Mensa Et Thoro and Related Matters \(LRC 8-1983\)*](#) as part of its First Programme of Law Reform. The Report proceeds on the basis of the existing constitutional position under which legislation providing for the grant of a dissolution of marriage was prohibited.

The Report recommends the retention of proceedings for legal separation. It recommends that adultery and cruelty should, as at present, constitute grounds for legal separation. The Report recommends that unnatural practices should be abolished as a specific ground for legal separation while envisaging that such conduct should, in appropriate cases, provide a basis for legal separation on some other ground, such as cruelty or unreasonable behaviour. The Report recommends that legislation should provide for certain new grounds for legal separation, which would supplement the existing grounds of adultery and cruelty. The Report also recommends that desertion should be made a ground for legal separation and that it should include constructive desertion i.e. where a spouse behaves in so deficient a manner that the other spouse is justified in leaving him or her. Further grounds of legal separation recommended in the Report are the breakdown of marriage and the fact that the parties have lived apart continually for a specified period.

The Report considered certain bars to a decree of divorce a mensa et thoro under the present law. The Commission favoured the abolition of the bar of recrimination which prevents a spouse from obtaining a decree to which he or she would otherwise be entitled where that spouse is guilty of conduct entitling the other spouse to a separation. The Report also recommends the abolition of the bar of collusion. However it does not recommend the abolition of the bar of connivance which covers cases where the petitioner has actually encouraged the other spouse to misbehave and suggests that legislation should provide that conduct conducing to adultery should constitute a substantive (rather than a discretionary) bar. The Report also recommends that the defence of condonation should be abolished but it should remain as a discretionary bar.

The Report recommends that the present discrimination between the sexes regarding alimony should be abolished and also that the courts should be permitted to make orders for the payment of lump sums and, with the consent of the parties, for the transfer of property. It also recommends that the law relating to payments for maintenance of spouses and children consequent upon a legal separation should be brought into line generally with the Family Law (Maintenance of Spouses and Children) Act 1976.

The Report recommends that legislation should provide explicitly that where the Court grants a decree of legal separation, the parties to the marriage should no longer be obliged to cohabit.

As regards succession rights, the Report recommends that legislation should provide that, on the granting of a decree for legal separation, each spouse is to be precluded from taking any share in the other's estate.

The Report recommends that the legislation should provide specifically that, in proceedings for legal separation, the court should proceed with the minimum of formality, that neither the judge

not the legal representatives should be robed, that the order of address of these representatives and of the parties should be at the court's discretion and that the court should be empowered to call witnesses additional to those suggested or called by the parties. The legislation should, in express terms, require the court to enquire into the case and not just permit it to proceed on whatever basis the parties may choose to present it. If proper counselling services are made available, the Report suggests that it could be made a necessary preliminary to the institution of court proceedings that the spouses should have had recourse to those services.

The Report proposes that the court should have imposed on it the duty of protecting the children of legally separated spouses.

One member of the Commission made a number of counter-proposals which are included in a separate chapter of the Report.

Draft Legislation in Report

Draft legislative provisions are included in the Report.

Information on Implementation

Recommendations of the Commission were implemented by the *Judicial Separation and Family Law Reform Act 1989* and the *Family Law Act 1995*.