“A fairer end to relationships”:
Government proposals for reform of financial remedies on divorce and cohabitation

A Response

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Executive summary

For many years there have been strong movements to reform, improve and make clearer and more certain the law relating to financial outcomes on divorce. It has been the subject of several Law Commission reports. In early June 2026 the UK government produced a consultation paper with a very fast response date. Separately and again over very many years there have been campaigns to improve the position of those cohabiting at the time of any breakdown of the relationship or death. The rights and entitlements of cohabitants have been significantly different to divorce and far less than in a number of other countries. The UK government in its consultation paper has proposed legislative reforms for cohabitation which they say is distinctly, and perceived to the public to be, different from that pertaining on divorce. In practice in my very considerable experience of the law there is no meaningful difference. Moreover and sadly, I'm not so convinced now from what I have seen in this consultation process that the reforms will produce a more certain, predictable and fairer law on divorce, although there are commendable proposed reforms. This paper is produced as part of the consultation process, as part of my anticipated response and to inform generally

I am a specialist family lawyer throughout my career; a solicitor, mediator and arbitrator and, since 1995, a part-time family court judge. I have an OBE for services to international family law and I am an honorary KC. Most of my work especially over the last 20 years has been complex financial remedy and international cases. I was in the 1990s the chair of the resolution financial remedy reform committee and I am presently a member of the Law Society family Law committee. I am an Australian solicitor and I have a good awareness of systems of law around the world. This paper represents my personal opinions and not of any organisation with which I'm connected. More details in the appendix

The reforms regarding financial arrangements on divorce

1. Present financial arrangements ancillary to divorce in England and Wales date back to 1969, featuring in Matrimonial Causes Act 1973. In the 80s and 90s, the higher courts developed a criteria of outcome of reasonable requirements of the applicant. This was gender unfair and in a landmark Supreme Court decision in 2000 of White[1], the family law profession was told it had engaged in gender discrimination for a generation. Instead there should be a starting point of equality of marital assets as if marriage was a marital partnership. Over the next years case law developed so that in broad terms the law can be fairly stated as follows. Assets acquired by either or both during the marital relationship, which includes pre-marriage cohabitation as if marriage, are shared, often although not always equally, on divorce unless fairness requires otherwise. Fairness is invariably needs, particularly but not exclusively child related. Assets which are not acquired during the marital relationship such as pre-marital assets, gifts and inheritances and some post separation assets and which have not been mixed and mingled with marital assets are not shared at all but might nevertheless be distributed, again for fairness reasons particularly needs.

2. This broad description has now been in place for over 20 years. Undoubtedly it is far better now than the previous law. In practice outside some large money cases, needs dominates

[1] 2000 UKHL 54

outcomes. Needs is nowhere defined in statute. It would certainly be accommodation for the children with each parent. It would take account of any disadvantage arising from the marriage relationship. It will include provision for pensions and income. There are a wide range of discretionary factors. English law is very creative with a number of solutions to bring about a fair outcome in the vast range of factual situations. Certainly sharing is a starting point and in some cases may strongly influence or determine the outcome. But many cases revolve around needs

3. The element of discretion in producing a fair outcome in individual factual situations is highly commendable. But it's uncertainty, and the wide-ranging of possible outcomes, decrease the likelihood of settlement and increase possible litigation. This is expensive in costs, disagreement between the parties and with consequential impact on any children. Over the years, there have been many discussions about reform although it is right to say some lawyers felt that there was no need for reform and that case law was sufficient. Various Law Commission reports have looked at distinctive aspects such as needs, maintenance, marital agreements and similar. Most recently a law commission project produced a scoping paper[2]. In summary it recommended four possible models of reform
   - Codification, with minimal change to the existing law in statute with retained wide discretion.
   - Codification plus, being codification of the existing law but reform to deal with specific areas where the law was not settled and with some but more limited discretion.
   - Guided discretion, an introduction of underpinning principles and objectives to guide the exercise of discretion with reform beyond existing law.
   - Default regime, creation of a matrimonial property regime similar to continental Europe.

4. The 4th was always unlikely, especially with the UK having left the EU. Some judges and lawyers felt there should be either no statutory reform or, as a minimum, codification. Many of us doubted there was little point in having only statutory codification with the accompanying huge Parliamentary upheaval. Many of us actively seeking reform were either at the 2nd or between the 2nd and the 3rd. We thought producing draft legislation might focus on what guided discretion might look like.

5. Instead the UK government has adopted the 2nd, codification plus, in reform proposals[3] published on 5th June with a very fast response of 14th August, particularly as this is during school and legal term holidays.

6. The inevitable concern with a codification plus model is how much is accurate and reliable codification of what might be uncertain law and how much is the plus feature of, effectively, new law. This paper seeks to separate out and analyse. It also seeks to explain how the law

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2 https://lawcom.gov.uk/publication/financial-remedies-scoping-report-and-summary/
3 https://www.gov.uk/government/consultations/a-fairer-end-to-relationships

works in practice, perhaps as distinct from the way it looks if codified[4]. Moreover as debate had hitherto been about whether there should be reform and if so which model, there had not hitherto been a debate about the detail of the so-called plus, new areas of reform. The government consultation seeks views on much detail; in places it is worryingly vague about what should be the new law or sometimes makes no proposals at all and simply asks for opinions. It is therefore fundamental that from this consultation there should be opportunity to discuss the detail rather than going directly to draft legislation. This paper[5] goes through each of the elements as set out in the specific questions raised rather than commenting on the text of the explanation of current law in the consultation. It then turns to the separate question of cohabitation. The consultation covers a vast number of areas and I can only concentrate on a few where I believe I have a distinctive contribution and knowledge

Sharing, 1-4

7. At present the objective in law is to produce a "fair settlement". This fairness is found in a combination of sharing and needs trumping sharing as reasonably required. I think this works well. A combination of the abstract and the practical. The Government seems to substitute an overriding objective of sharing and needs. I think this is a pity. Sharing and needs is an analysis of how fairness is presently worked out in English law but it is difficult to see how conceptually it can be an overriding objective. Fairness is a moral and public element which lends itself to discretion in individual cases. It encourages parties to settle themselves on their basis of fairness after legal advice. I don't think sharing and needs provides such an answer. It must also be mentioned that sharing as an overriding objective will be overridden by statutory marital agreements which are dealt with separately below. I suggest reverting to a fairness objective[6], then found in sharing, or needs if applicable and in private autonomy of domestic arrangements.

