



Matrimonial Property, Needs and Agreements

An Overview

THE LAW COMMISSION

MATRIMONIAL PROPERTY, NEEDS AND AGREEMENTS: SUPPLEMENTARY CONSULTATION PAPER

AN OVERVIEW

INTRODUCTION

- 1 This paper is an overview of the Law Commission's Supplementary Consultation Paper on Matrimonial Property, Needs and Agreements, published in September 2012. We would of course like everyone to read the full paper, which can be downloaded at www.lawcom.gov.uk. But we recognise that some readers may not have time to work through this detailed document and so we have produced this shorter version. It has been written for members of the public; we have set out our main arguments and reproduced all our consultation questions. Details of how to respond, and a glossary, are set out at the end of the document. Lawyers may prefer to read a more technical overview, which can be found at www.lawcom.gov.uk.

THE BACKGROUND TO THIS CONSULTATION

- 2 The Law Commission for England and Wales is an independent body, required by statute to review the law and to make recommendations to Government about law reform. We work on projects covering topics within the law; we publish Consultation Papers in which we seek the view of the public and of specialists – lawyers, for example – about possible reforms. Generally our projects culminate in a Report, in which we make our recommendations, and a draft Bill giving effect to those recommendations. Government is not required to accept our recommendations.
- 3 In January 2011 we published a Consultation Paper about Marital Property Agreements – more usually known as “pre-nups” and “post-nups”. These are agreements, made before or during marriage or civil partnership, about the couple's financial arrangements. They may relate to the way they organise their money or property during the relationship; our consultation was about agreements relating to the financial consequences of divorce, or of the dissolution of civil partnership. Civil partnership is in virtually all respects the legal equivalent of marriage, for same-sex couples; the statutory provisions relating to the financial consequences of the ending of civil partnership are the same as for divorce.

- 4 That consultation produced 81 responses. We have not yet published our recommendations about pre-nups and post-nups; but when we do, it is likely that we shall recommend the creation of a new form of agreement known as the "qualifying nuptial agreement", which will be enforceable provided that certain conditions are met. However, in the light of the responses to that consultation we decided not to conclude the project with a final Report at that stage. Instead, we agreed with Government that we would first carry out another consultation relating not to agreements, but to two difficult areas within the general law governing the financial consequences of divorce and dissolution. Those two areas are "needs" and "non-matrimonial property".
 - (1) Needs. The law is clear that former spouses have a responsibility for each other's needs after divorce or dissolution. But it does not state clearly how much, and for how long, a former spouse has to pay or contribute for this purpose.
 - (2) Non-matrimonial property. Since the case of *White v White*, a decision of the House of Lords in 2000, the courts have worked with a "sharing principle", which means that a couple's property – whether owned jointly or individually - will be shared equally on divorce or dissolution, provided that their needs are met. But some property, particularly property acquired before the marriage or civil partnership, or received as a gift or inherited, is less likely to be shared. It is known as non-matrimonial property; but the law has not developed clear rules about it and there are uncertainties which we believe should be ironed out.
- 5 The first of those two areas, needs, is important in the context of qualifying nuptial agreements, because we believe that it should not be possible for spouses to contract out of making provision for each other's needs. But provision for needs is also crucial in nearly all divorces and dissolutions. Non-matrimonial property is relevant only in those well-off households where there is more than enough money and property to meet the parties' needs. Some of the legal questions connected with non-matrimonial property are also important in the context of agreements, as we explain later.
- 6 In both these areas the law is very uncertain. We aim to recommend clearer law about needs and about non-matrimonial property, so that people know what they have to pay or to share and why.
- 7 However, we do not believe that a quick solution can be found to the law relating to needs. The problems are so fundamental that we think further work will have to be done after the end of our project. When we publish a Report and a draft Bill in the autumn of 2013 our recommendations will cover three aspects of the law relating to financial orders.
 - (1) The Report will examine the law relating to provision for needs on divorce and dissolution. The recommendations we make about this are likely to be in two groups.
 - (a) Some will be for fundamental and principled reform, and will require further research and piloting after completion of the Law Commission's project before there is a change in the law.

