Contextualising the Law on Pre-Nuptial Agreements in England: A Comparative Study and a Proposal for Reform

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Abstract

Over ten years ago, Lady Hale stated 'there is not much doubt that the law of marital agreements is in a mess.'[1] However, with no reforms being implemented, the 'messy law' subsists. This article analyses the English legal approach and compares it with the Australian one to discuss whether statutory change to make pre-nuptial agreements (PNAs) legally binding is needed. It will argue against the stereotype that PNAs are only suitable for uber-wealthy individuals and instead claim that PNAs should be considered by anyone wishing to protect their assets. First, the conventional objections to PNAs and the transformation of traditional attitudes are explored; demonstrating that such objections are no longer influential. This is followed by a discussion of English case law explaining the difficulties posed in applying precedent. The Australian law is then examined, outlining the effects that binding financial agreements have had for the public and practitioners. Finally, a proposal for reform by the Law Commission is evaluated, in tandem with the Australian law, to suggest what change to the English approach could look like. The article concludes that PNAs should be made legally binding, to respect the autonomy of individuals and to provide practitioners with clarity when advising clients, but that safeguards are paramount in this reform process to minimise the risks associated with the formation of PNAs.

[1] *Radmacher v Granatino* [2010] UKSC 42 [133].

1 Introduction

Pre-nuptial agreements (PNAs) exist differently within a legal context than media portrayal. Media accentuation of high-profile divorces has presented PNAs as underhand contracts that protect extreme wealth. This article challenges this stereotype and suggests that since PNAs, in their simplest form, protect individual assets in divorce, they are suitable for all parties entering a marriage. With recent statistics outlining that 41% of marriages do not make it to their 25th anniversary,[2] methods of dealing with assets post-divorce, such as legally binding PNAs, need to be addressed.

To understand the embedded stereotypes and provide an alternative perspective suggesting that these agreements are suitable for wider use, society's view on PNAs will first be contextualised. Having opposed these stereotypes, the article will outline the current legal status of pre-nuptial agreements following the case of *Radmacher* and the limitations of the law through understanding precedents set within case law. Following this, the traditional objections of adopting legally binding PNAs will be identified and subsequently criticised for their lack of evolution to a 21st century society.

The article then turns to the Australian approach as inspiration for potential improvements. Australia was chosen for several reasons. It is historically associated with the UK and is a member of the Commonwealth. Australia operates as a unitary state as does the English legal system, and most importantly, Australia has taken a progressive approach in relation to PNAs. After understanding the Australian framework, both the legal and practical implications will be analysed to ascertain whether this approach would be suitable for English law to introduce and what areas need to be addressed before its implementation.

The article will ultimately conclude that to mirror society's progressive views and to clarify the legal position of pre-nuptial agreements reform is desperately needed. Using the Australian approach as a suggested framework provides some progressive ideas for such a reform,

[2] Office for National Statistics, 'Divorces in England and Wales 2021' (*ONS*, 2022) <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/divorce/bulletins/divorcesinenglandandwales/2022#:~:text=3.-,Divorce%20rates,(opposite%2Dsex%20only).> accessed 6 April 2024.

however the implementation of safeguards under this reform does raise concerns and would need to be addressed before any English reform.

2 PNAs and the English Law

2.1 What is a PNA and why does it Matter?

English law does not provide a statutory definition of PNAs; without this, they are 'a somewhat ill-defined, yet extremely wide, category'.[3] Dalling provides a suitable definition for this article, defining a PNA 'as a contract that is entered into by a couple intending to marry, prior to the date of the marriage, which purports to regulate the financial aspect of any future reallocation of assets upon divorce.'[4] The standard motivations for a PNA are one party has generated wealth in the form of inheritance or from a successful career, which they wish to protect from a spouse in the event of divorce. The stereotypical purpose being to retain as much of one's individual assets as possible.

Considering this, PNAs have generally been regarded by society as only suitable for the 'uber-wealthy'. This article will challenge this stereotype, advocating that PNAs are appropriate for wider public use. When discussing PNAs, it should be emphasised that they are applicable for all who wish to protect their assets. This has been reinforced by the courts who stressed that those entering PNAs are not solely for 'the predominantly male super-rich anxious to ensure that the contemplated marriage will prove too expensive on its future dissolution'.[5] Practitioners have outlined that the range of assets dealt with as part of a PNA, have varied from £50,000 to up to £250 million.[6] Therefore, PNAs are 'no longer restricted just to an elite band of people in 'big money' cases'[7] and, should be considered regardless of wealth.

[3] Clare Robinson, 'Pre-nuptial Agreements—the End of Romance or an Invaluable Weapon in the Wealth Protection Armoury?' (2007) 13 Trusts & Trustees 207.
[4] Samuel Jed Dalling, 'Regulating Prenuptial Agreements: Balancing Autonomy and Protection' (2013) Durham University 2.
[5] *Radmacher v Granatino* [2009] EWCA Civ 649 [27].
[6] Emma Hitchings, 'A Study of the Views and Approaches of Family Practitioners Concerning Marital Property Agreements: Research Report for the Law Commission' (University of Bristol 2011) 31.
[7] Anne Barlow & Janet Smithson 'Is Modern Marriage a Bargain: Exploring Perceptions of Pre-Nuptial Agreements in England and Wales (2012) 24 Child & Family Law Quarterly 307.

The 'greater emphasis on self-determination and self-sufficiency'[8] within family law provides the optimal backdrop for understanding the importance of pre-nuptial agreements. The certainty provided by a legally binding agreement would be opposite to financial remedy proceedings where the overriding decision is made by a single judge if parties cannot agree. As Robinson suggests, 'it seems inevitable that, given the prospect potentially of losing half of your assets on divorce, clients are seeking a remedy and are looking to PNAs to provide it.'[9] This is compelling when noting the average cost of litigation for financial remedy proceedings, and the time proceedings can take to finalise. Lord Justice Rix seems to support the position stating that 'it is much better, and more honest, for that agreement to be made at the outset'[10] rather than following a difficult relationship breakdown.

There is no explicit statute concerning the law on PNAs and much of the guidance stems from precedent set within case law. Under section 23 MCA 1973, the court has the power to make a variety of orders, following a decree of divorce.[11] Parties to a PNA cannot override the court's discretion in deciding how to redistribute their assets, however, the agreement is to be considered alongside other factors under section 25(2) Matrimonial Causes Act (MCA) 1973.[12] Therefore, how courts treat agreements will vary on a case-by-case basis[13] creating, 'a somewhat ambiguous standing'.[14] This 'ambiguous standing' of PNAs was arguably emphasised by the case of *Radmacher v Granatino*.