8. The consultation asks if sharing should only apply to marital property. Of course. It is established law; no uncertainty. There are judicial dicta to the effect that sharing has not occurred to non-marital property. For example in relation to income after separation, it may be subject to a needs-based maintenance claim but it cannot be shared[7]. The consultation goes on to say that the principle should be equal sharing as a starting point unless justification for departure e.g. needs. I do not consider the only justification for departing from equality sharing would be needs. There are many cases of assets in the sharing category which are not nevertheless appropriate for equal sharing and case law is abundant

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[4] but what would be the point of the huge Parliamentary paraphernalia of legislation if it would only codify existing law, thereby not adding any benefits but potentially reducing flexibility?
[5] the numbers in the subheadings refer to the questions in the consultation paper
[6] here and elsewhere I believe there is usefulness in looking at New Zealand which had significant reforms in 2001 in ways not too dissimilar to this present consultation. However they still check back to look at whether an outcome is fair or just. Abandoning fairness is abandoning perceived justice
[7] Waggott 2018 EWCA 727

with such examples. These are invariably assets which have had nonmarital provenance[8]. I worry that any reference in statute to equal sharing will create an expectation of this outcome which under our present law and public perception would not be regarded as fair. It disregards the nature of many marriages where parties bring assets of their premarital life, perhaps even early inheritances or parental gifts, some of which are then shared for marital life but which wouldn't always in each instance warrant equal sharing on divorce

9. It is where a marital asset has derived significantly or entirely from nonmarital sources that the law and its application become much more difficult in practice and difficult to codify. If it is the matrimonial home in which the parties have lived for a number of years even if significantly purchased or owned by one of the parties pre marriage, there is a tendency towards equality, although certainly not always[9] and in any event pre-marital provenance can be easily trumped by needs e.g. accommodation of each party with children. But there are other assets which start nonmarital e.g. inherited or pre-separation which are used in various forms during the marriage such as an inherited rental property staying in the name of one spouse but where the income is used for family purposes or occasional holidays. So the family courts produced the concept of *matrimonialisation*, the process in which a nonmarital asset becomes fully or partially marital and hence shared wholly or to some extent.

10. Herein lies a lot of discretion in working out what is fair in each individual situation. It came before the Supreme Court in a case of Standish[10]. Lawyers hoped for clear guidance and were disappointed. The factual circumstances alone gave it a risk of being otherworldly; assets well over £100 million and the husband had placed many tens of millions of pounds into the name of the wife for tax saving purposes and which she said she should have on divorce or at most share equally. The Supreme Court set out basic principles which had been already well understood. The issue was nonmarital assets which had become marital. The Supreme Court said this was where parties have, over time[11], been treating[12] the asset as shared between them. It said the concept was neither narrow nor wide[13] and one had to consider whether their dealings demonstrated they treated as shared over a sufficiently long time. There was reference to whether an asset had been used or enjoyed. None of these

[8] In S v AG 2011 EWHC 2637 at para 9, Mostyn J said: even the matrimonial home is not necessarily divided equally under the sharing principle; an unequal division may be justified if unequal contributions to its acquisition can be demonstrated

[9] See above footnote from S v AG

[10] 2025 UKSC 26

[11] time itself does not make a nonmarital asset become marital but over time, the initial non-matrimonial element may diminish and moreover dependent upon the facts may more likely have been mixed and mingled with the marital assets.

[12] so it is necessary to look at intentions and a lot of the history of the marriage as to whether a nonmarital asset had been treated as marital. This is certainly not clear and certain nor encourage easier settlements.

[13] a comment which gives no help to anyone to settle!

criteria were straightforward, and have continued to prompt more litigation and conflicting outcomes[14].

11. Even if an asset has been so-called matrimonalised, it does not mean it should be shared equally. To the contrary, these are the cases where there would be a greater likelihood of unequal sharing to acknowledge the nonmarital provenance.

12. So when the consultation from the government says that statute law should embody what the Supreme Court said, I and other practitioners are wholly sceptical that this will produce any certainty, clarity and predictability. It won't just as the Supreme Court hasn't. If we are going to have significant Parliamentary reform, we need much greater certainty about the circumstances in which there may be unequal sharing and how to calculate the unequal element, when there should be equal sharing of a previously nonmarital asset and know the regard for nonmarital provenance. This seems to be hinted at in question number 4 when it asks about how property has been used, shared and treated to become matrimonial. This seems effectively to acknowledge that the Supreme Court decision alone is not sufficient. In my experience this concept of how much a nonmarital asset should be shared because it has become marital in some way is a major source of dispute and a major reason why cases don't settle quickly or easily. The case law does not hugely help at present. To work out who has contributed what, how an asset has been treated during the long history of a marriage and whether one person has committed it to the marital partnership involves quite a lot of delving into the history of the marriage. This reform, specifically question number 4, needs far more guidance from the government on their thinking. Perhaps they are expecting the legal profession to provide it. The Supreme Court guidance cannot be simply converted into statute[15].

13. Instead the worry is that much reduced discretion, the opportunity to look at individual facts, would penalise the spouse with the previously nonmarital asset as the easy, default, statute position is equality of sharing once there has been any marital treating of the nonmarital asset. That is not fair. It would certainly increase the number of marital agreements to avoid incidence of this matrimonialisation, at least amongst those who are well advised. It's questionable if it is beneficial for marriage itself. It would certainly lead to a change in conduct of couples regarding financial affairs within a marriage

14. What the consultation also significantly leaves out at this point is post separation assets. This has been the subject of extensive case law and is still uncertain. Some judges have

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[14] in fairness, it is a difficult topic to pin down and circumstances when separate property becomes relationship property is set out in the New Zealand legislation with reference to a number of factors and circumstances but noticeably without the opportunity of grading i.e. a percentage element of marital and nonmarital.

[15] in contrast, other jurisdictions such as New Zealand should be looked at as did the Law Commission in its scoping paper. I happen to think the New Zealand position is too hard and fast and fixed but I feel it should be looked at in the context of these proposals

indicated that assets acquired up to a year or a complete financial year after separation should not be treated as shared. Others have expected a longer period of sharing after separation especially if the parties have continued to have combined finances. Cases where there has been a long period of separation with the parties effectively living their own lives are some of the most difficult to resolve. Countries with a default marital regime have provisions for when the so-called community of marital property ends. England has rightly rejected this as it produces unfairness; the clash between rigidity and certainty with discretion and individual fairness. But at a time when the government is setting out in statute what is sharing, couples must know with some reliability when the sharing comes to an end. Mostly, the end of a complete fiscal year or business year if applicable to either party after separation will be the appropriate ending of the sharing, but certainly not always[16]. Parliamentary reform must address these sorts of issues if it is to be comprehensive.

15. The government has rightly rejected the 4th model of reform, a default marital regime. Nevertheless far more assistance for litigants is needed if there is to be parliamentary statutory reform on what are the marital assets being shared, when they come into existence, when nonmarital assets become wholly or partly marital and when the sharing comes to an end at or after separation.

Needs, 5-6, and application of the needs objective, 7-10

16. The government consultation proposes a list of factors when taking into account needs and that needs should be a principle of financial provision. It maintains the importance of moving as quickly as reasonably possible to self-sufficiency and independence, based on the so-called clean break 1984 Act legislation[17]. Any reform must continue the 1984 legislation requirements to allow a clean break and encourage early transition to independence. I suggest we need more clean breaks

17. In question 7 it raises a potentially controversial issue which has been much dealt with in reported cases. It says needs are not only those arising directly from the relationship but from circumstances such as illness and disability. A series of cases from the higher courts have referred to needs being based on relationship generated disadvantage i.e. directly following from the marriage and not necessarily because of the other circumstances of life. Reported decisions have made clear that on e.g. variation of maintenance, one spouse is not the so-called insurer of the misfortunes post separation of the other spouse. Some of the most difficult cases to resolve are when during a relationship a spouse has an illness or disability which will result in very long-term needs. The case law is quite nuanced although generally expects provision to be made. As the government says, clarity is needed. My feeling is that the consultation wants to widen too much the circumstances of needs provision. How far should marriage, and then divorce, be expected to provide for what might be very long-term needs of one party? If for example spousal maintenance might otherwise continue for no more than 5 years to enable adjusting to the end of the marriage,

16 and certainly not if still operating a combined household finance

17 Matrimonial and Family Proceedings Act 1984

should it continue for decades if during the marriage one spouse has physical or mental illnesses? This needs much more discussion, is not fleshed out much in the consultation paper and is a difficult topic.