- (b) Other recommendations about needs will be designed to improve the law in the short term. Some of them may be for a change in the statute, and if so we shall provide clauses in the draft Bill to show how this can be done.
 - (2) The Report will make recommendations about non-matrimonial property, reflected in provisions in the draft Bill.
 - (3) The Report will make recommendations about the legal status of marital property agreements and, again, the draft Bill will include clauses to reflect those recommendations.
- 8 This overview of our Supplementary Consultation Paper now goes through the arguments and questions in the main paper. We look first at the current law, and explain how the law relating to needs has got into difficulties. Then we discuss the principles behind payments to meet needs – or “spousal support”, as we prefer to call it – and ask consultation questions about this. Next we consider what can be done to improve the law relating to needs in the short term. Finally we examine, and ask questions about, the law relating to non-matrimonial property.

THE CURRENT LAW

The background

- 9 Almost all divorces and dissolutions involve some financial re-arrangement, whether as a once-and-for-all payment or on a continuing basis for many years. Quite a small proportion of couples go to court to resolve this; many negotiate their own arrangements, with or without lawyers. But even those who do not use the legal system are negotiating or bargaining “in the shadow of the law”; they need to know what, if anything, the law says that they are entitled to or have to pay. It is also helpful if they know why.
- 10 It is quite difficult to state clearly what is the law about the financial consequences of divorce and dissolution. That is partly because the law has to be found in a number of different places, none readily accessible to members of the public; it is contained not only in statutes but also in decisions of the courts. But it is difficult also because it is incomplete and is not entirely consistent; even when all the sources of the law are considered it is not possible to set out the law clearly because it is in fact not clear.
- 11 Before we summarise the law we need to make three general points.
- (1) We use the word “spouse” to refer to husbands, wives and civil partners.
 - (2) The law relating to financial provision on divorce is the same as the law relating to financial provision on the dissolution of civil partnership. The two relevant statutes – the Matrimonial Causes Act 1973 and the Civil Partnership Act 2004 – contain equivalent provisions, and the courts have not made any distinction between marriage and civil partnership in this context.

- (3) We use the term “spousal support” as a shorthand for provision made, whether by once-and-for-all payments or by recurring (also known as “periodical”) payments, to meet the needs of a former spouse. The two terms – “provision for needs”, and “spousal support” – mean exactly the same.
- 12 Moving on, then, to the law itself: the starting point is the statutes, which give us two legal tools. First, they set out a range of orders that the court can make. Second, they set out the considerations, or ideas, that the judge must have in mind when making any of these orders. We look at these in turn; then we look at what the statutes do not provide and what the courts have done to fill the gap. Finally we summarise the problems that have arisen as a result, and explain the type of reform that we think is needed.

The range of orders that can be made

- 13 The statutes provide a range of orders. The court can order lump sums to be paid, or property to be transferred. It can make an order for property to be “settled” – that is, a long term arrangement is made so that, for example, one parent lives in the family home with the children until they leave home and then the house is sold and the proceeds divided between the former spouses, perhaps many years ahead. The court can order periodical payments to be made; that means a series of payments for a definite or indefinite period of time, typically on a monthly basis. A wide range of orders for the sharing of pensions is available.
- 14 Orders can be combined, and very often are, so as to make an arrangement that works. For example, one party may be ordered to transfer part of his or her savings to the other; at the same time the family home might be transferred from joint names into the sole name of one party, but on the basis that it be sold later and the proceeds shared. A pension-sharing order might be made as well. Different ingredients in the overall settlement might be a matter for bargaining. For example, someone might prefer a larger share of the sale proceeds of the family home to a share in the ex-spouse’s pension.
- 15 An order for periodical payments may be varied later; for example, either party may come back to court to ask for payments to be raised or lowered or brought to an end if circumstances have changed since the order was made. Capital orders cannot normally be changed later. And once an application for a particular type of order has been dismissed, no further application can be made; so there is some pressure for the parties and the court to make an arrangement that works as a package. Sometimes an order is made for “nominal periodical payments”; that is, payments of a very small sum such as £1 each year. Such orders are made where the payee does not need support now, but may need it in the future; in that event the nominal order can be varied and more substantial payments made.

