Law Commission
Reforming the law

Financial remedies on divorce and dissolution

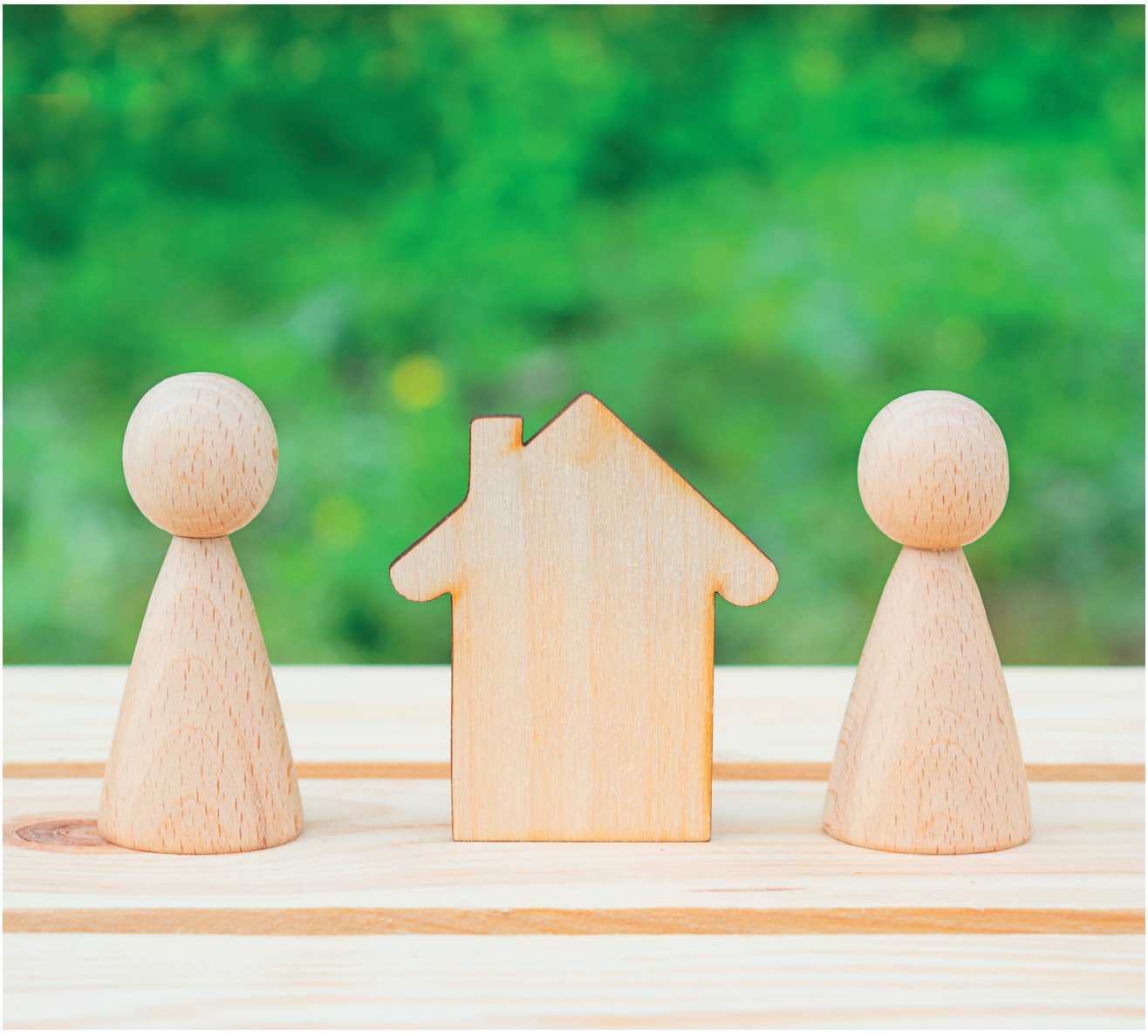
Summary of scoping report

Our Scoping Report

Who we are? 	The Law Commission of England and Wales is an independent body established by statute to make recommendations to Government to reform the law in England and Wales.
What is it about? 	The law governing financial remedies on divorce and dissolution of civil partnership. The court can make financial remedies orders to resolve the financial consequences of a couple's separation. These orders include property transfer, lump sum payment, periodical payments, known as spousal maintenance, and pension sharing orders.
What are we doing? 	We are scoping whether the law governing financial remedies requires reform. Our work seeks to ascertain whether the current law provides a cohesive framework in which couples going through divorce or dissolution can expect fair and sufficiently certain outcomes. We have identified problems with the current law, and suggested four possible models on which any future reform could be based. However, our Scoping Report does not contain recommendations for reform of the law.
Where can I find the Scoping Report? 	The full Scoping Report is available on our website at: https://lawcom.gov.uk/project/financial-remedies-on-divorce/
What happens next? 	Government considers our Scoping Report and decides whether further reform work in this area should be conducted.

This Summary

This Summary explains what the project is about and highlights our key conclusions and the four models we have identified, upon which any future reform of financial remedies law could be based. However, it does not summarise all of our Scoping Report.



Introduction

The end of a marriage or civil partnership is often a stressful and unhappy time for a couple. In addition to the legal formalities of ending the relationship by divorce in the case of marriage or dissolution of a civil partnership, the couple will need to make arrangements for any children of the family, and resolve the financial consequences of their separation. It is this last aspect with which our Scoping Report is concerned.

Our Scoping Report does not make recommendations for reform of the law. Instead, it identifies problems in the current law and ascertains if it requires reform, and considers possible models on which any future reform of financial remedies law could be based.

Our Terms of Reference

The Terms of Reference to our project are set out in full in the Appendix to our Scoping Report.

They set out the key question to be addressed by our scoping work – whether the current law relating to financial remedies on divorce and dissolution, in England and Wales, provides a cohesive framework in which parties to a divorce or dissolution can expect fair and sufficiently certain outcomes.

Divorce and Dissolution

For ease of reference, we refer in this Summary and our Scoping Report to spouses and divorce, but these references should be taken to include civil partners and dissolution of civil partnership unless otherwise specified.