18. The consultation proposes a 3-stage hierarchical position. Children's needs first which is uncontentious. Basic capital and income needs of the couple. Then discretionary needs such as lifestyle luxuries. The consultation says that as part of the reform there will be a difference between the 2nd and 3rd stages. We see this in several elements in the reform proposals. The problem is that this is completely new. We do not see it at all in practice. The 3rd is all part of the 2nd. Needs are based on factors such as the standard of the marriage. I don't know of any cases where parties[18] start by looking at their basic needs and then go on to their more luxury-based needs. Many cases have an income requirement schedule[19] setting out income needs on an annual basis. They are never separated between basic and so-called luxury. This proposal is completely artificial and out of step with existing practice. I have never come across any argument for this reform. I suggest it doesn't work. Certainly all lawyers know of cases where one party has put forward an extravagant budget, even of cases where the cumulative budgets of both parties for their income needs are dramatically in excess of the available income! Many settlements require a paring down of expectations. But this is not a two-stage process as the government proposes. It is what is appropriate needs in each particular case according to resources, standards and expectations. In any event, what is "luxury"? If it is all relative to the assets of the case then it's a meaningless concept. Moreover it seems harsh and a form of penalty against one or other party. It shouldn't remain in the reform discussions and I doubt it will survive this consultation

19. A checklist of factors for needs may be beneficial although lawyers have worked well without it, only using s25 MCA. It should certainly include explicit reference to relationship generated disadvantage and economic advantage deriving from the marriage. Both of these are regular features of many marriages and must be brought into account; one spouse may have given up opportunities for the marriage and/or one spouse may be advantaged by the sacrifices of the other spouse. It should also include compensation which had previously been a crucial element of fairness with needs and sharing but is rarely relied on. However it is important in a few cases and should be a factor for consideration

Domestic abuse, 11-15

20. This is a real conundrum in practice, recognised by lawyers and judges, here and internationally.

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[18] or indeed the courts

[19] modestly, I drafted what was probably the first version in the mid-1980s, subsequently updated and forming the basis of most income requirement schedules. At no stage was there ever any thought or contemplation of separation within the schedule between basic and so-called discretionary luxury items. It would be certainly based on the standard of the marriage across-the-board of needs

21. Rightly there is far greater awareness now than previously about the prevalence and impact of domestic abuse within domestic relationships. This may be obvious in physical injuries. It may be found in pressure brought on one spouse e.g. not to work or in relation to financial affairs. It may be found in the entering into various agreements and arrangements. It is found in many other ways. This needs training, undertaken by lawyers, to observe and recognise. All of this should rightly be considered when looking at the appropriate financial settlement. This might be conduct as below or a more general awareness of coercive and controlling behaviour.

22. Where however it becomes problematical is how and when there should be a financial impact in the settlement. For example a court may have come to the conclusion, after a hearing or after the parties reached a negotiated settlement, that the outcome provides reasonably for the needs of each party, stretching and straining scarce available resources. What then should it do if there is evidence of domestic abuse? Specifically should it take away money from one and give to the other? A form of penalty or judicial criticism expressed financially? Because in so doing, one party would therefore have more than they needed, even if in modest terms, and the other have less than they need[20]. In any event, it would not be easy to have judicial consistency. Some judges may feel more strongly about criticising certain forms of domestic abuse than others and make different financial remedy orders accordingly. Almost certainly there would have to be some sort of table[21] and very probably indicated in percentages rather than precise quantum.

23. In the appendix, I have tried to set out some case studies, scenarios, to see how the impact of domestic abuse would apply, if no tangible financial consequence, showing how it could potentially work against the best interests of children or produce quite perverse outcomes. I suggest it's only in working through these sorts of examples that there can be appropriate analysis of these proposals

24. Some countries have started to go down this direction and England is following closely what is happening in Australia where they have taken a more severe approach than England. But it is early days and they may pull back as e.g. they pulled back years ago from their original very strict requirements of preconditions of marital agreements to what is their present law. Do we want our courts to consider what is a fair division of the available resources to provide for sharing and needs and then to rearrange them to recognise, perhaps condemn and criticise, what might be domestic abuse by one or even both parties[22] within the relationship? If so, how does that exercise go?

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[20] including perhaps then dependent upon welfare benefits which they otherwise would not be

[21] akin to the sentencing table in criminal cases?

[22] the courts in this situation would have the very unattractive prospect of having to give different percentages to the respective domestic abuse on each side

25. This conundrum is very present in legal practice. Judicial guidance is not generally to take into any account domestic abuse in the financial settlement unless there is a specific tangible component e.g it can be shown that one party has greater needs as a consequence of the domestic abuse. The government asks if domestic abuse should be taken into account in the financial settlement, question 11, without saying how and in what circumstances and with what consequence. It goes through several circumstances in question 12 without again saying how it would be incorporated and worked out. It opts out of giving some sort of assistance on the way forward in question 13 by asking about principles. Knowing the judicial position above, the consultation should ideally be setting out principles for debate. It asks what would be the impact of bringing into account and of course then acknowledges it would mean far longer trials, less cases settling as each party thought they may have a chance of a better settlement by raising domestic abuse, much increased costs and far more dispute leading to less likely settlement. It would also in my experience increase the likelihood of domestic abuse being frequently raised, not in the context of seeking protection which is utterly reasonable and right, but to seek some sort of better financial outcome. It becomes a card which one party plays to have a better hand, and which correspondingly the other party could then raise either as the proverbial defence or as a sword for their own claims[23]. In my experience, this is rarely beneficial either in getting to a settlement or longer term for the parties[24]. Then finally in question 15 it asks about the threshold test, referring to conduct generally as below. I think this is singularly unhelpful. Domestic abuse has its own definitions, criteria and boundaries. It should not be adopting others from another context. Deciding what should be the threshold is surely a very preliminary consideration. As above, judicial guidance has given a threshold i.e. only brought directly into account when there has been a tangible financial consequence. If it is to be any other, how will it be assessed[25] and in what circumstances and what sort of outcome? To find out requires a debate in the profession which hasn't reached any consensual outcome over several years and yet is intended to be sorted within a few weeks of a summer consultation! Yet if this goes to Parliament, it is certain that it will be a focus of much attention and probably many amendments, perhaps worthy but perhaps not particularly effectual.

[23] thereby inevitably requiring a substantial fact-finding, either well in advance of the FDR or at the final hearing, to analyse exactly what has happened. Ironically this is within a couple of years of England at last going to no-fault divorce.