- 16 One type of package that the court has to consider, but does not have to order, is known as a “clean break”. This is the term used to describe a package of orders that brings payments to an end, whether immediately or after a defined period of time (five years, for example, on the basis that the payee cannot come back to court to ask for that period to be extended). The Court of Appeal has said that a clean break should not normally be ordered where the couple have school-age children; even if no payments are needed at the time the order is made, nominal payments should be ordered in case circumstances change.
- 17 A clean break may not mean that no provision is made for the future. A clean break may include an order for a very large lump sum to be paid, calculated so as to provide an income for the payee, either for a defined period or for his or her lifetime. That sort of order is only possible if the payer has substantial assets.
- 18 Anyone who has been through divorce or dissolution will know that although we can set out relatively tidily the range of orders that can be made, reality is more chaotic. It is not easy to agree financial issues, whether or not lawyers are involved. Any family’s finances may be quite complex, and the process of ending the relationship will probably have increased complexity. There may be debts outstanding. There will often be a mortgage to be paid off. Most importantly, there may be children, who need financial as well as emotional security.
- 19 The law does not tell us what has to be paid. What it does instead is to provide a list of things that the judge must bear in mind when making orders.

The considerations to be borne in mind

- 20 The statutes state that in all cases, when financial orders are made on divorce or dissolution:

... first consideration [must be] given to the welfare while a minor of any child of the family who has not attained the age of eighteen.

- 21 So the children’s welfare is given pride of place. Maintenance for children is calculated by a formula, set out in the Child Support Act 1991, and so child support is not directly relevant to the financial orders that the court can make for spouses. But children need a home, and someone to look after them, and so their welfare is important when the court considers the financial circumstances, and particularly the housing situation, of their parents.
- 22 The statutes also provide a list of things that the judge must bear in mind. It is not an exclusive list, but presented as a list of matters that the judge must think about in particular.

- (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;
- (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
- (c) the standard of living enjoyed by the family before the breakdown of the marriage;
- (d) the age of each party to the marriage and the duration of the marriage;
- (e) any physical or mental disability of either of the parties to the marriage;
- (f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;
- (g) 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;
- (h) in the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

23 It is hard to disagree with this as a list of factors that might be relevant to the financial outcome of divorce or dissolution. But the list does not tell us what is to be done in response to these factors. A family lawyer could usually predict, within a range, what sort of outcome the court might order in a particular case, but only do so only because of his or her experience, and knowledge of the case law. A member of the public reading the statute, and without any other guidance, can have no sense of what would be ordered or how the court would choose within the range of possibilities that is opened up by the menu of available orders.

What is missing: an objective

24 What the statute does not provide is an objective: something to say what the financial order or orders are supposed to achieve. Family judges have been compared to:

... a bus driver who is given a large number of instructions about how to drive the bus, and the authority to do various actions such as turning left or right. There is also the occasional advice or correction offered by three senior drivers. The one piece of information which he or she is not given is where to take the bus. All he or she is told is that the driver is required to drive to a reasonable destination. (See page 19 of the Supplementary Consultation Paper).