Our engagement with stakeholders

During our scoping project we met with stakeholders with an interest in financial remedies reform. These stakeholders included specialist lawyers, judges, academics, legal representative organisations, and other Government departments.

We engaged with members of the public, hosting an online event and inviting members of the public to contact us directly to tell us about their experiences and proposals for reform. Additionally, we met with civil society organisations who represent sections of the public; for example: groups concerned with supporting women, single parents, fathers or victims of domestic abuse. However, as this is a scoping project, we did not conduct the full public consultation that would be necessary before any recommendations for reform are made.

We also engaged with lawyers and academics in other jurisdictions, to help us understand how the law works elsewhere, and to inform our work.

The current law

The law governing financial remedies on divorce is contained in the Matrimonial Causes Act 1973, which is mirrored in the Civil Partnership Act 2004 for dissolution of civil partnerships.

The current law confers a wide discretion on the judge hearing the case when deciding whether to make financial remedies orders.

Section 25 of the Matrimonial Causes Act 1973 requires the court to have regard to all the circumstances of the case, after giving first consideration to the welfare of any children under the age of 18. The court must take into account a list of factors, shown in the box below.

Section 25(2) of the Matrimonial Causes Act 1973

Section 25(2) lists the matters to which the court is to have particular regard when deciding whether to make a financial remedies order. In summary, these are:

a) the income, earning capacity and resources of both spouses;

b) financial needs, obligations and responsibilities;

c) standard of living during the marriage;

d) age of parties and duration of marriage;

e) any disabilities of the spouses;

f) contributions to welfare of the family;

g) conduct which it would be inequitable for the court to disregard; and

h) the value of any benefit which either spouse will lose the chance of acquiring because of the divorce.

Over the years since the passing of the Matrimonial Causes Act 1973, the statute has been interpreted by the court in a series of key decisions. The current approach taken by the court to the exercise of the discretion contained in the Matrimonial Causes Act 1973 reflects these case law developments; the statute however contains no express purpose or objective, and has remained substantially unchanged since 1973.

This has the consequence that reading the legislation will not explain how the court is likely to apply the factors listed above to resolve an individual case, as that explanation is contained in the case law. Furthermore, most of the case law relates to high net worth cases, which do not relate to the situation of most divorcing couples.