[24] There is also a historic irony. In the last century an adulterous wife lost the opportunity of maintenance. If domestic abuse is now fully having an impact, the domestic abuser spouse may find himself paying more maintenance than his wife needs! See the case studies in the appendix

[25] it cannot be left simply to judicial discretion in each case as this will lead to unfairness and inconsistency. If it is going to be decided as a percentage, e.g. one party might have 45% of the assets but only 40% because of domestic abuse, there will need to be a clear table of what sort of abuse leads to what sort of percentage otherwise again there will be massive inconsistency and injustice. Where this issue will be raised it is likely that it will be raised on both sides and therefore again there needs to be clear guidance on balancing the distinctive allegations of abuse and what percentage overall would be ordered. These issues are fraught with procedural and justice problems

26. Everyone involved in family justice condemns domestic abuse and supports any steps which can be done to reduce and stop it. But financial consequences on divorce, unless a tangible direct impact, is unlikely to be the way to do so.

Conduct, 16-18

27. Conduct is a very fraught factor in financial settlements. It is rarely argued successfully and yet is often raised. It is arguably where the law is significantly out of touch with public expectation, as solicitors hear frequently directly from their clients. But how much policy, specifically policy of reducing litigation and areas in dispute, should be brought into play here?

28. Conduct is the behaviour and actions of one party. It has since 1969 been a factor in the outcome but what sort of conduct and how much? In 1973 in a leading case of Wachtel[26], the court indicated that the conduct should be obvious and gross. This was clearly judicial policy to prevent more mild forms of conduct being raised. It was a high bar. It was felt to be too high by many. Then in legislation in 1984[27], conduct was only to be taken into account if it was inequitable to disregard. I remember the expectation then was this would allow more conduct than previously. That didn't happen. The years passed without much change. Judges tried to put the statutory wording into ordinary language with one judge saying it should pass the so-called gasp test[28]. In other words, a reasonable person would gasp on hearing of such conduct. But again this was a severe test[29]. Categories of conduct were set out including litigation misconduct which would result in a costs order. But they were not exhaustive. Then added to this category were so called add back cases where one party during the relationship or often during the separation had engaged in expenditure as to significantly reduce the marital pot which would then be shared equally. It might be thought this was a simple tracing exercise but again the higher courts have compelled a very high standard before this sort of equitable accounting happens[30]. It is undoubtedly an emotional topic. When the 1996 divorce legislation was going through Parliament, attempts were made by MPs on both sides to introduce conduct elements, almost always inappropriately. Any new legislation reforming financial provision on divorce is likely to put much attention on conduct.

29. It's therefore little surprise that the government asks, 16, what should be conduct. It would be thought that after the previous extensive reform process, government would be making recommendations, not asking basic questions. It goes on to ask about impact. Here judicial guidance is clear. It should be quantifiable. Not nebulous and not emotive. It then asks if conduct without financial consequences i.e. no obvious quantifiable loss, should be brought

26 1973 EWCA 10

27 Matrimonial and Family Proceedings Act 1984

28 S v S 2006 EWHC 2793

29 sadly it was also pretty unreliable. Family court judges see some appalling behaviour and actions in the family domestic context. They rarely grasp. It might be a gasp test for the public but not the courts.

30 See article at https://financialremediesjournal.com/50-years-on-from-martin-v-martin-1976-are-add-backs-fit-for-purpose/?mc_cid=16312d5cc4&mc_eid=4b752a636b

into account just as is conduct with financial consequences. This is a difficult one because it may be the same conduct which in one marriage may have financial consequences and in another may not. Is it a fair system to take into account one and ignore the other? But if both are considered, how does the financial settlement then lie? Here we are back in the arena, above with domestic abuse, and similar considerations apply. Should there be some sort of penalty or judicial condemnation in the financial outcome? My pragmatic opinion is that unless there is quantifiable consequences of the conduct, it will be immensely difficult to formulate a law which produces in all such instances a fair outcome.

30. I believe the present test for conduct is too high. It has been specifically introduced to limit how much conduct is referred to in cases in order to reduce the amount of litigation. But it causes much ill feeling with the public, when parties to litigation feel that the wrongful conduct, actions and behaviour of the other party are being ignored, and even sometimes get a financial benefit. Of course there must be some threshold but I would like to examine a lower threshold meeting public expectation. Specifically whilst add back claims should not be about insignificant amounts, the higher threshold causes much public unhappiness when one spouse has inappropriately spent marital money which is not then brought into account or is not available for distribution for needs. The add back threshold should be specifically reduced and by and large claims allowed as long as they were not disproportionate or de minimus

31. Litigation misconduct, the way the case is conducted, failure to give disclosure in time or at all or breaching of court orders, should result in costs orders but I think it confuses to bring into the category of conduct. It rarely has an impact on the financial outcome and probably shouldn't in law. I think this should be hived off into the law regarding the making of costs orders which is where it often lies.

Pension sharing, 19

32. We have had 2 excellent reports from the specialist body, PAG. The law is pretty settled. Nonmarital pensions will be brought into account for needs but this may depend on the age of the parties and how long it was acquired before the marriage. There must be continuing power for offsetting especially as many cases do not have value of pensions to warrant either the cost of a report or of the relatively high cost by pension companies of pension sharing. Marital pensions should include premarital cohabitation. Greater recognition must be given to the impact of marriage on some parties on pension acquisition postdivorce and pre-state retirement; at the moment it can work quite unfairly. But equally automatic expectation of equality of income provision of all pensions goes too far especially for parties of younger years. The goal should be fairness sharing with some needs provision. Where there are marriages of moderately short or short to medium duration, provision beyond sharing for what may be several decades hence may not be fair. But overall the PAG reports have done phenomenal benefit and service for the profession in this complex area of finances

Marital agreements 20-22

33. England is very different to most other countries around the world in that we do not have binding marital agreements. It is not part of the English culture of marriage. Because we do not have marital default regimes, there is no regime of ownership of property to opt into or out of, which is a primary reason for marital agreements in many countries. For a long time, they were against public policy but then in a leading Supreme Court decision of Radmacher[31] it was held they would be persuasively evidential. In other words, are not binding but likely to be taken into account and perhaps strongly taken into account. There had to be the usual elements of fraud and contractual ability. Crucially as a precondition there had to be either legal advice or the opportunity[32] of independent legal advice even if not taken, moreover there had to be disclosure either explicitly or a party had a pretty good awareness of the financial circumstances of the other i.e. what they were giving up in the agreement. Without these, little or no account will be taken. Even with all of these preconditions from the Supreme Court, subsequent case law has made it clear that the marital agreement will allow people to opt out of marital sharing but not out of needs provision. So needs trumps any marital agreement, as a number of parties have found to their cost after relying on a marital agreement entered into with disclosure and advice[33]. This has been upheld in reported decisions. Failure to provide in a marital agreement for needs on relationship breakdown allows the family court to make a needs-based order whatever the marital agreement may otherwise say.

34. In 2014 the Law Commission made proposals[34] in this regard for qualifying nuptial agreements but they sat on a shelf with nothing happening. The government is now reviving them, and this warrants a broad discussion as we had in 2014. Generally private autonomy through marital agreements have merits.