- 25 The reason for this is historical, and to explain it we have to go back some decades.
- 26 Before 1969 the law of divorce rested on the idea of the “matrimonial offence”. There was an innocent and a guilty party. An “innocent” spouse was entitled to remain married for life; a “guilty” one could be divorced; a guilty husband could be divorced but must still maintain his wife. However, in 1969 the law changed; the new basis for divorce was “irretrievable breakdown” of the marriage, which could be proved in one of five ways including not only adultery and behaviour but also separation. The law was therefore no longer framed in terms of guilt and innocence. The gendered basis of financial provision was taken away; either party could apply for it. And the Matrimonial Causes Act 1973 as originally drafted contained a provision that is no longer there: a direction to the judge to put the person applying for the financial order in the position he or she would have been in had the marriage not broken down.
- 27 That was a strange and impracticable requirement. It was strange because it was inconsistent with the law of divorce, whereby no-one now had the right to stay married for life. And it was impracticable because in all but the richest cases it was impossible. The resources that support one household will not normally support two similar ones.
- 28 That requirement was repealed in 1984, leaving the statutory provisions in their present form. The bus driver is given no clue about why he or she has to drive, nor where the bus is to go to.
- 29 In the absence of any directions in the statute, the courts devised their own. The approach that the higher courts took in the first three decades of the current statutory framework was to award financial provision with a view to enabling the applicant to live as nearly as possible at the sort of level that he or she had been accustomed to during the marriage. A few words of the statutory provisions quoted above – “financial needs, obligations and responsibilities” – came to dominate the law in this area, and “needs” took on a very wide meaning. It included not only provision for income but also provision for accommodation, where possible in the form of owned housing; it also encompassed provision for old age in the form of pension or capital, as well as travel and holidays where that could be managed.

- 30 Clearly it was impossible in most cases for financial orders to be made that would keep the parties living at the same standard of living as they would have had if they had remained married, for the rest of their lives. The courts continued to do the best they could with the assets available. But in the very wealthy cases – the ones that hit the headlines – it was possible. In those cases the applicants were awarded very generous provision, on a lifetime basis, to meet their income requirements. But they received no share in the family assets beyond that.
- 31 In the “big money cases” this looked very generous, enabling a luxurious lifestyle. But in the minority of cases where there was money to spare once needs were met, what was left over was not shared between the couple. It stayed with the party in whose name it stood. That made England and Wales unusual among modern legal systems in not recognising that a family’s wealth is built up as a partnership; it devalued the efforts of the spouse who worked at home, and regarded savings and investments and other property as belonging solely to the wage-earner. Because the home-making role is traditionally the wife’s, it was discriminatory, although that effect was noticeable only in the case of very wealthy couples.
- 32 That changed in 2000 when the House of Lords’ decision in *White v White* introduced the “sharing principle”; provided that the parties’ needs are met, their property (with some exceptions, which we discuss below) is to be shared equally.
- 33 Further cases in the higher courts have emphasised that financial provision is a mixture of meeting needs, providing compensation, and sharing. Compensation is an idea that is not set out in the statute, although it may always have been an element of the broad concept that the courts call “needs”. The courts use this word to refer to compensation for earnings or lifestyle that has been lost as a result of choices made during the marriage – for example by a high-flying lawyer who has chosen to give up her career in order to look after her children. In fact there is rarely a separate award of compensation.
- 34 Since that change in 2000, therefore, we can say that financial provision cases in the courts fall into two groups.
- (1) At the lower end of the scale, where the vast majority of cases lie, all that can be achieved is an order that meets the needs of the parties, because there is not enough to do any more. Indeed, in most cases there is insufficient to do that; the court and the parties are trying to “get a quart out of a pint pot”. The “sharing principle” is not relevant here: there is no room for equal sharing because of the overriding problem of meeting needs.
 - (2) In the very wealthy cases the courts work out what the person applying for the order “needs”, by reference to his or her budget (which will be drawn up on the basis of the standard of living that person expects to maintain); if those needs are met by an award of half the matrimonial property pursuant to the sharing principle then no further financial award is made – the family property is simply shared, with the exception of any non-matrimonial property (which we discuss later in this paper).

Problems in the law relating to needs

- 35 We can see from the above discussion that the law relating to needs is very important, and indeed is often the only important factor in the financial outcome of divorce and dissolution. It is problematic for a number of reasons.