2.2 The *Radmacher v Granatino* Case

The landmark *Radmacher* case took place between Mr Granatino and Mrs Radmacher. The parties signed a PNA in 1998, prior to their marriage of eight years. The parties had two children who were aged four and seven at the time of separation. The PNA was encouraged by the wife's family, as she was to inherit a proportion of the family's wealth. The agreement defined that 'neither party was to derive any interest in or benefit from the property of the other party during the marriage or on its termination.'[15] When the agreement was drafted, the

[8] Dalling (n 4) 13.
[9] Robinson (n 3) 207.
[10] *Radmacher* (n 5) [73].
[11] Matrimonial Causes Act 1973 (MCA) 1973 s 23.
[12] MCA 1973 s 25(2).
[13] Gareth Miller, 'Prenuptial agreements in English Law' (2003) 6 PCB 416.
[14] Brigitte Clark 'Prenuptial Contracts in English Law: Capricious Outcomes or Legislative Clarification?' (2010) 32 The Journal of Social Welfare & Family Law 238.
[15] *Radmacher* (n 1) [12].

husband earned £120,000 a year until 2002, where he began studying for a doctorate, which reduced his income. Originally, Mr Granatino was awarded £5.5m to provide a home and form of income, however in the Court of Appeal it was held that 'the award should make provision for the husband's role as the father of the two children but should not otherwise make provision for his own long-term needs'.[16] Mr Granatino appealed to the Supreme Court which raised the question of what principles should be applied when considering the weight attached to an agreement.[17]

The Supreme Court emphasised that 'it is the Court, and not any prior agreement between the parties, that will determine appropriate ancillary relief when a marriage comes to an end.'[18] However, the judges approached the enforceability differently, than had ever been done in previous cases. Two main issues were raised within the case: what circumstances in the making of the agreement should detract from its enforceability, and whether under the circumstances at the time of divorce it would be fair or just to depart from the agreement.[19] The court proposed the following test; if 'both the husband and wife … enter into it of their own free will, without undue influence or pressure, and informed of its implications',[20] the PNA will be considered legally binding. The judgment confirmed that the court is right to give decisive weight to PNAs,[21] satisfying this test.

The court referred to the government consultation 'Supporting Families',[22] which contained suggested scenarios where an agreement would not be legally binding, regardless of the case's circumstances. These included: where there are children involved, where the agreement is unenforceable under contract law, or would cause significant injustice, where there has not been full disclosure of assets, and where the agreement is made less than 21 days prior to marriage. It was suggested these would act as safeguards in the formation of agreements, as Lord Phillips outlined 'it is necessary to have black and white rules of this kind if agreements are otherwise to be binding'.[23] Lord Phillips highlighted that where duress, fraud or misrepresentation are present, this will 'negate any effect the agreement might otherwise

[16] Ibid [16].
[17] Ibid [2].
[18] Ibid [7].
[19] Ibid [67].
[20] Ibid [68].
[21] Ibid [70].
[22] Ministerial Group on the Family 'Supporting Families: A Consultation Document' (1998) 12 PCLB 5–7, para 4.24
[23] *Radmacher* (n 1) [69].

have'[24] and conduct that falls short of duress 'will also be likely to eliminate the weight to be attached to the agreement'.[25] However, he concluded that whilst safeguards are 'likely to be highly relevant',[26] he outlined that 'there is no need for them'[27] to be prescribed into law.

The court proposed that an agreement satisfying the test would be legally binding unless 'in the circumstances prevailing it would not be fair to hold the parties to their agreement'.[28] This sought to address concerns of upholding an agreement 'where there has been a significant passage of time and change of circumstances since the signing of the PNA'.[29] Unsurprisingly, the first material change in circumstance being a child of the parties under the age of 18.[30] The court emphasised that it would be important to give respect to the individual autonomy of the parties in signing the agreement[31] and the exclusion of 'non-matrimonial property'[32] when considering an agreement's fairness. The court highlighted the importance of parties' present and future needs concluding an agreement would not be upheld if it placed either party 'in a predicament of real need'.[33]

The majority ruled it would be fair to give 'decisive weight' to the agreement and Mr Granatino should have only been granted provision due to his role as a father, as the Court of Appeal had held. However, Baroness Hale provided a dissenting opinion centred around the premise a PNA may be deliberately designed to disadvantage one spouse in the event of divorce.[34]

2.3 Developments following the *Radmacher* Precedent

The *Radmacher* case demonstrates a transformation in how PNAs will be considered. However, overturning the orthodox approach without prescribing it into law has created a 'varied and unpredictable position of pre-nuptial contracts under judicial consideration' which 'leaves the law potentially costly and urgently in need of legislative attention.'[35] This is evident

[24] Ibid [71].
[25] Ibid.
[26] Ibid [69].
[27] Ibid.
[28] Ibid [75].
[29] Clark (n 14) 243.
[30] MCA 1973 s 25(1).
[31] *Radmacher* (n 1) [78].
[32] Ibid [79].
[33] Ibid [81].
[34] Nigel Lowe and others, *Bromley's Family Law* (12th edn, OUP 2021) 324.
[35] Clark (n 14) 245.

in the post-*Radmacher* case law, which has dealt with issues of fairness and need, and circumstances arising from the formulation of PNAs.

The issue of fairness and parties' needs, divided the justices in *Radmacher* however, the courts have subsequently, adopted a more lenient approach. In *Luckwell v Limata,*[36] the parties signed a PNA and two post-nuptial agreements outlining the husband would not make a claim on his wife's property upon divorce. However, the court chose not to uphold the agreement since it would have placed the husband in 'real need'. This demonstrated that 'current and likely future need'[37] could outweigh an agreement that would have otherwise been legally binding under the *Radmacher* test. Similarly, in the case of *Ipekçi v McConnell,*[38] Justice Mostyn emphasised that 'needs when assessed in circumstances where there is a valid prenuptial agreement' should not be considered 'markedly less than needs assessed in ordinary circumstances.'[39] This highlights that in determining the weight given to an agreement, needs will always be considered despite parties having signed an agreement outlining a different distribution of assets. However, as Bray emphasised, ''need' is a subjective concept',[40] open to a judge's interpretation and is therefore, difficult to identify.

When considering safeguards, 'sound legal advice is obviously desirable'[41] as Lord Phillips stated, acting as a sign of the parties' 'determination and their intention to create legal relations.'[42] The extent of this, however, is difficult to understand within case law.