Since the decision of the House of Lords in the case of *White v White* in 2000, when deciding how to exercise its discretion, the court will treat the different roles that may have been played by the spouses during the marriage as equal, whilst seeking to achieve a fair outcome.

Fairness has been articulated by later key court decisions as requiring consideration of potentially three elements: needs, compensation and sharing, although there is limited consensus on the content and scope of each of these elements.

In practice, in the majority of cases, where the available assets are not sufficient to meet the couple's individual financial needs, the court will prioritise the needs of any children, but try wherever possible to ensure that the needs of the divorcing couple are met. In those cases where there is a surplus of assets over that which is required to meet needs, the court will look to share the assets fairly, which will usually mean equal sharing unless there is a reason to depart from equality.

Financial needs

Financial needs are not defined in the Matrimonial Causes Act 1973, and we have noted in our previous work looking at aspects of financial remedies law that "needs" is a very broad concept with no single definition. One of the challenges within the current law is the nebulous concept of needs.

Case law has established that "needs" encompass a wide range of forms of provision, including the income and capital needs of the divorcing couple, the needs of any children of the marriage, the need for a home, the need for provision for retirement and, as far as possible, to avoid either party being left dependent upon state benefits. Needs are usually assessed with reference to the couple's standard of living during the marriage, but other factors such as the length of the marriage and the age of the spouses may also be relevant. Needs have also been interpreted in the context of what each spouse needs to enable them to become financially independent. In most cases, there will not be sufficient assets to meet both spouses' needs.

Sharing

In those cases where there is an asset surplus after needs have been met, case law indicates that the assets should be shared, provided that they are matrimonial property (as described below).

The sharing principle often results in equal sharing, unless there is good reason to the contrary. Equal sharing is not a rule, but is seen as a relevant starting point.

Matrimonial and non-matrimonial property

A key concept in looking at financial remedies law is that of matrimonial property, a term defined in many other jurisdictions. In England and Wales, matrimonial property is not defined in the Matrimonial Causes Act 1973, but has been developed as a concept through case law.

Under the current law, matrimonial property is usually considered to be any property built up during the marriage, with the exception of gifts or inheritances to one of the spouses, and assets generated by one spouse after separation. Case law also indicates that the family home is matrimonial property, although its provenance, and the use and intentions of the couple may result in a departure from sharing it equally.

Case law is clear that although all property is potentially available to meet needs on divorce, non-matrimonial property will not generally be shared once needs have been met. However, there remain differences in judicial interpretation in how, and when, non-matrimonial property is shared. There is also a divergence of views as to when property which may start off as non-matrimonial may become matrimonial over time.

What happens in practice?

Fair Shares

Throughout our scoping report, we refer to the Nuffield Foundation's research project, "Fair Shares? Sorting out money and property on divorce".

The Fair Shares report is based on an online survey of 2,415 people and qualitative in-depth interviews with 53 individuals who had divorced in the preceding five years.

Fair Shares provides comprehensive data and evidence on how the current law on financial remedies on divorce is working in practice, in "everyday divorce" cases.

Fair Shares seeks answers to three questions.

(1) What financial and property arrangements are made on divorce?

(2) How do couples make those arrangements?

(3) What short-term effects result from the arrangements that are made?

Importantly, Fair Shares confirms that most divorces are "needs" cases, where there are insufficient assets to meet the couple's individual financial needs, and those of any children. In the cases Fair Shares studied, the median asset base value (including homes, pensions, and including those couples with only debts, or no assets available) was £135,000 per divorcing couple.

Fair Shares also notes that most divorcing couples make their own arrangements with little legal guidance, or even none at all.

Criticisms of the current law

Our Scoping Report explores the criticisms that have been made of the current law, not all of which are listed in this Summary. The key criticisms of the law centre on the wide discretion available to the court, and the claim that the law is as a result both uncertain and difficult for divorcing couples to understand.

In practice the majority of divorcing couples will not have a "bespoke" or "fair" solution imposed by the court based on the facts of their particular situation. Most couples do not apply to the court to resolve the financial consequences of their divorce, and even fewer pursue that process to a final determination.