A lack of principle

- 36 Good law should be principled. We should be able to see what it is doing and why. It is obvious, for example, that when a crime is committed the law is there to punish the guilty; it is clear that the law relating to unfair dismissal is there to provide redress when someone loses their job for the wrong reasons. It is easy to see that when someone gets damages for personal injury the law is requiring the other person to make a payment to make up for damage for which he or she is responsible.
- 37 We cannot see that sort of principle in the law relating to needs. The old explanation based on guilt and innocence has gone; in its place we can see a group of possible explanations, many of them referred to in the cases, and based on ideas of responsibility, compensation, adjustment to a new lifestyle, housing and so on – but there is no one principle to tell us what financial orders are supposed to be achieving.
- 38 That said, in the very wealthy cases the courts seem to be trying to ensure that the parties can continue to live in the style to which they were accustomed. But as we discussed above, that is not an appropriate principle. And indeed, it does not function in quite that way. In cases where there is plenty of capital, there is no separate award of provision for needs; the family assets are simply shared, with the court satisfied that needs will thereby be met. And where wealth lies in income and not in property or investments, so that a specific payment for needs is ordered, the courts have said that the payee cannot live at the marital standard of living for the rest of her or his life. But they have not said clearly what level of support is to be given and for how long. The courts have referred to the need for transition to independence, but we cannot tell from the cases how quickly or slowly this is to be done.

The law is inaccessible

- 39 As we have seen, we can say, broadly, what level of needs the courts will generally award, but only by a study of the case law. Couples managing the financial consequences of dissolution are left to bargain in the shadow of the law, but it is not clear how they are to find out what the law is. That is problematic in a context where by no means all separating couples take legal advice, and where far fewer will be able to get publicly funded advice following reforms to legal aid.

Uncertainty within the current law

- 40 The law does not tell us what level of support is payable or for how long (whether in the form of ongoing payments or in the form of a lump sum calculated to provide support for the future). The level of support ordered by the courts is related – in an uncertain way – to the lifestyle the couple had while they were married. It also seems that judges may not be making awards consistently. Lawyers have told us that different outcomes can be obtained in different courts or different regions; sometimes they issue proceedings in a particular court centre or area of the country because they believe their client will do better there.

Dissatisfaction with the level of awards

- 41 For decades there has been regular critical press and public comment about perceived open-ended financial liability for “undeserving” former spouses after divorce. The image of a wife living a pampered existence at the ongoing expense of her former husband is an enduring one, albeit largely inaccurate. Whether this dissatisfaction is widespread is unclear.
- 42 But on the other hand there remains a concern about inequality, despite the introduction of the sharing principle. Those who sacrifice earning capacity for the sake of the family tend to fare worse after the ending of marriage or civil partnership; and that still tends to be women, even though today it is not only women who do this.

The reform that is needed

- 43 At the heart of all this are two problems. One is the lack of a principled basis for the law relating to needs, which in practice appears to aim to award lifelong support at the marital standard of living. The other is the position of people without legal representation who have to discover what their obligations are; even legal advisers who conduct cases on a daily basis have difficulty in predicting what awards will be made.
- 44 We aim to make recommendations for law reform which would introduce a clear principled basis for meeting needs after divorce and dissolution – a principle that would state what has to be paid and why. However, we do not intend that that our Report will recommend immediate statutory change. Reform in this area is extremely complex, not least because these issues are connected with people’s views and beliefs about marriage and civil partnership. Other countries have managed this type of reform only after a great deal of research and piloting, and it has taken a number of years to accomplish. We believe that it can be achieved in England and Wales, but that our recommendations will not be the end of the process.
- 45 So we aim to do two very different things:
- (1) to consult about the theoretical and principled basis for reform of the law relating to needs, so as to make recommendations for fundamental reform in the future; but also

- (2) accepting that principled reform will take some years to achieve, to recommend reform that can be achieved quickly so as to improve the current law in the meantime.