In *Kremen v Agrest,*[43] the PNA was not upheld following the wife not having received independent legal advice. Justice Mostyn emphasised 'that it will only be in an unusual case where it can be said that absent independent legal advice',[44] a marital agreement will be upheld. However, in *Versteegh v Versteegh,*[45] even though the wife made the same argument, the court upheld the agreement concluding that in jurisdictions where PNAs are commonplace, the

[36] *Luckwell v Limata* [2014] EWHC 502 (Fam).
[37] Ibid [138].
[38] *Ipekçi v McConnell* [2019] EWFC 19.
[39] Ibid [27].
[40] Judith Bray, 'The Effect of "Fairness" on Prenuptial Agreements' (2014) 26 Denning Law Journal 273.
[41] *Radmacher* (n 1) [69].
[42] Anne Sanders, 'Private Autonomy and Marital Property Agreements' (2010) 59 The International and comparative law quarterly 593.
[43] *Kremen v Agrest* [2012] EWHC 45 (Fam).
[44] Ibid [73].
[45] *Versteegh v Versteegh* [2018] EWCA Civ 1050.

individual will likely understand the repercussions of the agreement regardless of receiving independent legal advice. This demonstrates inconsistencies in applying the precedent providing little certainty as to the importance of independent legal advice to the court. It is also concerning when noting that 94% of people find it 'very or fairly important for both partners making a binding PNA to take legal advice',[46] with some even regarding it as 'fundamental to the basic concepts of English culture of fairness and justice.'[47]

The the extent to which parties disclose their financial assets is also considered an important safeguard. As Clark emphasises, 'the law remains unclear as to the extent of the effect of non-disclosure of assets on the weighting of the PNAs in the ancillary relief exercise.'[48] It was highlighted in *BN v MA*,[49] that full disclosure is not 'a necessary pre-condition' to satisfy the criteria for fairness.[50] Despite this, the agreement in *WW v HW*[51] was upheld although the husband disclosed exaggerated financial figures. The court determined that this was done to 'deliberately mislead' his future wife and her legal advisers to ensure the marriage took place.[52] Similarly, in *Z v Z*,[53] the agreement was upheld, despite the wife only being aware her husband 'was doing well'[54] financially. However, whilst there may be some flexibility in the case law, 'cases where these safeguards are not present should be the exception rather than the rule.'[55]

As outlined in *Radmacher* undue influence and duress are vitiating factors however, the courts have enforced a high threshold for evidence of their presence. In *KA v MA*,[56] the husband threatened not to marry unless his wife signed a PNA, which she did, despite being under 'immense pressure to do so.'[57] The court concluded this did not amount to an 'exploitation of a dominant position'[58] vitiating the wife's signing of the agreement since both parties were 'mature, consenting adults.'[59] Similarly in *V v V*,[60] a young pregnant woman signed an

[46] Joanna Miles, 'Marriage and Divorce in the Supreme Court and the Law Commission: For Love or Money? (2011) 74 Modern Law Review 308.
[47] Dalling (n 4) 103.
[48] Clark (n 14) 242.
[49] *BN v MA* [2013] EWHC 4250 (Fam).
[50] Ibid [30].
[51] *WW v HW* [2015] EWHC 1844 (Fam).
[52] Ibid [18].
[53] *Z v Z* [2011] EWHC 2878 (Fam).
[54] Ibid [46].
[55] Anna Heenan, 'Family: The After-Shock' (2012) 162) New Law Journal 797.
[56] *KA v MA* [2018] EWHC 499 (Fam).
[57] Ibid [39].
[58] Ibid [60].
[59] Ibid.
[60] *V v V* [2011] EWHC 3230 (Fam).

agreement with her husband who is ten years older. The wife raised the children and the husband worked. The court concluded, applying *Radmacher*, that the weight given to the PNA should not be reduced due to the 'inequality of bargaining position'[61] as 'the agreement was not one that was not willingly and honestly entered by both parties.'[62]

Both cases demonstrate that in determining whether a vitiating factor is present, the court tends to take a stricter approach. This stricter approach is concerning since a lack of equal bargaining position has been outlined as 'a potential danger with a PNA'[63] and the lack of undue influence or pressure was an important element of the test laid out in *Radmacher*.

2.4 How has *Radmacher* affected Practitioners advising on PNAs?

As inferred, it is difficult to ascertain how much weight the court assigns to factors in the context of PNAs. Therefore, an unsurprising consequence for practitioners is how successfully they can advise their clients when drafting a PNA.

The key challenge for practitioners' is identifying a clients' needs; as Miller highlights, 'the position becomes all the more complex'[64] when predicting these needs for a fair PNA. Since *Radmacher*, demand for PNAs has increased 'by those attempting to combat the uncertainties of divorce'.[65] However, practitioners highlighted a tendency for these enquiries to 'drop-off.'[66] Whilst practitioners cited a number of reasons why clients did not follow through with agreements, a common reason was 'no guaranteed outcome'.[67] This suggests when clients gain a fuller understanding of the legal status afforded to PNAs, they are deterred from drafting the agreement. Therefore, 'there remains considerable scope for parties to dispute the amount of weight to be afforded to an agreement',[68] increasing costs, a consequence that parties seek to avoid in drafting a PNA.

[61] Ibid [64].
[62] Ibid.
[63] Miller (n 13) 422.
[64] Jan Miller, 'Pre-nuptial Pursuit' (2015) 165 New Law Journal 11.
[65] Heenan (n 55) 796.
[66] Hitchings (n 6) 23.
[67] Ibid 24.
[68] Miller (n 64) 10.

As Dalling contends, 'both autonomy and protection are embraced to varying degrees'[69] in the case law. The lack of 'hard and fast rules'[70] makes it almost impossible for practitioners to conclusively advise clients and deters parties from pursuing this as a form of protecting their assets. Further statutory guidance is needed to provide guidance outline the legal standing of binding PNAs and the formalities required to make a valid agreement, in order promote PNAs as a successful method of protecting assets.

3 'Legally binding PNAs': A Good Idea?

3.1 In Support of legally binding PNAs

The lack of clarity in the current legal position highlights that a legally binding PNA would allow for a smoother transition upon divorce. The current dynamic social context only strengthens this position further. For example, it is obvious the 'nuclear family' is no longer the norm and families exist in many different forms that the law must consider. Ribet contends that PNAs would be a 'sensible option' for divorced couples where both parties have had their individual assets reduced having undergone divorce proceedings with a previous partner.[71] A legally binding PNA ensures all parties' assets remain their property, avoiding fears of losing assets as experienced following their first divorce.

Similarly, Dalling outlined that 'a higher median age at first marriage coupled with an increased volume of remarriages'[72] means newlyweds now hold significant wealth prior to marriage which may require protection. This demonstrates there is no conventional formula for marriage; parties enter marriage at different ages having acquired various levels of wealth. As Lady Hale outlined in *Radmacher*, 'nowadays there is considerable freedom and flexibility within the marital package'[73] and a legally binding PNA would give all parties the freedom to protect their assets.

[69] Dalling (n 4) 14.
[70] Stephen Gilmore and Lisa Glennon 'Hayes & Williams' Family Law' (7th edn, OUP 2020) 80.
[71] Julian Ribet, 'Hedging One's Bets' (2010) 160 New Law Journal 1479.
[72] Dalling (n 4) 5.
[73] *Radmacher* (n 1) [132].

However, whilst social attitudes have significantly transformed over recent years, the objections to a legally binding pre-nuptial agreement still seem to carry weight amongst society and practitioners.