35. However there must be no doubt that these are not contractual arm's length equally negotiated arrangements. Significant pressure is often brought by one fiancé to the other, with the latter often being in a weaker financial or emotional position, to enter into an agreement to provide less well than on divorce. Many marital agreements have an underlying gender imbalance and inherent unfairness[35]. They are not easy agreements to negotiate as a lawyer; the parties are only concerned about the happy days of the imminent wedding and honeymoon, not about negotiating what could happen if it all broke up. Some people are far more commercial, hard-nosed, financial than others and insist on their terms otherwise the wedding, now only weeks away, will be cancelled. This is hard for some keen

31 2009 UKSC 31

32 effectively the financial wherewithal to afford legal advice

33 it has often been particularly harsh in application in international cases where the parties entered into a marital agreement abroad in a country where they are binding but with little knowledge of what may occur if divorced in a country like England, and specifically that the English courts will substitute their own preferred needs outcome.

34 https://lawcom.gov.uk/project/matrimonial-property-needs-and-agreements/

35 it is very important to consider the several comments of Judge Brenda Hale in this regard in Radmacher. She referred to the gender dimensional. She referred to the object of these agreements being to deny the economically weaker spouse the provision to which she, and it was usually but no means always she would otherwise be entitled. She said some would question giving legal status to these agreements which will produce greater certainty and lesser costs at the price of inflexibility and injustice

to marry, perhaps more emotionally invested than the other. Many marital agreements are imposed by the advisers for one spouse, perhaps trust or financial advisers or sometimes parents anxious about what may happen with inheritances. The stress and tension surrounding these agreements are very hard and out of step with the forthcoming nuptials. It's little wonder relatively few[36] enter into these agreements in England, even if sensible financially for them.

36. Some countries have negligible preconditions with, sometimes, appalling injustice to one party as a consequence[37]. Yet some countries such as Australia have very strenuous preconditions. The government proposes 5 criteria; contractually valid, executed as a deed, 28 days before the celebration, material disclosure and independent legal advice. The first 2 are obvious. Is 28 days too late and too near the marriage viably to back out[38]? Possibly but any longer would cause problems for those getting married soon after engagement.

37. The fundamental precondition clauses are of material financial disclosure and independent legal advice. Not in themselves contentious but what if one party chooses not to? Specifically what would be the position if one party chose not to have independent legal advice[39]? Under present case law, that is not fatal. Under the government proposals it would seem to be fatal for the agreement. This is a dramatic change. It's also out of step with other elements of family justice e.g. independent legal advice is not required by a party entering into a financial settlement and a final court order so why should it be for a marital agreement? If a party undertakes their own homework about legal consequences and still decides to proceed, why must they go to a lawyer? I'm not sure English society is ready and willing to compel everyone to take legal advice. I don't think this is reasonable. In any event if the intention of compulsory legal advice is to overcome coercive behaviour by one against the other to enter into the agreement, it doesn't work and see below.

38. The government asks, 20, if the safeguards, presumably the independent legal advice, will give sufficient protection against coercion. No it definitely won't. Case law is full of reported decisions where one person has been coerced into an agreement even though they have had independent legal advice which has been to say no, don't sign. Letters are written by solicitors strongly recommending against entering into the agreement. Lawyers protect

[36] including anecdotally remarkably few celebrities in marriages with each having quite different financial circumstances and prospects

[37] typically the case in continental European countries where marital agreements are far more understood and expected, but often with no independent legal advice, where the primary purpose is to opt out of a marital regime into an established alternative regime.

[38] the problem of course is that in the colossal wedding industry, booking up venues, arranging wedding dresses, invitations and similar happen often many months before the wedding and backing out even 28 days before the wedding e.g. with an unacceptable demand of a pre-marriage agreement, will create huge costs and loss as well as the emotional impact which may be felt far more by one than the other. "Four weddings and a funeral" was Hollywood.

[39] in any event does this mean a solicitor, qualified and in practice, under SRA supervision and on the roll? Or will this be opened up to any online service purporting to provide legal advice but not regulated? If the latter, then the protection is likely to be even more perfunctory

themselves by video recording the signing ceremony and the giving of advice not to enter into the agreement. Yet clients go ahead. Here is the biggest problem. As above, there is sadly a serious gender imbalance in entering into marital and other domestic agreements. If each party has had independent legal advice, should the court still be able to ignore an agreement if satisfied there was unreasonable pressure and coercive control? This needs answering. If they can opt out of the agreement through showing domestic abuse or similar, where then lies the need for the independent legal advice in all cases?

39. It goes on to ask if needs should remain a trumping factor as it is at present under existing law and was under the previous Law Commission proposals, above. It seems to suggest only basic needs would trump, but luxury needs would not trump the marital agreement. That seems bizarre. It seems barely consistent. Either it's needs or not. What is basic needs in this context? In modest cases that may be welfare benefit limit lifestyle. But what about in wealthy cases? What are basic needs for a very wealthy family? It's an oxymoron. I don't think the government has thought this through fairly and comprehensively. Either needs are going to trump the marital agreement or the marital agreement trumps any form of financial provision. We cannot have an artificial two-tier form of needs.

Seamless cohabitation before marriage, 23-24

40. I am very surprised this is raised given it is very clear case law and uncontentious in my experience in cases. If parties lived together for 7 years as if married, which is discernible on the facts perhaps taking account of the matters in question 24, and they were married for 10 years, it should be the entire 17 year period which would be the time of marital acquisition, sharing and dependency.

Other issues

41. There is no question here from the government but there are most definitely areas where there is uncertainty giving rise to litigation which a "codification plus" project should deal with. Specifically the question of spousal maintenance for joint lives. This is a mess. A joint lives maintenance order, which is the default for maintenance, lasts in law until the first death of either party. Only it doesn't. In reality it will be varied decades earlier, perhaps on retirement[40] and quite probably earlier on a review as the years after separation and divorce go by[41]. Certainly the court has the power to grant a fixed term maintenance order e.g. 5 years, sometimes with the inability to seek any longer period[42]. In the circumstances of only a simple term of years, the recipient has to ask the court for an extension before the end of the term[43]. If she does not, the maintenance comes to an end. What is crucial with the joint lives order is that the burden on bringing it to an end, i.e. before the first death, is on the paying party. If he does nothing, it continues. So he has to apply to vary or terminate the maintenance obligation. The paying party will assess the appropriate time when in his

[40] after the introduction of the power for pension sharing, many maintenance orders now end on retirement age

[41] consistent with reasonable attempts are becoming self-sufficient after the divorce

[42] a so-called s28 bar, after the MFPA 1984 clean break legislation amending MCA 1973

[43] and then show she has been unable to become self-sufficient within that term

opinion periodical payments should not be needed any further. If there is no agreement, the court decides and may allow it to continue but perhaps then substitute a period of years i.e. a term order. So it doesn't continue for joint lives[44].

42. There is a huge amount of public misunderstanding, fear, anxiety and artificial expectation around joint lives. The court should review these various forms of maintenance orders making it clear that joint lives means little more than the burden is on the paying party to vary or bring to an end. There should perhaps be new terminology and new expectations about spousal maintenance longer term. I'm certainly not suggesting provisions as in some countries for maintenance linked to the length of the marriage or for an absolute maximum term. There remain cases where one party is financially dependent long term upon the other spouse on divorce because of the circumstances pertaining during the relationship. But there should be no expectation that it will often be for joint lives and this must be reviewed in this process.