46 We now go on to look at those two objectives separately.

PRINCIPLED REFORM OF THE LAW RELATING TO NEEDS

Why do needs have to be met at all?

- 47 Before we look at the principle that should underlie the law about needs, it is worth asking why needs have to be met at all. Some people say that once the legal relationship of husband and wife, or civil partners, has come to an end the couple should be no longer be financially responsible for each other.
- 48 That is an unrealistic view. There are many reasons why former spouses may have to keep a financial connection with each other. Marriage and civil partnership involve co-operation, at least, and usually interdependence. Living together and sharing practical and financial responsibilities changes people and can change their financial capabilities. Choices and joint decisions are made. Economies of effort mean that individuals often take on different roles. Sometimes sacrifices, and regularly compromises, have to be made. All this means that the relationship is not easy to unravel and that it cannot usually come to an abrupt end at the point of divorce or separation. Indeed, the longer the marriage or civil partnership, the harder it will be to become financially independent. As Lady Hale, one of our senior judges, has said:

Choices are often made for the sake of the overall happiness of the family. The couple may move from the city to the country; they may move to another country; they may adopt a completely different life-style; one of them may give up a well-paid job that she hates for the sake of a less lucrative job that she loves; one may give up a dead-end job to embark upon a new course of study. These sorts of things happen all the time in a relationship. The couple will support one another while they are together. And it may generate a continued need for support once they are apart. (See page 33 of the Supplementary Consultation Paper).

- 49 The need for continued support is likely to be greatest when the couple have joint responsibilities, and in particular when they have children; responsibilities are often unequally shared during the marriage or civil partnership. Choices about roles are made during in the safe environment of ongoing co-operation and mutual support. When that co-operation ends, the economic consequences may be both unfair and financially disastrous for one or both parties. And responsibilities may continue be shouldered unequally – perhaps more unequally than before – after divorce or dissolution. That is likely to give rise to costs that the payment of child support will not cover, often for many years ahead.

- 50 All this remains true even at a time when women as well as men are expected to undertake paid employment. Women's employment patterns have changed dramatically since the current law was enacted, and women's preferences and expectations have also changed. There is also a renewed understanding of the benefits for children of being cared for by both parents following divorce or dissolution, and that too might be thought to entail a more equal sharing of responsibilities. The days when it was obvious that the wife would give up work until the children grew up are long gone; patterns of employment and parenting have changed profoundly. But the reality of managing and making ends meet after divorce means that unequal arrangements continue to be made.
- 51 So although the law makes separate provision for child support, that support is not comprehensive. It does not cover housing needs for the children and the parent with whom they live. The other parent may find that he (and we accept that it is usually "he") will not only have to fund child support payments but will also have to accept either that the family home is transferred to the parent with whom the children live, or that it has to be retained unsold for some years in order to house the children, thus keeping him out of his entitlement to capital until much later. That arrangement embodies both child support and spousal support (and the latter especially may be a cause of bitterness, even though the evidence is that women continue to fare significantly worse than men, financially, following divorce). However much such arrangements are resented, there are good reasons for making them.

Why meet needs as well as sharing?

- 52 A more difficult question is: why should needs be met at all now that the spouses get to share the family property?
- 53 The first and most important practical answer to that is that there may be nothing to divide – even in very wealthy cases, the parties may have substantial incomes but no savings. More usually, ordinary families may have a house subject to a mortgage, with little or negative equity, and perhaps a small pension fund. There may be no possibility of the available capital going more than a short way towards meeting the housing needs of any children, at best.
- 54 Where there is something to divide in a low-income case, the value of half the equity in the house may be disastrous for the financially weaker party because the capital will not be enough to re-house him or her, but it will mean that for some time – until the money is eaten away – it is impossible to claim social security. So simple equal sharing is inappropriate because it is likely to leave one party with needs unmet whilst the other may have a surplus and indeed the capacity to borrow.
- 55 So it is not true that a former spouse who receives payment to meet his or her needs is "double-dipping". In most cases there is little or no capital to "dip" into at all, and needs remains a live issue which requires financial adjustment.