3.2 Conventional Objections

The most common objection cited is that PNAs 'foresee the end of a marriage before it has even begun',[74] making the parties' separation imminent. This has shaped the legal approach of many jurisdictions that such agreements 'violated public policy because they facilitated divorce'.[75] Public policy arguments focus on the protection of the public rather than the individual.[76] Leech argues that the 'historic repugnance' exhibited by English law towards PNAs and their anticipation of a failed marriage centres around the sanctity of marriage.[77]

When noting the intrinsic links marriage holds with religion, this is particularly convincing. It could be suggested the legal system has mirrored the sacredness of marriage through enforcing policies providing it with stronger legal protection. This is supported by Lady Hale in *Radmacher,* who contended that marital status means the parties 'contract into a package which the law of the land lays down' which traditionally was shaped by religious ideals.[78] Under this view, parties to marriage should 'not (be) free to vary at will'[79] their own affairs and it is the responsibility of the state to ensure marriage is afforded its 'higher status'.

Whilst this argument is persuasive under society's lens, legally it has been argued that PNAs no longer violate public policy. In *MacLeod v MacLeod,* a Privy Council decision which discussed a post-nuptial agreement, the validity of marital property agreements was discussed and concluded that it is time for the public policy rule 'to disappear'.[80] This was justified as the rule was founded on the assumption there is 'an enforceable duty of husband and wife to live together' however, this duty no longer exists.[81] Some argue that this does not legitimise the

[74] Robinson (n 3) 209.
[75] Sanders (n 5) 582.
[76] Dalling (n 4) 15.
[77] Stewart Leech, 'With "All" My Worldly Goods I Thee Endow—The Status of PNAs in England and Wales' (2000) 34 Family Law Quarterly 198.
[78] *Radmacher* (n 1) [132].
[79] Sanders (n 5) 581.
[80] *MacLeod v MacLeod* [2008] UKPC 64 [39].
[81] Ibid [38].

abolition of the 'public policy argument' since it is a Privy Council decision, meaning its precedent is not binding on the English courts. Nevertheless, the judgment has been cited to demonstrate the public policy argument no longer exists by institutions recognising the weaker 'status' of marriage. For example, the Law Commission quoted the decision in concluding that 'the evolution of the law and changed social attitudes have rendered this public policy rule obsolete'.[82] As Lord Justice Thorpe summarised 'marriage is not generally regarded as a sacrament and a divorce is a statistical commonplace'.[83]

A more convincing argument against legally binding PNAs is protecting a financially weaker spouse. This stems from the fear that 'allowing couples to oust the jurisdiction of the court to make orders for financial relief'[84] could leave the weaker in desperate financial need. Lady Hale highlighted in *Radmacher*, that this is central to the concept of a PNA. She outlined that society 'can all too easily lose sight of the fact that … the object of an ante-nuptial agreement is to deny the economically weaker spouse the provision to which she would otherwise be entitled'.[85] Lady Hale also specified the 'gender dimension'[86] to such agreements, as the financially weaker spouse is generally the woman. Some argue gender roles are blurred within 21st century marriages however, many couples continue to adopt the stereotypical 'homemaker/breadwinner' roles within their family dynamic.[87] Therefore, there is a disparity in how legally binding PNAs may negatively affect women compared to men.

This links to the concern that PNAs create a financial incentive.[88] In drafting a PNA, parties can avoid court proceedings and escape responsibility of spousal maintenance.[89] As a result, there is a risk to the state of using finite resources to provide for a spouse, who has been left vulnerable through relying on a PNA. This highlights the safeguarding concern of pressure to sign an agreement, felt by the economically weaker party, emphasising an obvious power imbalance. As Robinson suggests, 'pressure on a party to enter into a PNA can take the form of obvious direct spoken or written pressure from the other party or, perhaps, their family'.[90]

[82] Law Commission, *Matrimonial Property, Needs and Agreements* (Law Com No 343 2014) para 4.28.
[83] *Radmacher* (n 5) [29].
[84] Dalling (n 4) 16.
[85] *Radmacher* (n 1) [137].
[86] Ibid.
[87] Dalling (n 4) 22.
[88] Joanna Miles 'Marriage and Divorce in the Supreme Court and the Law Commission: For Love or Money?' (2011) 74 Modern Law Review 431–432.
[89] Ibid.
[90] Robinson (n 3).

Whilst there may be safeguards in place to minimise this, it is difficult to identify, creating a legitimate concern of financial vulnerability, both for the state and parties entering into an agreement.

Practitioners have highlighted one of their difficulties in providing accurate advice on PNAs is predicting the parties' circumstances in the event of divorce. In one study, the process was described by more than one practitioner 'as attempting to gaze into a crystal-ball'.[91] It was the 'ultimate fairness' of agreements that raised participants' concerns in the Law Commission's consultation[92] as it would be difficult to formulate an agreement that would remain fair for both parties in the possibly distant future.[93] Lady Hale in *Radmacher*, emphasised it would be 'difficult, if not impossible'[94] to do so. However, some practitioners raised that their advice is only 'discretionary' and therefore, should not be treated as definitive by the court or clients.[95] Dr Therese Callus notes that PNAs 'require a certain amount of crystal ball gazing which is neither conducive to a predictable result, nor necessarily fair'.[96]

Considering all the above, any reform should seek to reduce these concerns through implementing safeguards that ensure that parties are aware of the effects of their agreement.

4 The Case Study of Australia: What Could We Do Differently?

4.1 Why Australia?

Australia has historically demonstrated 'an unwillingness to enforce private agreements'[97] removing the court's power to make financial orders upon divorce. Prior to 2000, agreements between spouses could only be entered post-separation and had to be registered with the court.[98] The Family Law Amendment Act 2000, established the ability for binding financial agreements to be entered into before, during or following marriage. The rationale behind this reform was

[91] Hitchings (n 10) 38.
[92] Law Commission (n 82) para 5.22.
[93] Ibid.
[94] *Radmacher* (n 1) [176].
[95] Hitchings (n 10) 38.
[96] Law Commission (n 82) para 5.48.
[97] John Eldridge, 'Lawful-Act Duress and Marital Agreements' (2018) 77 CLJ 34.
[98] Belinda Fehlberg and Bruce Smyth, 'Binding Pre-Nuptial Agreements in Australia: The First Year' (2002) 16 International Journal of Law, Policy and the Family 127.

to acknowledge the changing perception of marriage being an 'economic partnership' in addition to a 'social relationship'.[99] The reform provides spouses with greater certainty over their assets post-divorce[100] in response to a changing social context that the English courts have failed to provide thus far.

4.2 Binding Financial Agreements in the Australian Law

The binding financial agreements are defined in section 90B Family Law Act 1975, as a written agreement made 'between people who are contemplating entering into marriage with each other,'[101] to decide 'how in the event of the breakdown of the marriage,'[102] their assets will be dealt with and if either spouse is to receive any maintenance.[103] These financial agreements 'operate as a means of exclusion of the operation of section 79'[104] of the same Act, which grants the court power to 'make such order as it considers appropriate'[105] in property settlement proceedings.