Cohabitation

43. Appropriate provision for cohabitants has been a fraught issue in the family justice in England and Wales over very many years, particularly vis-à-vis distinctiveness with marriage and divorce. For many years before the introduction of same sex marriage, the debate was clogged up understandably by seeking equality in cohabitation for same-sex relationships. After the new law, the debate subsided quite a few years but was revived. Some campaigners have continued to seek equality of outcome with divorce, indicating similarity or being identical therefore to marriage as a relationship. Some campaigners put forward proposals which were remarkably close to that of divorce and would have become effectively identical to divorce on any parliamentary passage.

44. The Law Commission was asked to investigate and prepared a report in 2007[45] but in 2011 the government said it would not take forward the recommendations. I felt this was a pity. They had specifically worked hard to formulate a process for remedies and claims for cohabitants which was distinctly different from marriage. They looked at concepts of "retained benefit" and "continuing economic disadvantage", very different to concepts on divorce. Of course it would have taken time to unpack and work out in practice but it was new and different to divorce. They positively considered the impact of the reform on marriage and was satisfied there would be no adverse consequence, in large part because of the difference. But nothing happened. There has been some subsequent movement in case law to give more opportunities for claims but it is still very limited.

[44] Other than in rare and exceptional cases

[45] https://webarchive.nationalarchives.gov.uk/ukgwa/20241223105400/https://lawcom.gov.uk/project/cohabitation/

45. One part of the problem was knowing reliably what was the demographic of those cohabiting. Certainly many cohabiting would go on to marry and therefore divorce law would apply. A number of cohabitation relationships were short-term where there was a moderately limited financial component. Some cohabitation relationships were in poorer sectors of community where the powers on relationship breakdown would rarely be used. Nevertheless there was obviously a good number cohabiting over many years, often with children, often with a good level of financial resources. What should be the outcome and the criteria for sorting out the finances? What should the courts do[46]?

46. The reform discussions frequently went nowhere because of the significant and unresolved disagreement about whether cohabitation law should have a specific and publicly acknowledged differential from marriage. With continuing evidence[47] [48]that, compared to marriage, cohabitation is invariably shorter, less stable and more likely to break up earlier including when there are children, many advocates for marriage have argued government has a positive duty to ensure marriage is encouraged both for the sake of the parties and their children.

47. Accordingly, it was highly refreshing to see the government acknowledging there should be a clear and public differential in law and public perception between the outcomes on the ending of these separate relationships, marriage and cohabitation. The role of practising lawyers is arguably not so much to engage in the policy issue of the differential but to comment on whether this differential is indeed a difference in practice. I am clear it is not. The government may state it is. It isn't in practice at all. This must be clearly stated

48. They seek two separate elements to distinguish. Neither are effective or different.

49. The first is that there would be no sharing claim arising from a cohabitation relationship. Several elements make this pointless and/or unfair. First and chief in this differential argument, in the vast majority of divorce cases the outcome is based on needs not sharing. So there would be no differential in practice in most cases between divorce and cohabitation. It simply would not exist. It's illusionary. It is not different at all. There is no clear water between one needs dominating sharing outcome from a domestic relationship of marriage and the needs only outcome from the domestic relationship of cohabitation. But secondly not to have some sharing between cohabitants is unfair. One may live in the property of the other contributing to works and mortgage et cetera and then find nothing on

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[46] in almost all instances, child maintenance was not dealt with through the courts but through government agencies or agreements

[47] such as recently by Dr Harry Benson in his paper, "The timing of marriage and union dissolution", https://marriagefoundation.org.uk/research/the-timing-of-marriage-and-union-dissolution/

[48] instead the government paper seems to rely on research from 2007 which may well have been accurate at the time but is 2 decades ago in which the demographic of the cohabiting population has changed significantly, including with the availability of same sex and heterosexual civil partnership taking a number out of the cohabiting population

cohabitation breakdown apart from needs[49]. A way must be found to provide these remedies in law, without reference back to Chancery and trust principles. So having no sharing claims doesn't give any real differential with marriage and divorce and in any event is unfair.

50. The 2nd element of alleged differential is this strange element of basic and luxury needs. There seems a suggestion that cohabitants would only be able to claim the former. That is unfair on them and in any event I cannot see this working in practice. It's harsh and not reasonable. It doesn't respect the standard of the relationship and sacrifices made. I cannot think this will or should survive parliamentary passage.

51. Therefore as a very experienced financial remedy lawyer and part-time financial remedy judge, I find that in practice and in reality the government is not bringing in any differential between marriage and cohabitation. It is classically the Emperor's clothing. It may look grand in the consultation publicity but proves itself to be nothing at all. In those circumstances, sadly because I believe some cohabitation reform is necessary, these changes should not be supported. The government should do more, and honestly look at how a differential can truly be found. It should go back to the drawing board which could usefully be reviewing the 2007 Law Commission paper.

52. In the meantime I respond to some of the cohabitation proposals but subject to this overriding comment

Definition of cohabitation to qualify for claims 25-30

53. The most important, 29, is a 3-year minimum time unless the parties have children[50]. In Australia it is continuous 2 years unless there has been significant financial or domestic interdependence, i.e. supporting each other. The consequence is that in Australia there is considerable caution after a year or so of a relationship. Other countries are also shorter than 3 years. It's to be expected that during parliamentary passage there will be pressure to reduce this time period and I could accept 2 years.

54. The cohabitation law would immediately apply if there was a child of the family, 30. This is not right because this is not necessarily a natural born child of the couple but a child of one who is then treated as a child of the relationship[51]. This concept of being "treated" could occur in as short a period as 3 months; a period neither may expect the cohabitation laws to

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[49] otherwise parties have to return to TOLATA type claims which is regrettable and not fit for the purposes of cohabitation domestic relationships. Surely one aim of this reform process should be to remove the need for cohabitants to refer to this law which was never intended as a remedy in domestic relationships

[50] notably children of the family

[51] child of the family has a specific legal definition in other legislation which would be carried across to this.

kick in. There have been many disputed cases about "treated" and what does it involve with established case law. Many people starting to live with another person and their child would naturally treat that child lovingly and caringly from the outset but not thereby realise the child has become a child of the family and all financial entitlements in law arising from the cohabitation are now running. The concept of child of the family is inappropriate here. It should only be the natural child.

55. I also question whether we need discussion on a separate categorisation of cohabitation relationships between those where there is a child of the relationship and those where there are not. In the former, everything will change with having the child. This will include often far greater dependency of one cohabitant on the other, prejudice perhaps to their own earning and career and needing to be out of the workplace for longer as well as needs for the child separate to the accommodation needs of each cohabitant. These child inclusive families require opportunities and remedies. Although I remain convinced of the need for differential between marriage and cohabitation, this should not be to the prejudice of any child and there should be distinctive child -related remedies available for cohabitants which the consultation does not anticipate. But for the latter category, cohabitants without a child, this is a very different scenario altogether. By rejecting the opportunity of marriage or civil partnership, and presumably rejecting the opportunity of a cohabitation agreement, how much should the law courts and justice system be providing remedies? I think the answer lies perhaps with the 2007 Law Commission criteria of economic advantage or disadvantage but probably not much beyond that. It is within this area of the cohabiting population that the law should be far slower to intervene. I urge discussion regarding this differential between cohabitants with a child born to the relationship and the other category of cohabitants.