On what basis should needs be met?

- 56 So – to turn back to the comparison made earlier – the bus has to travel. Spousal support at some level has to be paid, because marriage and civil partnership have financial consequences which do not come to an end at the point of divorce and dissolution, and sharing capital equally is not usually an effective way to meet needs.
- 57 But where is the bus to travel to? The law does not tell us how much should be paid, nor for how long, because it does not give an objective that the court order, or the parties' agreement, is supposed to be achieving. The following three imaginary cases illustrate the problem, and some potential solutions; readers are encouraged to think around these imagined scenarios and consider variations on them. It is sometimes useful to consider how these examples would feel if the genders were reversed.

Case study 1: Sarah and Ian

CASE STUDY 1

Sarah and Ian are in their early thirties; they have been married for six years and have two young children aged three years and five years. Ian works as a deputy manager in the local building society and Sarah looks after the children full time, having given up her career as a speech therapist. They live in a home worth £250,000, with a mortgage debt of £200,000. Ian has accrued 10 years of pension benefits. The couple have no other assets. They have agreed to divorce, and that the children will live with Sarah.

Possible outcomes include:

OUTCOME 1: Sarah stays in the family home with the children. Ian makes the usual child support payments in respect of the children. Ian additionally undertakes to repay the mortgage until Sarah is able to assume financial responsibility for the property. Both Sarah and Ian accept that she will be unable to achieve enough income to do that in the immediate future, not least because the costs of childcare would outweigh her likely earnings. Ian will be able to rent a flat. When the children leave home, the family home will be sold and the sale proceeds will be divided 60/40 in Sarah's favour. The court makes an open-ended nominal periodical payment order for Sarah, so that Ian does not have to make payments for her now (apart from the mortgage payments) but may have to do so in the future if circumstances change.

OUTCOME 2: As in 1), save that the court declines to make a nominal periodical payment order for Sarah and therefore terminates her right to apply for periodical payments in the future.

OUTCOME 3: Sarah has managed to get a part time job. The family home is sold and Sarah is awarded 75% of the equity which, combined with the income from her new job, is enough to raise a mortgage for a two-bedroomed flat. Ian is awarded 25% of the equity from the home and has to rent a flat for the time being (it is anticipated that he will be able to buy later). Sarah is also awarded a 25% share of Ian's current pension fund, to be transferred to a separate fund for her. Ian makes the usual child support payments and takes on liability for part of the mortgage payments on Sarah's flat.

- 58 We have set out a number of possible outcomes under the current law for Sarah and Ian; in each case we are supposing that a court order is made. The outcome depends largely on the details of their financial circumstances, in terms of what each can earn – we have left the facts deliberately vague. It may also depend upon where they live – most but not all courts, for example, would be reluctant to leave Sarah with no possibility of ongoing support, as in our Outcome 2.
- 59 Whatever the details of the parties' finances, this is a case where there is no money to spare.
- 60 So what is the court trying to achieve in making financial orders? As discussed, the law does not say. If this were a case with unlimited resources the court would be trying to achieve for Sarah a lifestyle at or near the standard of living experienced during the marriage. This is problematic for Ian, because it is not clear why he should have to support Sarah to that extent and for so long; and it would put Sarah in a dependent position rather than encouraging her to move on.
- 61 However, in this as in the majority of cases that objective cannot be achieved, because there is not enough money to go round. This means that it is difficult for Sarah and Ian to negotiate a settlement because it is not clear how much Sarah should receive; and Ian's liabilities are open-ended, both as to amount and duration. He is likely to have to make the mortgage payments; and he may have to make ongoing periodical payments but cannot be sure for how long. It is not possible to say when Sarah might be expected to support herself. We cannot say what, if any, entitlement she has to share Ian's pension.
- 62 A change to the basis on which spousal support is paid could both provide an explanation for Ian's liability and, with varying degrees of precision, determine how much he has to pay and for how long. None is going to make a difference to the immediate future; one of the consequences of divorce is that this family is in financial difficulties and the two parents will have to continue, in effect, to pool their resources for some years in order to meet their shared responsibility to provide a home and care for their children.
- 63 In the Supplementary Consultation Paper we go on to discuss a variety of ways on which the law could be changed. We can summarise them briefly as follows.