- Official statistics suggest that in 2023 only around 40% of divorcing couples made applications for financial remedy orders, and that of those applications, only 29% were contested. The remaining 71% of financial remedies applications were uncontested, which includes those made by couples who have reached an agreement which they ask the court to make binding.
- Many people do not even take legal advice. The Fair Shares report found that only 32% of divorcing spouses reported using some form of legal support for financial arrangements.

Critics claim the wide discretion in the law effectively encourages disagreement and dispute, rather than supporting couples to reach settlement.

- Even when spouses are legally advised, they can be given different expectations about outcomes, making it harder for people to reach agreement.
- The lack of a clear objective in the law, and the wide discretion available to the court make it difficult for couples wishing to negotiate the division of their finances between themselves, who are looking to agree a financial settlement similar to what a court might order.
- This uncertainty can be even more problematic for those without legal representation, who are less likely to be able to understand how the law may be applied in their particular case, and what might represent a fair agreement.

Critics of the current law also argue that legal costs (that is, the fees paid to lawyers if either spouse is legally represented) are increased by the discretion inherent in the current law, and the resulting uncertainty.

- If a couple cannot agree, legal costs will increase, particularly if the couple have to ask the court to resolve the financial consequences of their divorce.
- The costs associated with legal representation and court proceedings may be a barrier, raising issues of access to justice.
- However, the Fair Shares report suggests that the legal or mediation costs of divorcing couples are, for many, relatively modest.

Couples can decide for themselves how they wish their assets to be divided on any subsequent divorce, by entering into nuptial agreements before marriage. However, whilst the current law regards nuptial agreements as an important factor to be considered when deciding what outcome is appropriate, any such agreement is not binding and cannot exclude the power of the court to make financial remedies orders.

These and other criticisms of the current law are considered in full in our Scoping Report.

Current procedure and practice

Our Scoping Report focuses on financial remedies law. However, we also consider the court procedure used in applications for financial remedies orders, as well as the range of options available to couples who wish to resolve the financial consequences of their divorce without going to court.

As well as giving us their views on the current law, stakeholders also informed us about difficulties faced by those engaging with the financial remedies court process, and other procedural and practical problems. Whilst our report focuses on the law rather than process, we think that it is important for Government to be aware of these concerns.

We conclude that if Government pursues reform of financial remedies, then consideration should be given to including procedural reform in the scope of any work. Substantive reform and procedural reform appear to be intrinsically related, and any reform of the substantive law would have to consider the effect on how cases are resolved in practice.

Does the law require reform?

In our Scoping Report, we conclude that the current law of financial remedies requires reform, although the shape that reform should take is a matter for Government to decide.

The current law contained in the Matrimonial Causes Act 1973 does not reflect the significant developments to financial remedies law arising out of judicial decisions. Combined with the wide-ranging discretion contained in the current law, this means that it is not possible for an individual going through divorce to understand, by reading the statute, how their case will be decided. The law lacks certainty and accessibility to an extent that could be argued is inconsistent with the rule of law.

Whilst the court process, and related non-court dispute resolution options, encourage couples to try and settle their financial disputes, the discretionary nature of the current law makes it difficult to negotiate. The degree of discretion, and the resulting uncertainty in the law, can be said to promote dispute rather than settlement. Even if a couple seek legal advice, their lawyers may not agree about the appropriate outcome; for those who do not obtain legal advice, the position is even less clear.

The flexibility offered by the discretionary approach to achieve a fair outcome, tailored to the couple's own circumstances, instinctively seems beneficial. In practice, however, it is an elusive ideal. While divorcing couples may expect fair outcomes if their case is decided by the court, the majority of couples will not have their case heard by the court. They will not benefit from an outcome tailored for their particular circumstances. Even couples who do obtain a judicial resolution will face delays and legal costs before their case is eventually determined.

In our view, the current law relating to financial remedies on divorce and dissolution does not, to use the words of the question set out in our Terms of Reference "provide a cohesive framework in which parties to a divorce or dissolution can expect fair and sufficiently certain outcomes".

It is for Government to decide how this situation might be remedied, to promote increased certainty without losing the benefits of fairness and flexibility.

Models for future law reform

Our Scoping Report's Terms of Reference require that we identify possible models on which future reform of financial remedies law could be based. We have identified four models of reform, shown in the infographic below. These models are described in more detail on pages 13 to 15 of this Summary.