Section 90G(1) emphasises that a financial agreement will be considered binding 'if, and only if' certain requirements are met[106] including: that the agreement is signed by all parties,[107] both parties have received independent legal advice about the effect the agreement has on their rights as well as the advantages and disadvantages of making the agreement.[108] Each party should receive a signed statement by their solicitor stating the advice has been provided,[109] a copy of which is given to the other party and vice versa.[110] In addition, the Federal Justice System Amendment (Efficiency Measures) Act introduced section 90G(1A),[111] following significant case law developments. This states an agreement will be considered binding if it has been

[99] Explanatory Memorandum to Family Law Amendment Bill 1999 5.
[100] Eleanor Rowan, 'A "Thorne" in the Side for Family Lawyers in Australia: Undue Influence and Prenuptial Contracts' (2018) 40 Journal of Social Welfare and Family Law 238.
[101] Family Law Act 1975 (FLA) 1975 s 90B(1)(a).
[102] FLA 1975 s 90B(2)(a).
[103] FLA 1975 s 90B(2)(b).
[104] Christopher J Turnbull, 'Family Law Property Settlements: Principled Law Reform for Separated Families' (Queensland University of Technology 2017) 56.
[105] FLA 1975 s 79(1).
[106] FLA 1975 s 90B(1).
[107] FLA 1975 s 90G(1)(a).
[108] FLA 1975 s 90G(1)(b).
[109] FLA 1975 s 90G(1)(c).
[110] FLA 1975 s 90G(1)(ca).
[111] Federal Justice System Amendment (Efficiency Measures) Act (No 1) 2009 sch 4A.

signed by all parties[112] but one or more of the other requirements outlined in section 90G(1)[113] is not satisfied and the court deems it 'unjust and inequitable' for the agreement not to be binding on the parties.[114]

Section 90K sets out circumstances where binding financial agreements will be set aside by the court. These include where the agreement has been entered into fraudulently,[115] where circumstances have changed materially such as a child of the marriage[116] meaning it is impracticable to uphold under these circumstances,[117] where either party has displayed unconscionable conduct[118] and where the agreement would be considered void, voidable or unenforceable under contract law.[119] This is reinforced by section 90KA which states the validity, enforceability and effectiveness of agreements, 'is to be determined by the court according to the principles of law and equity.'[120] The court retains the power to make an order as to the maintenance of a party to the marriage if, the party would be 'unable to support himself or herself without an income tested pension, allowance or benefit.'[121]

The case law of binding financial agreements can be categorised into two groups: the interpretation of section 90G in relation to 'independent legal advice' and the interpretation of section 90K in considering whether to set aside agreements.

A controversial issue surrounds how the courts enforce compliance with the requirements in section 90G. In *J v J*,[122] the wife sought to rely on an agreement without a statement proving the parties had received independent legal advice and the wording on the certificate did not comply with the requirements of section 90G at the time. The court placed 'real significance'[123] on the words 'if and only if', in section 90G and that 'something approaching full compliance, or something that if looked at in a less than strict light, might come close to establishing compliance, is not enough.'[124] Justice Collier concluded that he was not 'satisfied at the time

[112] FLA 1975 s 90G(1A)(a).
[113] FLA 1975 s 90G(1A)(b).
[114] FLA 1975 s 90G(1A)(c).
[115] FLA 1975 s 90K(1)(a).
[116] FLA 1975 s 90K(1)(d).
[117] FLA 1975 s 90K(1)(c).
[118] FLA 1975 s 90K(1)(e).
[119] FLA 1975 s 90K(1)(b).
[120] FLA 1975 s 90KA.
[121] FLA 1975 s 90F(1) and (1A).
[122] *J v J* [2006] Fam CA 442.
[123] Ibid [19].
[124] Ibid [20].

the husband signed the agreement there had been explained to him the advantages and disadvantages of him entering into the agreement.'[125]

This issue was also discussed in *Black v Black*.[126] Parties entered an agreement that the parties would both deposit monies into a joint account to purchase a house, to be treated as joint property if their relationship broke down. When this transpired, the husband sought the agreement to be set aside after 'his solicitor did not re-certify the agreement'[127] after amending it. The judge concluded the agreement did contain a statement that was 'certified in the annexure to the agreement',[128] however, the Full Court concluded 'that strict compliance is necessary to oust the court's jurisdiction to make adjustive orders under s.79.'[129] A decision in favour of strict compliance was not positively received by various legal professionals,[130] resulting in the introduction of section 90G(1A) which 'relax[ed] certain requirements'[131] of binding financial agreements and restored confidence in their binding nature.[132]

The second controversy relates to the grounds one may rely on to set aside an agreement under section 90K where the contradictory precedent has muddied the strength of these grounds. In *Blackmore v Webber*,[133] an Australian man began living with a Thai woman who was a student. When she fell pregnant, the couple planned to marry. Five days before their wedding, the husband presented her with a financial agreement which she reluctantly signed two days later after obtaining legal advice. The wife alleged the agreement be set aside for being void under section 90K(1)(b) due to the presence of duress. The court noted that the proximity of the wife signing the agreement to the marriage, the wife's pregnancy, and her impending visa expiration constituted 'illegitimate' pressure on the wife to sign the agreement which amounted to duress.[134]

[125] Ibid [32].
[126] *Black v Black* [2008] Fam CAFC 7.
[127] Ibid [27].
[128] Ibid [31].
[129] Ibid [45].
[130] Owen Jessep, 'Marital Agreements and Private Autonomy in Australia' in Jens M Scherpe *Marital Agreements and Private Autonomy in Comparative Perspective* (Bloomsbury Publishing 2012) 35.
[131] Explanatory Memorandum to Federal Justice Amendment (Efficiency Measures) Bill (No 1) 2008 2.
[132] Ibid.
[133] *Blackmore v Webber* [2009] FMCA Fam 154.
[134] Ibid [106].

The more recent case of *Thorne v Kennedy*[135] discussed financial agreements made by a wealthy property developer,[136] and his wife, a less wealthy woman.[137] The husband told his wife that to marry, a PNA would have to be signed as he wished to leave his fortune to his adult children.[138] The agreement was signed a few days prior to the wedding, despite the wife's solicitor advising the agreement was 'no good' and should not be signed.[139] The High Court ruled that the agreement be set aside due to Mr Kennedy having taken 'unconscientious advantage of Ms Thorne's position of special disadvantage.'[140] They outlined key factors including: the emotional circumstances in which the agreement was entered, whether there was any time for reflection, the nature of the parties' relationships, the relative financial positions of the parties and the independent advice that was received.[141] Prior to this, parties had been able 'to shield behind the principle of independent legal advice to rebut any presumption that advantage has been taken of a superior position.'[142] However, this case demonstrated that independent legal advice is not a complete bar to the presence of a vitiating factor.

