

TERMS OF REFERENCE – FINANCIAL REMEDIES ON DIVORCE AND DISSOLUTION

- 1.1 The project will provide the basis for any future detailed financial remedies reform project. It will identify the key questions that any such project would address.
- 1.2 The fundamental question underlying the Law Commission's work for this project will be whether, in England and Wales, the current law relating to financial remedies on divorce and dissolution provides a cohesive framework in which parties to a divorce or dissolution can expect fair and sufficiently certain outcomes.
- 1.3 The project will provide a comprehensive scoping exercise regarding the law of financial remedies on divorce and dissolution (save for those elements which are out of scope as per Paragraph 1.13 of these Terms of Reference), going beyond the discrete areas of law that were examined in the Law Commission's 2014 report "Matrimonial Property, Needs and Agreements". For the avoidance of doubt, as part of the project, the Law Commission will scope whether the issues of matrimonial property, needs and agreements need to be reviewed beyond its 2014 recommendations, to the extent that these issues may impact on any potential reform project in the future.
- 1.4 The Law Commission aims to provide a substantive report in the form of a scoping paper by September 2024.
- 1.5 The Law Commission will conduct detailed analysis of the current law relating to financial remedies on divorce and dissolution, as set out in legislation and developed through case law. As part of this analysis, the Law Commission will consider:
 - (1) The financial orders that may be made by the courts on divorce or dissolution (including orders made by courts in common practice, such as "*Mesher* orders"); and
 - (2) The considerations to which the court must have regard when making such orders.
- 1.6 The Law Commission's scoping exercise will also undertake a comparative review of laws governing finances on divorce in other jurisdictions, such as in Scotland, other common law jurisdictions (such as Australia, New Zealand, Canada and the United States), as well as civil law jurisdictions which operate choice of matrimonial property regimes.
- 1.7 As part of its scoping exercise, the Law Commission will consider the current legal and socio-economic research on the operation of the existing law, including the outcome of the Nuffield Foundation's "Fair shares? Sorting out money and property on divorce" project, which is due to be completed in September 2023.
- 1.8 As part of its scoping exercise, the Law Commission will consult with key stakeholders on reform in the area, including specialist lawyers and judges (including the senior family law judiciary) and academics, civil society and legal representative organisations, and other Government departments.
- 1.9 The Law Commission will identify:
 - (1) Any problems in the current law of financial remedies on divorce, and whether there is a case for law reform;
 - (2) Possible models on which future reform of financial remedies law could be based;

- (3) The necessary parameters for further detailed technical and legal policy work relating to financial remedies law;
- (4) A range of questions that would likely need to be considered in detail at any consultation phase;
- (5) Any policy choices that the Government would need to make to enable a revised scheme of financial relief to be designed.

1.10 The Law Commission will consider specifically (but not be limited to considering) whether there is scope for reform in relation to the following areas:

- (1) The discretionary basis of the current law, and whether it allows for sufficient certainty as to legal outcomes;
- (2) Whether there may be ways to structure the discretionary basis of the current law with a clear set of underpinning principles, in order to create more certainty as to outcomes;
- (3) 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 eighteen;
- (4) The operation of 'conduct' as a factor to which the court must have particular regard when deciding to make financial remedies orders;
- (5) The treatment of pensions on the division of parties' assets on divorce;
- (6) Potential maximum periods for spousal periodical payments orders; and
- (7) The principles underlying s.25A of the Matrimonial Causes Act 1973.

1.11 The review will proceed on the following policy assumptions:

- (1) When making financial remedies orders, the first consideration of the court should be given to the welfare while a minor of any child of the family who has not attained the age of eighteen.
- (2) The law should not discriminate between the respective roles of parties to a marriage or civil partnership.
- (3) Any reform to the law of financial remedies on divorce would be replicated so as to apply in the same way in respect of financial remedies on dissolution of civil partnerships.

1.12 The review will proceed taking into account the following policy aspirations (insofar as is possible, accounting for potential tensions between the aspirations):

- (1) The law relating to financial remedies should:
 - (a) provide fair outcomes;
 - (b) provide sufficiently certain outcomes;

- (c) have regard to the position in which financially vulnerable parties might find themselves on divorce;
- (d) be straightforward and easy for parties to a divorce or dissolution to understand, where possible equipping parties to reach agreement without the court's assistance and without needing to expend large sums on legal fees;
- (e) minimise risk of conflict between parties to a divorce or dissolution;
- (f) apply effectively, including in relation to cases involving parties with limited financial means; and
- (g) be capable of adapting over time to socio-economic changes.

1.13 The review will not consider:

- (1) The law relating to child maintenance as governed by the Child Support Act 1991.
- (2) The law relating to financial provision for children under Schedule 1 to the Children Act 1989.
- (3) The law relating to the rights of cohabitants on relationship breakdown.
- (4) The principle that parties may make an application for financial relief in England and Wales after an overseas divorce under Part III of the Matrimonial and Family Proceedings Act 1984.
- (5) The principle that the court may make financial remedies orders on a nullity of marriage order or nullity of civil partnership order, or on judicial separation order or separation order.
- (6) The principle that the law on financial remedies on divorce will be replicated so as to apply in the same way in respect of dissolution of civil partnership.
- (7) The principle that a former spouse who has not remarried may make an application for maintenance under the Inheritance (Provision for Family and Dependents) Act 1975.
- (8) The law relating to the enforcement of financial remedies orders, including in relation to cross-border reciprocal enforcement.