The four models represent a spectrum of reform, ranging from codification to a default matrimonial property regime. At one end of the spectrum is a model based on codification of the current case law, which retains a high degree of judicial discretion but only a small increase in certainty. At the other end is a model based on creation of a default matrimonial property regime, under which discretion is greatly reduced, but the law is much more certain. The other two models fall in between these two points.

Models on which law reform could be based

Codification	Codification-plus	Guided Discretion	Default Regime
• Minimal change to the existing law contained in s25 MCA 1973. • Current law as developed through case law is codified. • Court retains a wide discretion.	• Current law is codified. • Additional reform to deal with specific areas where the law is not yet settled. • Court retains discretion, but limitations on discretion may be introduced in relation to areas of reform.	• Introduction of a set of underpinning principles and objectives which guide the exercise of the court's discretion. • Reform goes beyond changes to existing law contained in s25 MCA 1973.	• Creation of a matrimonial property regime. • Couples know when marrying how property will be divided on divorce. • High level of certainty - court has very limited discretion.

Codification

Codification would involve bringing settled case law principles on financial remedies into statutory form in the Matrimonial Causes Act 1973. It would be the simplest approach to reform – the substance of the law would not be reformed, but it would be presented within a cohesive framework and be more easily accessible. A reformed statute would make clear what the law is, rather than the law being contained in different court decisions.

The established principles of fairness, needs and sharing would be embodied in any reformed statute. Sharing would be limited to matrimonial property as understood through the existing case law. Non-matrimonial property would remain the property of the spouse who owned it, unless it was required to meet the other spouse's needs. The duration of the marriage would be deemed to include the preceding period of "seamless" cohabitation; a point that would be relevant for determining matrimonial property. Codification of the law would also mean that the settled case law in relation to nuptial agreements would be incorporated into statute, and agreements would be upheld where fair, but would not be binding.

Codification-plus

Codification-plus is a model that goes slightly further than codification in terms of reform. It retains the benefit of codification, in making the law more cohesive and easily accessible.

Government may wish to take the opportunity to reform the law further. This could involve reform of specific areas of law identified in our Terms of Reference which are not yet the subject of settled case law, such as:

- nuptial agreements;
- spousal maintenance;
- the law relating to "conduct";
- the court's powers to make financial remedies orders for children aged 18 and over; and
- the treatment of pensions.

We discuss reform to these areas of law in our Scoping Report, and at pages 16 to 21 of this Summary. Reform to any of these areas could further limit discretion and provide greater certainty, for example by making nuptial agreements binding, or placing a limit on the period for which spousal maintenance may be paid.

Codification-plus could also encompass additional reform to areas where the law is settled, such as the treatment of matrimonial property, for example by defining exactly when the family home is not to be treated as matrimonial property.

Guided discretion

Under a guided discretion model, legislation sets out the purpose of financial remedies law and the principles which must guide the application of the law. The model is intended to provide sufficient clarity in the legislation itself to enable divorcing couples to come to their own financial arrangements "in the shadow of the law"; something we are told is difficult under the current law.

A model based on guided discretion retains, to a greater or lesser extent, some judicial discretion, which can then be exercised on a case-by-case basis. However, legislation prescribes how, and when, the discretion can be exercised.

In our Scoping Report we look at three examples of guided discretion. We consider the financial remedies law of Scotland and New Zealand, and the proposals contained in the Divorce (Financial Provision) Bill, a proposal for law reform put forward by Baroness Deech, which is modelled on, but not a direct transplant of, the Scots law of financial provision.

We look at how each of those three examples divide assets on divorce, and specifically their treatment of matrimonial and non-matrimonial property, as well as their approach to nuptial agreements and spousal maintenance. While these are useful examples of the approach, reform based on guided discretion need not replicate any of them, but could be a bespoke scheme devised for England and Wales.

Default regime

A default regime (otherwise known as a matrimonial property regime), imposes a set of rules which come into effect from the date of the marriage, and which dictate with a high level of certainty the financial outcome when the marriage comes to an end. Such regimes do still retain the possibility for use of discretion in certain areas, albeit to a very limited extent. Default regimes are common in a number of European and Commonwealth jurisdictions.