4.3 The Effect on Couples and Practitioners

Fehlberg and Smyth's study noted short-term consequences of binding financial agreements, after one year. It was noted that enquiries increased from two-three per year to four-six.[143] They highlighted the groups who made enquiries including: couples with a significant asset disparity, who have previously been involved in family proceedings, or been married before.[144] Wade observed a further pattern of 'counter-culture couples who live in alternative communities and do not want their assets divided under FLA 1975.'[145]

However, enquiries are again, not always followed through. A major factor for this being the 'difficulty experienced at a personal level between couples during the process of negotiating agreements.'[146] It is unsurprising that 'firm belief on the part of clients who are about to embark

[135] *Thorne v Kennedy* [2017] HCA 49.
[136] *Kennedy v Thorne* [2016] Fam CAFC 189 [8].
[137] Ibid [7].
[138] Ibid [11].
[139] Ibid [16].
[140] *Thorne* (n 135) [74].
[141] Ibid [60].
[142] Renati Grossi, 'The Discomfort of Thorne v Kennedy: Law, Love and Money' (2019) 44 Alternative Law Journal 283.
[143] Fehlberg and Smyth (n 98) 135.
[144] Ibid 134.
[145] John Wade, 'Marriage and Cohabitation Contracts' (2011) 17 The National Legal Eagle 3.
[146] Fehlberg and Smyth (n 98) 135.

on a marriage … that nothing can go wrong'[147] results in unsuccessful negotiations. Therefore, the options available to parties are not fully explored.

The main effects that binding financial agreements have had relate to practitioners. As Brierley highlights, 'solicitors have an underpinning role by putting the "binding" in binding financial agreements.'[148] The government anticipated that these agreements would increase solicitors' workload but it was 'not possible to estimate the extent of the increased workload.'[149] The reality being that it has intensified since 'independent legal advice is required in the legislation as the central means of protecting the less advantaged party to a financial agreement.'[150] This determines that practitioners instructed to draft agreements 'have a high risk of being guilty of professional negligence.'[151]

The requirement for solicitors to provide a signed statement proving the advice has been received, raises the issue of practitioners' 'potential professional liability'[152] if the agreement is upheld. The fear of being held liable was emphasised by one study, where a practitioner explained 'he had referred clients wishing to enter financial agreements to other solicitors rather than acting for them himself'[153] to avoid such liability. This is unsurprising when noting Wade's comments that with patterns of marital life, most financial agreements will be re-examined by critical eyes searching for loopholes.'[154] Brierley suggests that the increase in family law claims 'is directly attributable to binding financial agreements and the failure of some solicitors to properly understand their responsibility when preparing or drafting a BFA or providing independent advice on one.'[155] This demonstrates that further education should be provided to practitioners.

Another factor exaggerating this issue, is where practitioners draft agreements close to the marriage date. Therefore, solicitors will be under pressure to provide 'quick, rapid, and cheap

[147] Martin Bartfeld, 'Financial Agreements—Just A Little Bit Binding' (2012) 22 Australian Family Lawyer 38.
[148] Christopher Brierley, 'Love, Contractually: Risks in Advising on Binding Financial Agreements' (2011) 49 Law Society Journal 54.
[149] Explanatory Memorandum to Family Law Amendment Bill 1999 8.
[150] Fehlberg and Smyth (n 98) 137.
[151] John Wade, 'The Perils of Prenuptial Financial Agreements in Australia: Effectiveness and Professional Negligence (Bond University 2012) 1.
[152] Fehlberg and Smyth (n 98) 135.
[153] Ibid.
[154] Wade (n 151) 1.
[155] Brierley (n 148) 54.

advice without proper instructions.'[156] The time needed to explain the effect of the agreement to the client and the 'increased cost of adequately performing that role'[157] contrasts the service most clients will be expecting.

This study was conducted prior to the introduction of section 90G(1A) which allows agreements with errors to remain legally binding. Yet, as the Legal Practitioners' Liability Committee (LPLC) outlines 'while this gives some relief for things like referring to the wrong sections in the agreement, it may not go so far as to cure inadequacies in the advice given'[158] and consequently, the protection seems only in relation to drafting mistakes. The LPLC noted that aside from drafting errors, the main areas leading to inaccuracies were either, 'the practitioner failed to give the advice required by s.90G'[159] or 'the practitioner failed to keep adequate file notes of the advice they gave and failed to confirm that advice in writing.'[160] It is important to consider this impact on practitioners as legal developments will become useless if practitioners are unwilling to draft PNAs. Therefore, understanding the view of practitioners is vitally important to best ensure that PNAs are not avoided and are encouraged.

4.4 What can we Learn from the Australian Approach?

In allowing parties to remove the court's jurisdiction the Australian law has 'opted for a relatively certain and inflexible approach to marital agreements where the focus is on the circumstances of an agreement's formation.'[161] It is suggested that whilst the amendments afforded couples autonomy, the judiciary were mindful of needing to 'exercise a protective function.'[162] This is demonstrated through *Black v Black* and *J v J*, where the courts consistently 'upheld the need to fulfil the statutory requirements'[163] to be bound to an agreement. In particular, the focus on independent legal advice has had limitations in its role as a 'safeguard'[164] and places a heavier liability on practitioners. However, as McKay reinforces,

[156] Helen Richter, 'Binding Financial Agreements: Assessing and Managing the Risks' (2001) 23 Law Society of South Australia 35.
[157] Brierley (n 148) 54.
[158] Legal Practitioner's Liability Committee, 'Focusing on Family Law: An LPLC Practice Risk Guide' (*LPLC*, 2020) 5 <https://lplc.com.au/resources/practice-risk-guides/focusing-on-family-law> accessed 2 May 2023.
[159] Ibid 9.
[160] Ibid.
[161] Eldridge (n 97) 35.
[162] Dalling (n 4) 81.
[163] Ibid.
[164] Fehlberg and Smyth (n 98) 137.

on balance 'it is far better to legislate compulsory legal advice and risk professional negligence claims'[165] than leaving parties unprotected.

However, the influence of this advice on enforcing agreements has decreased following *Thorne v Kennedy* concluding that advice would not act as a bar to vitiating factors, in addition to section 90G(1A) allowing for mistakes within agreements. Some practitioners argue that judicial intervention undermines the certainty of agreements and 'if courts are cautious about enforcing agreements, the effectiveness of legislation allowing BFAs is in practical terms undermined.'[166] This is stressed by practitioners emphasising that the legislation makes 'it hard to guarantee that a client would in the future have the "certainty" they were hoping to achieve.'[167] Therefore, legal professionals wish for 'the return of approval of agreements by a court'[168] to escape their liability. In contrast the courts are reluctant to do this due to lack of resources.[169] The issue has subsequently evolved into 'whether the closely-bounded analysis required by the Australian scheme'[170] is an appropriate price to pay for providing autonomy to couples through binding financial agreements.