56. I feel instinctively uneasy about the new law applying to those aged 16 and 17. It wouldn't on divorce as they would not then be married. Of course I appreciate they may live together then although in practice financial elements are unlikely to arise unless there are children and my comments above about distinctiveness of provision for cohabitants with children of the relationship. My preference would be that it only applied if there was a child of the relationship but not otherwise

Needs claims, 32-39

57. The government intends that cohabitants should be able to bring needs-based claims against the other on the breakup of a relationship. It provides an overarching policy, objectives, and a list of factors. Mostly these are not contentious if this is the direction of travel. The objective of a clean break, termination of dependency, as on divorce is brought across and rightly. But it then refers to discretionary needs being excluded, understood to be the level of needs as with the distinction on divorce as above. It was nonsense with divorce, and it is nonsense here. It is unsustainable and unfair on the parties. It is thoroughly impracticable and runs completely contrary to practice over past decades.

58. It goes on to say that ongoing maintenance, akin to spousal maintenance, would be only available in exceptional circumstances and meeting needs would be done through capital payment rather than ongoing payment. This is also nonsense. In the vast majority of cases there is insufficient capital for adequate housing for each, let alone available capital to capitalise ongoing maintenance needs. This has no prospect of working. It's unfair on mothers of young children who need income support as on divorce, and see comments about differential treatment of different cohabitation relationships above.

59. It rightly asks for confirmation that no one should do better arising from a cohabitation relationship than on divorce. Of course although it's hard to see how that could ever arise with the structure proposed by the government in this consultation.

Opting out of this cohabitation arrangement, 40

60. Most English cohabitation reform proposals have anticipated an opt out, and this is the case in the law in other countries as well. Because the demographic of cohabitation is different to marriage, including with no obvious start date and with more couples sliding into the cohabitation relationship[52], it's important that couples know not only when legal entitlement start but what they are. Many cohabiting in their middle or late years, perhaps already having been through a divorce process, perhaps already having accumulated some level of financial wealth but also perhaps with children whom they want to receive that wealth, are more sceptical and wary of finding themselves again the subject of claims arising from a domestic relationship. For some, it's why they cohabit rather than remarry. For some, they retain their separate accommodation, perhaps where children may live or stay, whilst nevertheless having time together in circumstances which would amount to a cohabitation relationship in law even if not fully living together. There are many different situations in which one or both would not want the law to apply. The opt out is fundamental.

61. But as with marital agreements, the government has gone far beyond what is the present position in law. It demands that anyone opting out of the cohabitation law, perhaps even in circumstances where they are not yet fully aware if they are cohabiting in law but want to be cautious, must take independent legal advice. The government says there can be no waving of the right to legal advice[53]. Far more than with marital agreements which are optional before getting married, this will produce a huge amount of legal work with many seeking solicitor services for these opt out agreements. I cannot think this will pass through Parliament. I cannot imagine Parliament will be willing to sign such a large blank cheque to

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[52] studies continually show that cohabitants may have quite different expectations of intention and commitment within a cohabitation relationship, particularly in the early years, with one perhaps expecting long-term full-scale commitment and the other only expecting or wanting a more casual relationship. These expectations clash when it comes to when is the start of the relationship. They may disagree dramatically, primarily because intentions were not expressed as mostly would be the case on marriage. This is a significant issue which cannot be decided only in one direction

[53] see comments above in respect of marital agreements as to whether this is solicitors or just some sort of legal advice from unregulated lawyers. It must be the former to have any prospect of safeguarding

the legal profession. But it's right to say this is the requirement in Australia so there is precedent.

62. Probably even more than marital agreements, the prospect of coercion and strong persuasion and much more upon one party to enter into this opt out agreement will be huge. Independent legal advice may temper a few from signing up but the vast majority will. I'm not sure independent legal advice is any or any reliable safeguard in practice or at all.

Reforming the position on intestacy

63. I am not a lawyer who deals with estates or intestacy. I am therefore wary about making commentary here on intestacy reforms and will limit myself to the primary issue of whether there should be identical provision on death as separation.

64. At the moment, substantially more can be claimed by a cohabitant on the death of their cohabitee than if they had separated. In some ways this is unfair and this is asserted by the government. But is it? On separation, there are 2 people needing resources for the rest of their life and seeking help for a fair distribution between the 2 of them. On death, obviously there is only one. Of course reference must be made to other claimants upon an estate such as children. But otherwise I don't see why there is not a differential between provision on death and that on separation. I do not see the need to bring the law on separation across to the law on death or vice versa. It's artificial and unnecessary. Otherwise at the moment, I have no further comments on this intestacy element of the proposals.

Conclusion

65. I have been a keen advocate over a couple of decades, and well before White in the year 2000, for reform of the law on financial remedies on divorce. It has been a highly frustrating experience. Good proposals after huge consultation processes such as previously from the Law Commission have come to nothing. Hence I am pleased that the government is taking an active role now. The irony is that having considered these changes, I have provisionally come to the view that I am unconvinced that they will necessarily improve the position for people on divorce needing to sort out the finances. I'm not sure it will improve the likelihood of certainty and predictability of outcome, or at least not at the risk of losing flexibility in the multitude of different situations which apply to the very many different marriage relationships which occur. It would help to have better definitions of marital property including when nonmarital becomes marital and also of post separation assets. But I don't find this in the government consultation. I fear it may be only until draft legislation that we get a chance to see what the government is actually saying[54]. When we come to

[54] which would be an unsatisfactory position where Parliament would have to debate both general and broad concepts as well as detailed elements of how the present law is or is not working in practice. The draft legislation should certainly be after there has been good

needs as distinct from sharing, in reflecting on the cases going through the courts, I'm not convinced a checklist would bring about more or earlier resolution. I certainly reject any suggestion of 2 tier needs, basic and luxury. This is simply impracticable, unnecessary and unfair. I don't see the proposals, whether the codification process or whatever is the plus element of supposedly uncertain areas of law, helping much or at all in early, out-of-court resolution of family disputes. With the continued experience that some pieces of legislation come out of Parliament far worse, and far harder to implement in practice, than when they arrived such as the 1996 divorce legislation, I am positively fearful where this present vague consultation might end up in new statutory law. I am wary about whether it actually will produce significant benefit to family justice and those needing help to reach a fair outcome for themselves, their children and all others affected by their relationship breakdown. Reducing the level of judicial discretion is always a cautious and precarious step but can be justified by fair provisions on what may happen in particular circumstances, with particular assets and other features. I don't see those fair provisions in these consultation proposals. This is immensely disappointing