Matrimonial property regimes are characterised by a number of "pillars", each one concerned with a distinct aspect of financial remedies upon divorce. The law therefore contains separate provisions relating to property, spousal maintenance, pensions, and child maintenance.

In our Scoping Report we examine the main characteristics of the most common types of matrimonial property regimes. We discuss the likely effects of the different regimes, taking into account the additional pillars of spousal and child maintenance (where relevant). However it is important to note that these regimes operate within the socio-economic context of those jurisdictions.

Adoption of a default regime in England and Wales would require wholesale reform of the law. Consideration would need to be given to whether marriage should have an immediate effect on property rights, or, whether any rights will only be generated upon divorce (as is the case under the current law).

Default regimes in other jurisdictions go hand-in-hand with availability of binding nuptial agreements, meaning that the spouses are free to choose an alternative option to the default regime at any point in time. Any consideration of a default regime should also include consideration of introducing binding nuptial agreements, as we discuss at pages 16 to 17 of this Summary.

Potential areas of law reform

Our Terms of Reference identify specific issues relating to financial remedies law which we have considered as part of our scoping project. This Summary provides a brief account of the issue and the suggestions for reform made in respect of each issue. Whilst reform of these issues could be incorporated into a codification-plus model, as they represent reform to the existing law contained in the Matrimonial Causes Act 1973, it could also be possible to address them as part of a guided discretion model, or even a model introducing a default regime.

Nuptial agreements

Nuptial agreements are agreements made between couples either before or during their marriage, which govern the way in which their assets are to be divided on divorce. Nuptial agreements are not legally binding in England and Wales, although the Supreme Court ruled in the 2010 case of *Radmacher v Granatino* that such agreements should be upheld if fair and freely entered into.

In the Law Commission's 2014 Report on Matrimonial Property, Needs and Agreements, we recommended that it should be possible for couples to enter into binding nuptial agreements, which we called Qualifying Nuptial Agreements (QNAs), provided certain legal safeguards were met. These safeguards included the couple having independent legal advice, being given material information about each other's financial situation, and the agreement being entered into no fewer than 28 days before the marriage.

Importantly, we recommended that it should not be possible to use a QNA to contract out of providing for financial needs. The meaning of "financial needs" for this purpose would be that in the existing law, which we noted included both capital and income needs. Where a QNA was in force, the court would only be able to use its powers under the Matrimonial Causes Act 1973 in relation to one of the spouses to meet the needs of either spouse or the needs of a child of the marriage.

Our recommendations about QNAs were incorporated into a draft Nuptial Agreements Bill attached to our Matrimonial Property, Needs and Agreements Report. However, Government has not taken our recommendations forward.

Since our 2014 Report, the courts have continued to uphold nuptial agreements where they have been entered into freely and without duress, provided that the provision in the agreement meets the needs of the spouses and any children. Where agreements do not meet needs, the court has been willing to depart from their terms.

Any reform of the law relating to nuptial agreements would depend on the model of reform adopted as our 2014 recommendations are based on the current law in which needs plays a central role. Our draft Nuptial Agreements Bill could be implemented as part of a codification-plus model, or provision for binding nuptial agreements could be form part of a guided discretion or default regime model.

Our engagement with stakeholders suggested that there is broad support for implementation of our recommendations for QNAs. However, if "needs" are to remain central to any reformed law, one issue to be resolved relates to how needs should be considered in a nuptial agreement – should needs have the same meaning as in a financial remedies claim where there is no nuptial agreement, or should it be possible to interpret needs more restrictively in a nuptial agreement? Equally, a small number of stakeholders thought that it should be possible to exclude provision for a spouse's needs altogether, allowing the couple to enter into whatever agreement they wished.

Spousal maintenance

Spousal maintenance is provision made to a former spouse under a financial remedies order. It is usually made by way of regular periodical payments (although these may be capitalised as a lump sum) and may be granted in addition to any other property or lump sum order.

Under the current law, when making an order for spousal maintenance the court is required to consider whether it would be appropriate for the payments to be made only for such time as would, in the court's opinion, be sufficient to enable the recipient spouse to adjust without undue hardship to the termination of his or her financial dependence on the other party. This is part of the court's duty to consider whether a "clean break" between the spouses is appropriate.