1 Is Change Needed and What Might Change Look Like?

5.1 Changing PNAs Law: Advantages and Concerns

A frequent comment within the debate on PNAs is how they are treated by English law versus other jurisdictions. One group characterised the law as 'increasingly out-of-step with international practice'.[171] The lack of uniformity across jurisdictions has meant that 'international issues often arise in cases involving nuptial agreements'[172] as 'those with significant assets who may have an international lifestyle'[173] stereotypically would require such

[165] Anita Mackay, 'Who Gets a Better Deal? Women and Prenuptial Agreements in Australia and the USA' (2003) 7 University of Western Sydney Law Review 121.
[166] Belinda Fehlberg, Lisa Sarmas and Jenny Morgan, 'The Perils and Pitfalls of Formal Equality in Australian Family Law Reform' (2018) 46 Federal Law Review 385.
[167] Fehlberg and Smyth (n 98) 136.
[168] Bartfeld (n 147) 43.
[169] Ibid.
[170] Eldridge (n 97) 35.
[171] Law Commission (n 82) para 5.15.
[172] Practical Law Family, UK Practice Note, 'Nuptial Agreements Overview' <https://uk.practicallaw.thomsonreuters.com/5-521-8765?transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 15 May 2023.
[173] Ibid.

an agreement. Disputes become complex where parties originate from different jurisdictions, leading to as Beaton outlines, separating couples racing to seize the jurisdiction with which marriage has the furthest connection.[174] As stressed by Lord Justice Rix 'we should be seeking to reduce and not to maintain rules of law that divide us from the majority of the members states of Europe.'[175]Achieving legal uniformity in the context of pre-nuptial agreements would allow for a smoother process for all parties and Member States.

The jurisdictions of Sweden, Canada, and certain US states have made PNAs fully enforceable,[176] thus prioritising parties' independence to decide their own distribution of assets. This sentiment is mirrored in the findings of Barlow and Smithson, where 58% of participants agreed that 'binding PNAs are a good way of allowing couples to decide privately what should happen in the event of a divorce.'[177] Lord Phillips emphasised that weight should be given 'to the decision of a married couple as to the manner in which their financial affair should be regulated'[178] being well-informed adults. By not awarding this autonomy and overriding an agreement that parties are happy to be bound by, there is the potential danger of the court being viewed as 'paternalistic and patronising.'[179] As Lord Justice Rix argued, 'there is fairness and justice too in a proper appreciation of party autonomy'[180] and this approach would realise other benefits. As Dalling suggests 'it is conceivable that affording parties such levels of autonomy will strengthen marriage as an institution.'[181]

For those who have been married before and acquired individual wealth, agreements would 'ensure a more stable basis for marriage'[182] and encourage parties to marry who were deterred from it without a PNA. Coupled with the fact that 'the old public policy objections having withered away',[183] the conclusion is it is no longer sensible to restrict the status of PNAs and the law is in desperate need of change.

[174] Kim Beatson, 'Family: Failing to go the Distance' (2012) 162 New Law Journal 125.
[175] *Radmacher* (n 5) [29].
[176] Roiya Hodgson, 'Pre-Marital Agreements' in Roiya Hodgson (ed), *Family Law* (12th edn, OUP 2021) 125.
[177] Barlow and Smithson (n 7) 307.
[178] *Radmacher* (n 1) [78].
[179] Ibid.
[180] *Radmacher* (n 5) [83].
[181] Dalling (n 4) 27.
[182] Clark (n 14) 241.
[183] Miles (n 32) 439.

The overriding concern with introducing legally binding PNAs into English law is ensuring protection of individuals bound by agreements. Some argue that since there are no established rules under the English system, the court can currently 'take full advantage of the flexibility to alleviate injustice that would otherwise result'[184] and any change in the status quo would threaten this. As raised by Lord Phillips, 'parties who make such agreements are not necessarily on an equal standing, above all emotionally'[185] since they can be blinded by their relationship. This is linked to public concerns regarding gender equality and fairness which was 'linked to a general view that the financially weaker spouse … should not be left with nothing at the end of a marriage.'[186]

Therefore, it is important that 'the court should retain a residual discretion to intervene'[187] as achieved in the US, Canada, New Zealand and Australia, where the courts 'have the final word on whether to hold the parties to what they have signed.'[188] Some suggest this is 'not necessarily going to provide certainty of outcome',[189] but in the words of Miller, is a 'degree of uncertainty such a bad thing if the trade-off is that it enables the court to protect individuals?'[190] A small degree of uncertainty, if only to afford protection, is not an unreasonable suggestion, considering the concerns of two very distinct financial positions of parties' to a PNA.

5.2 Addressing Implementation Concerns

Any implementation of legally binding PNAs is reliant on carefully drafted legislation which protects individuals through appropriate safeguards. It is important to recognise Dalling's comments that the regulation of PNAs cannot be absolutist or rigid.[191] Instead, some flexibility is required to avoid the consequences of tight restrictions experienced by Australia prior to section 90G(1A). A reform proposal suggested by the Law Commission, recommended the

[184] Clark (n 14) 244.
[185] *Radmacher* (n 1) [126].
[186] Law Commission (n 82) para 5.26.
[187] Clark (n 14) 244.
[188] Dalling (n 4) 23.
[189] Ribet (n 71) 1480.
[190] Miller (n 64) 11.
[191] Dalling (n 4) 11.

introduction of 'qualifying nuptial agreements' according to which the jurisdiction of the court would be excluded provided that certain safeguards were met.[192]

The recommended requirements for a qualifying nuptial agreement differed from that implemented in Australia. Five elements of a binding financial agreement were suggested: contractual validity, execution, timing, disclosure, and legal advice. Consultees agreed that contractual validity is 'an essential pre-requisite for the validity of a qualifying nuptial agreement.'[193] As a result, these agreements would 'have the protection of the safeguards built into contract law'[194] and so could be considered 'void, voidable or unenforceable'.[195] Agreements will, therefore, be excluded based on undue influence. However, the Commission opted against a presumption of undue influence since 'there will be a risk that a presumption will be found in every case'.[196]

It was recommended that any qualifying nuptial agreement be made in writing, including all express terms, 'to ensure an appropriate level of formality'.[197] A further recommendation was for agreements to be made via deed to 'impress upon the parties the formal and legally binding nature of the agreement.'[198] Parties should also sign a statement 'stating that he or she understands that the agreement is a qualifying nuptial agreement and that it will remove the court's discretion.'[199] These safeguards would ensure parties' awareness of the agreement's effects minimising the risk this would later be challenged.