66. Turning to the position in relation to cohabitation, the proposals of a differential with marriage are sadly no more the emperors clothing. Even a slight inspection shows there is no real differential at all in practice. It is illusionary and misleading to suggest there is. Yet we need to have reform for the benefits of cohabitants. This is not it. Government must be clear about the benefits of marriage. It's almost impossible to contemplate any other area of public life where there would not be alerts for one particular course of action i.e. cohabitation as distinct from the benefits of another. Yet this is the position with cohabitation with the government's proposals in this consultation not helping those contemplating cohabitation to realise the disadvantages with marriage. But even if the government is not willing to signal these differentials, it has failed to produce any meaningful differential between cohabitation and marriage in respect of the financial outcomes on relationship breakdown. For those in the early days of a possible relationship there is then the high hurdle of each having to see a lawyer[55] to opt out of either qualifying as a cohabitation relationship or having any of these rights and duties. Just as with marital agreements which the government is setting out preconditions far wider than present case law, so these cohabitation opt out agreements are unfair and unrealistic and almost certainly won't survive parliamentary passage. Moreover in neither marital agreements nor cohabitation opt out agreements is the problem of the gender imbalance of persuasion to enter into the agreement satisfactorily dealt with and will not give confidence and assurance that it is fairly entered into. To suggest otherwise is misleading and potentially deceitful. Overall I am pleased that the government acknowledges cohabitation law must have a clear and outward differential but disappointed there is none in practice in these proposals. Accordingly I oppose them. The losers will be cohabitants who should have distinctive rights and claims in a modern law. But this consultation does not provide it

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opportunity for the profession and others to review proposed detail. So the next stage should not be a draft bill

[55] and give full disclosure of their financial circumstances which some may be unwilling to give at an early stage of a relationship

67. There is one final remark which is crucial at a practical level. Whilst we must have a law which is recognised as fair and, I say, a law which recognises the distinctive benefits of marriage, we must also have a law which highly encourages out-of-court resolution, whether through negotiation with legal advice, mediation or other dispute resolution. This law must be understandable to the public. It should not require the public to analyse substantial case law to know what should be the way to an outcome. It must be convertible onto a digital format where many disputes will inevitably be resolved in the future. Whilst at the boundaries of distinctive circumstances some external adjudication such as a judge may be needed, the law must enable the significant majority of those going through financial disputes in the family court to know in advance what should be the outcome and settle accordingly. England has a highly sophisticated out-of-court dispute resolution profession, but too few resolve in that way because of uncertainties of what would happen at court. As a part-time financial remedy judge doing many FDR[56] hearings, I see too many cases which should have been resolved far earlier in the process. I have many FDR hearings where even experienced practitioners ask for a judicial indication to enable the case to settle and it invariably does; these practitioners should have the benefit of a clear, certain and fair law to help them resolve without needing this stage of the process. Therefore irrespective of the many issues raised above by me, we must have a law which enables far more people to settle financial arrangements after domestic relationships, after disclosure, without the high, often grossly disproportionate, level of costs incurred in getting to the settlement. A country has a duty in my opinion to provide laws which are certainly fair but which also enable and encourage resolution of many disputes without high costs and lengthy court proceedings. Sadly we do not have that at present which is why I have supported reform for some time. Sadly, I do not think this consultation and reform proposals will lead to it.

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What might happen if finding of domestic abuse but no quantifiable financial consequence? Some possible examples

We know that at the moment strong judicial guidance is only to take domestic abuse into account when there is tangible financial consequence. But the consultation paper seems to want to go much further. I remain unclear how it will work and these are possible ways and residual problems.

1 no spare income, no pensions, 3 young children and very small equity in the family home. Stretching and straining can just afford basic housing for each, which might even be

[56] when a judge gives an early neutral evaluation to encourage the parties to settle and when many cases do settle without a final hearing

shared ownership or a mobile home. 60:40 to the wife. But husband guilty of domestic abuse and therefore the court gives her 75:25. Husband now cannot get suitable accommodation for the children to stay overnight. Not enough capital for any sort of deposit. No available income for suitably sized rented accommodation. He cannot see the children overnight as there is nowhere for them to stay satisfactorily. And so the relationship with the children suffers badly. Victims? The children. Therefore there is an inevitable interrelationship between children proceedings and domestic abuse raised in financial remedy. If he went to the children court and asked for overnight contact and the court thought it was in the best interests of the child, what then happens?

2 As above but wife now moves from e.g. Devon to Leeds. Even more important the husband has accommodation for the children for long weekends and holidays. But he can't afford that because of the decision. He will now not be able to have the children as no suitable accommodation and limited other opportunity for contact. Again detrimental to the children and father children relationship

3 As 1 above but now it is the wife who is guilty of domestic abuse. So instead of getting 60% she now gets 45%. It was expected she would be the primary carer. But she cannot now afford accommodation to house the children. Husband now says they can live with him as he has 55%. Does primary care move to the other parent as a consequence of the primary carer suffering the domestic abuse premium? Where do the children live if the wife cannot house them? But maybe the husband says he cannot look after them because of work commitments or otherwise. What happens? In reality will a financial remedy court finding domestic abuse against the anticipated primary carer really be willing to take money away so that she cannot house the children?

4 No capital, no pensions, basic income, not enough spare for spousal maintenance but husband pays child support according to the government calculation. Guilty of domestic violence. Now nothing to do with the family court but will the government change the child support calculator if the family court has found domestic violence? If not, the family court is being expected to do something which the child support administration is not and that's not fair

5 No capital, no pensions, child support and very modest spousal maintenance for 4 years in order for the wife to become self-sufficient when the younger children are perhaps 8 years of age. Husband guilty of domestic abuse. Court cannot increase quantum of spousal maintenance because there is simply no money spare. But it's got to do something because the new law. Does it perhaps extend the four-year term to 8 years even though the court has found that four years are sufficient for the 1984 Act clean break requirements? If so, the wife would enjoy the benefit of an additional 4 years, not needed, but as result of the domestic abuse.

6 Rare case but it happens, minimal assets and income but moderately good pensions in payment. Finding of domestic abuse. Will the court now give a greater pension share as a consequence, even though it may put one party into reliance or greater reliance on welfare benefits during pension years? Given that the courts do their best to avoid making an order which will put one party onto the benefit system, will there be an exception in findings of domestic abuse?

I'm sure there are others. We are all critical of domestic abuse but are these sorts of outcomes where we want English family law on financial remedy to go? If not, where does it go if domestic abuse is taken into account across-the-board?

Biography

Prof David Hodson OBE KC(Hons) MCIArb is a dual qualified English and Australian (NSW) solicitor, a mediator, an arbitrator and a deputy (part time) family court judge (DDJ) at the Central Family Court in London and recently also in Devon and Cornwall. He was a co-founder and for 16 years a partner at The International Family Law Group (iflg.uk.com), a specialist law firm representing international families. He is a member of the English Law Society Family Law Committee, a Fellow of the International Academy of Family Lawyers, a member of LawAsia, the Family Law Section of the Law Council of Australia and a similar contributor to many family law organisations worldwide. He is a regular speaker at international family law conferences around the world. He was awarded the OBE for *services to international family law*. He was appointed a KC(Hon) in March 2022 by virtue of making a significant impact on the law of England and Wales. He is the editor and primary author of the LexisNexis textbook *'The International Family Law Practice'* (6th ed*).* He is Visiting Professor at the University of Law and Honorary Professor of Law at Leicester University. He is an Anglican lay preacher. See here for career interview: https://tinyurl.com/y7stmwjy He can be contacted on dh@davidhodson.com and more details here www.infinityfamilylaw.com