Our Terms of Reference require us to consider whether there is scope for reform of the law to incorporate a maximum term for spousal maintenance.

Some commentators have called for a limit on spousal maintenance; for example, that it should be limited to 5 years save in cases of serious financial hardship. Supporters of this approach have suggested that the current law allows a "meal ticket for life" for wives, although research has shown that orders providing for maintenance for a spouse's whole life are extremely uncommon.

The Fair Shares report made findings about the role of spousal maintenance:

- only 22% of those surveyed had a maintenance arrangement in place;
- of those maintenance arrangements, 88% were for a fixed period of time;
- women were more likely than men to be in receipt of spousal maintenance;
- maintenance arrangements are more likely where there are children of the marriage, or where one spouse had an illness or disability; and
- in 76% of cases where there was a spousal maintenance arrangement, its termination was linked to a specific event, such as a child reaching a certain age or the earning potential of the recipient spouse. Only 20% were for a fixed number of years.

Many of our stakeholders were concerned about the effect a term limit on maintenance orders could have on vulnerable spouses, although there was support for a limit amongst others.

Even where stakeholders expressed support for a time limit, many supported retaining some discretion, depending on the circumstances. There was little consensus on what would constitute exceptions to the limit, or indeed whether the exception should be as wide as necessary to achieve a fair outcome.

Children aged 18 and over

Our Scoping Report also considers whether there should be wider powers for the courts to make orders in respect of children of the family who have already attained the age of 18.

Child maintenance paid through the Child Maintenance Service ends upon the child reaching the end of their secondary education or training. We note in the Scoping Report that the court is able in some circumstances to make maintenance orders for children under 18 using the Matrimonial Causes Act 1973, but we do not consider that in this Summary.

The Matrimonial Causes Act 1973 provides that financial support for children will generally cease when they reach 18 years old, although there are limited powers to make provision for a child beyond this age, if they are or would be in education or training, or where there are "special circumstances". Such circumstances have generally interpreted to mean a physical or mental disability of the child that creates a financial need into adulthood.

We have been told that the current law is unsatisfactory, as increasingly parents are still providing financial support for children beyond the age of 18. Our stakeholders recognised that the financial burden for supporting such a child can often fall on the parent with whom they are living.

The Fair Shares report found that 84% of divorced individuals who had children aged 18 and over were financially supporting them at the point of divorce. This figure then dropped to 69% five years after the divorce. Fair Shares also found that mothers are more likely than fathers to have children aged 18 and over living with them at home, whereas fathers were more likely to be providing support in the form of financial payments to their children for university or other study.

Stakeholders suggested that the court's powers to order financial provision for children aged 18 and over should be extended. It was suggested that the age at which provision ends by default – currently 18 – should be revised upwards, possibly to the age of 21. Alternatively, financial provision could end upon the occurrence of a particular event, such as when the child finishes a first undergraduate degree, or becomes financially independent.

Conduct

One of the factors which the court can consider when deciding to make a financial remedies order is "the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it", as set out in subsection 28(2)(g) of the Matrimonial Causes Act 1973. There is no statutory definition of such conduct.

Our Terms of Reference require us to consider whether there is scope for reform in the operation of "conduct" as a factor to which the court must have regard. Under the current case law, conduct falls into four categories:

- personal misconduct by one spouse towards the other;
- wanton and reckless dissipation of assets;
- litigation misconduct; and
- failure to provide full and frank information about finances.

Our stakeholders primarily focused on the way in which personal misconduct is treated. Particular issues have arisen in relation to the treatment of domestic abuse, including controlling or coercive behaviour and economic abuse, and whether such abuse should more readily be considered as conduct. This reflects a wider ongoing discussion on this topic.

The current case law suggests that personal misconduct will only be relevant where it is "gross and obvious" – the case law also refers to conduct which provokes a "gasp" rather than a "gulp" – and has a direct financial consequence. Examples of such conduct include a case where the husband attempted to murder the wife, who was unable to work as a result.