The Commission suggested a timing requirement would 'relieve the pressure, or the feeling of compulsion, to sign an agreement because of the impending wedding.'[200] However, any statutory time period may be considered 'arbitrary' since 'it would simply be a figure determined, by the legislator, with no real factual grounding or formulaic calculation for its deduction.'[201] The Commission noted imposing such a time limit would only 'divert the

[192] Ibid para 5.8.
[193] Ibid para 6.6.
[194] Ibid para 6.11.
[195] FLA 1975 s 90K(1)(b).
[196] Law Commission (n 82) para 6.28.
[197] Ibid para 6.32.
[198] Ibid para 6.35.
[199] Ibid para 6.40.
[200] Ibid para 6.44.
[201] Dalling (n 4) 100.

pressure to another day',[202] but concluded that ensuring an agreement be signed at least 28 days prior to the wedding would limit the risk of pressure 'even if it cannot be eradicated.'[203]

Another requirement was financial disclosure. One practitioner involved with the consultation, explained that negotiating a qualifying nuptial agreement without disclosure would be like 'operating blindfolded'.[204] Whilst it is acknowledged that some level of disclosure is paramount to such an agreement, the question is 'whether statute should demand that full and frank disclosure'[205] take place. The Commission adopted that 'the appropriate disclosure requirement is one of disclosure of material information'[206] and defined materiality as 'that which would reasonably be considered to matter to the individual in deciding to enter the agreement.'[207]

The final consideration outlined the advice provided to parties prior to entering the agreement. It is unsurprising that the Commission proposed that 'both parties received legal advice at the time that the agreement was formed'[208] as without doing so, the proposal would do little in addressing concerns of individual protection. However, the Commission provided a different viewpoint as to the advice's content. They recommended practitioners should advise that the agreement would prevent the court to interfere with the financial terms of the nuptial agreement, with the exception of financial needs, and explain how the rights of the party advised will be affected by the agreement.[209]

The Law Commission's proposal and the considerations therein, provide a rounded suggestion for reform inclusive of views from professionals, practitioners, and individuals. The recommended requirements therefore reflect society's priorities of a proposed reform, and can constitute a sound starting point. However, it should be recognised that this is only a proposal; Australia's post-reform experiences will therefore shed light on how recommendations, such as these, may be realised in practice.

[202] Law Commission (n 82) para 6.45.
[203] Ibid para 6.65.
[204] Ibid para 6.72.
[205] Dalling (n 4) 56.
[206] Law Commission (n 82) para 6.88.
[207] Ibid para 6.93.
[208] Ibid para 6.105.
[209] Ibid para 6.142.

5.3 Improving the Law Commission's Approach by Considering Australia's Study

The Law Commission's paper also included specific advice in relation to the proposals that was tailored to practitioners. Considering the new requirement of 28 days, the Commission identified that this could act as a 'potential negligence trap for practitioners',[210] as 21 days is currently cited as the usual requirement despite not being statutory. Bartfeld proposed two improvements to Australia's approach. First, a 'cooling off' period allowing parties to reflect on the agreement thus strengthening its validity[211] and second, a sunset clause making agreements lasting several years terminate automatically to prevent them from applying in the distant future.[212] This idea was supported in Barlow and Smithson's study where 'a number of participants spontaneously recommended a sunset clause approach whereby the agreement expired'[213] and these ideas were 'endorsed by the majority of the follow-up sample.'[214] It would therefore be logical to implement these into a reform alongside the Commission's proposals.

Another area covered in the recommendations is that of disclosure which is both key to the process of drafting PNAs and difficult to accurately define for all circumstances. As the Law Commission outlined, 'it is not possible to set out exactly what disclosure will mean in all situations.'[215] As Dalling notes "both parties to financial relief proceedings are already required to 'make full and frank disclosure of all material facts to the other party and the court' as part of a Form E".[216] However, the Commission noted this 'may be too extensive or disproportionate'[217] and proposed having as a minimum requirement the provision of a schedule of assets.[218] Professor John Wade contends that in practice, 'many clients are in too much haste and want to avoid expenses'[219] to make the full disclosure required by the Australian approach. In defining materiality as 'that which would reasonably be considered to matter to the individual in deciding to enter the agreement'[220] the Commission's proposal

[210] Ibid para 7.48.
[211] Bartfeld (n 147) 42.
[212] Ibid.
[213] Barlow and Smithson (n 7) 311.
[214] Ibid.
[215] Law Commission (n 82) para 7.50.
[216] Dalling (n 4) 121.
[217] Ibid para 7.52.
[218] Ibid.
[219] Wade (n 151) 2.
[220] Law Commission (n 82) para 6.88.

requires a lower level of disclosure than the Australian approach. Thus, it avoids the practical implications of increasing time and costs.

The most important impact for practitioners, is the safeguard of independent legal advice. In addition to the above requirements of legal advice, the Commission also suggested that advice might 'usefully cover': advantages and disadvantages of the agreement, provision for parties' needs, the need for disclosure and that the agreement will subsist regardless of changes over time.[221] The Commission supplemented this, commented on the non-exhaustive nature of the list provided and stated that 'lawyers will need to ensure that they advise fully on the client's specific situation.'[222]

The lack of clarity on what advice would satisfy the independent legal advice requirement is suggestive of a need for a statutory reform to provide a specific outline for what is required. Unlike the Australian approach, the proposal outlines that 'it is for the lawyer to determine the detail' of the advice. [223] This is a concerning proposal placing a heavy burden on practitioners and could lead to inconsistent advice. The Commission proposed that evidence of such advice should be provided through 'a statement signed by both lawyer and client to the effect that the client has been advised.'[224] However, as seen in Australia, statements cannot always be used as conclusive evidence of advice. Consequently, clearer requirements of the formalities of the legal advice should be implemented to avoid disputes arising for practitioners.

6 Conclusion

This article has been focused on critiquing the English law approach to PNAs whilst exploring the rationale underpinning the law's current position. The objections to PNAs are based in the entrenched stereotype that PNAs are only suitable for wealthy individuals and on an old-fashioned notion of marriage. However, perceptions of marriage have been shifting with increased focus on the parties' autonomy and the law should reflect these changes. A wider use of PNAs would be a logical move towards that direction.

[221] Ibid para 7.59.
[222] Ibid para 7.60.
[223] Ibid para 6.143.
[224] Ibid para 6.145.

An instrumental step in awarding PNAs legal enforceability was made in *Radmacher*. However, the lack of statutory implementation failed to establish principles in how PNAs were to be treated by the courts thereafter. As Lady Hale stated, 'without legislation, it is not self-evident what the right answer should be'[225] and this sentiment has been reflected in subsequent case law. The inconsistencies relating to how safeguards should be applied, how fairness is achieved, and how parties' needs are prioritised, has exacerbated the unclear position of the legal status of PNAs. Practitioners have therefore struggled to provide advice when applying precedents set by the case law to the position of their clients.

Making PNAs legally binding in England would mirror the approach taken by several other jurisdictions including Australia. Providing individuals the ability to determine the distribution of their own assets would allow individuals to be independent of the court's jurisdiction, mirroring society's focus on autonomy and self-sufficiency.

The Law Commission's proposal provides a sound starting point, however, considering the difficulties Australia has had, the proposal should be reassessed to include certain additions. These are the implementation of a reflection period and 'sunset clause' approach, as well as providing some clarification on practitioners' advice requirements.

It is obvious that without reform, the law on PNAs will remain unclear and convoluted. The legislature needs to acknowledge this and finally give PNAs 'legally binding' status. The relevant statute should be carefully drafted, using the Law Commission's proposal as guidance. It is vital to ensure that adequate protection is provided to individuals entering PNAs and that practitioners are not burdened with substantial legal responsibility, but ultimately, legally binding PNAs can provide certainty as to the distribution of assets upon divorce and therefore are the way forward.

[225] *Radmacher* (n 1) [156].