Some commentators and stakeholders suggest that there should be a greater recognition of domestic abuse as conduct. These stakeholders make the point that victim-survivors of abuse (who are predominantly female) suffer poor financial outcomes following divorce and that the financial consequences of domestic abuse should instead properly fall on the perpetrators.

Conversely, other stakeholders, including members of the judiciary, suggest that the law is already able to take account of domestic abuse where it is relevant, as part of the court's consideration of the needs of the spouses, making it unnecessary for abuse to be treated as conduct.

These stakeholders say that if it is easier for domestic abuse to be treated in law as conduct this would mean that the court would need to spend longer in looking at evidence of such abuse, which could create practical problems in terms of stretched court resources, delays, increased costs, more animosity between the spouses and a reduced chance of spouses reaching a financial settlement themselves. It is also suggested that a greater role for conduct would be contrary to the policy of removing "fault" from divorce.

Our Scoping Report concludes that, it would be beneficial for the law to state clearly:

- what forms of behaviour will be considered conduct (whether that be personal misconduct or litigation misconduct);
- the impact that conduct will have on a claim for financial remedies; and
- the process to be adopted when making an allegation of conduct.

Pensions

The Fair Shares report also found that many people have little or no awareness of their spouse's pension: 24% of divorcing individuals did not know if their spouse even had a pension (let alone knowledge of its value). Women were less likely than men to know if their spouse had a pension. This is concerning as, for many divorcing couples, pension assets are their most valuable assets, even taking into account the former family home.

The court can make orders dividing a person's pension, so that the person's spouse gets a share, called a pension sharing order. However, the Fair Shares report also found that only 11% of divorcing couples (who were not yet drawing their pension) had pension sharing arrangements in place.

Instead, the most common way for couples to deal with pensions is offsetting – where instead of a share in a pension, a spouse receives a greater share of other assets. Offsetting is not legally defined and does not require a court order. It also involves the comparison of very different types of assets: pension assets versus, usually, the family home.

There are a number of reasons why couples offset. Many view pensions as belonging to the spouse who built them up, and therefore not suitable for sharing. Equally, many couples choose offsetting rather than pension sharing to enable the primary carer to remain in the family home. And, importantly, most couples do not get an order settling their finances, so a pension sharing order would not, anyway, be available in those circumstances.

Commentators have expressed concern that offsetting can result in unfairness, particularly for women as their longer-term financial wellbeing is ignored in favour of the practicalities of their current financial needs. Women often take time out of the workplace or work part-time, particularly to focus on caring responsibilities, and, as a result, their pension pots are smaller than men's.

Our conversations with stakeholders reflect the findings of other research - that pensions are considered by divorcing couples as complicated and opaque, and their value is not fully recognised, or in some cases even acknowledged at all. There is a general consensus from stakeholders that any reform of financial remedies law should examine how pensions are currently treated on divorce. We explore in our Scoping Report suggestions for reform – for example, whether pension sharing should be specifically mentioned in the law, or even if pension sharing should be the default position.

An objective for any reformed law?

The current law set out in the Matrimonial Causes Act 1973 no longer contains a statutory objective, although it has been interpreted as implicitly requiring the court to achieve a fair outcome. Inherent to fairness is the principle of equality – that there should be no discrimination between the respective roles of parties to a marriage or civil partnership. This forms part of the policy assumptions on which our Scoping Report is based.

In addition to deciding on a model for reform, Government may wish to consider whether other principles should be articulated as underpinning any reformed law and be included in any reformed legislation, If so, it will need to decide the weight that is to be given to any such principles. Any decision about underlying principles will inform the way in which future reform work structured around a particular model is conducted.

Conclusion and what happens next

We have concluded that current law does not provide a cohesive framework in which parties to a divorce or dissolution can expect fair and sufficiently certain outcomes. Any of the four models for reform which we have identified could form the basis of a reformed system of financial remedies law, addressing at least some of the concerns raised by stakeholders and critics of the current law.

This is a Scoping Report, so we have not made recommendations for reform of the law.

It is now for Government to consider and respond to the Law Commission's Scoping Report. Under the Protocol between the Lord Chancellor (on behalf of Government) and the Law Commission of England and Wales, the responsible Minister will respond as soon as possible, and in any event with an interim response within six months of publication of the Scoping Report and a full response within a year.