COMPENSATING FOR THE LOSS CAUSED BY THE RELATIONSHIP

- 64 Spousal support could compensate Sarah for what she has lost as a result of the marriage and of the childcare role that she has taken on. This would involve looking at the earning capacity that she would have had, as a speech therapist, looking at what she now has (at best, a very limited capacity for some years), and then redistributing Ian's earnings so as to make up for that loss until she is able to recover her earning capacity, as well as sharing the value of the house.
- 65 Compensation on this basis may go on for some years; Ian is likely to have to support Sarah at least until the children leave home, and possibly longer. But it does explain why he has to pay and in most cases – except where the payee is at an age where he or she will never recover earning capacity – it does provide an end date.
- 66 This is a very logical basis for spousal support. But it has some serious practical disadvantages. One is that it involves proving what might have been, or at least establishing what would probably have happened if Sarah had remained single. Another is that it generates very harsh results in a case where the spouse who is claiming support would have been very much worse off but for the marriage – imagine a case where the wife, say, had been a shop assistant with no prospects of a better job, but married a very wealthy man. On a compensation basis, on divorce, she would not be entitled to ongoing support because she can resume the sort of job she held previously and so has lost nothing as a result of the marriage.

TRANSITIONAL SUPPORT

- 67 Alternatively, spousal support can be paid on a basis that enables a transition to independence, taking into account the length of the marriage and the roles undertaken in it. Although that sounds very similar to the compensation basis, it is fundamentally different in that it does not require a calculation of what might have been. Instead, the court compares the financial means of both parties and makes orders that give them a similar lifestyle, but only for a finite period. That period is longer where there has been a long marriage and is also extended where childcare responsibilities are going to continue in the future.
- 68 The thinking behind transitional support is based on writing about what has been called the “merger over time”. This refers to the way that lives are merged during marriage or civil partnership, and the impact that this merger has upon earning capacities and financial profiles. The term “transitional” is not intended to imply “short-term”; on the contrary, support may be for as long a period as under the compensatory basis because the impact of many years of child care can mean that unravelling the merger over time can be a long-term undertaking. And again – as is the case with a compensatory basis – there comes a point, with older parties after a long marriage, where transition becomes impossible and support has to be given indefinitely.

USING A FORMULA

- 69 Compensation and transition both generate difficult results in some cases. Compensation in particular requires the court or the parties to assess what might have happened in a possible world where the marriage did not take place.

- 70 Some jurisdictions have avoided these difficulties by using a formula or equation to calculate spousal support. The idea behind the formula is to make up the difference between the two parties' incomes after divorce, as if transitional support was being given but on the basis of a mathematical formula (rather than depending upon the judge's or the parties' ideas of when independence can be achieved). The formula can also allow for additional support in cases where there are ongoing childcare responsibilities so that support has to be given for longer.
- 71 This sort of calculation can be seen in the reform proposals published by the American Law Institute ("the ALI"), of which we give fuller details in the Supplementary Consultation Paper. The ALI has provided calculations which depend upon the two parties' earnings after divorce or dissolution, the length of the marriage, the ages of the children, and the length of time during which childcare has been undertaken during the marriage.
- 72 In Canada, a similar system is found in the Spousal Support Advisory Guidelines; these give not a single figure but a range, so that Sarah and Ian could negotiate and bargain within the parameters of an upper and a lower limit. Some courts in Germany take a similar approach.
- 73 A formula does not give individualised justice. It does give a clear answer about what has to be paid and for how long.
- 74 There is, of course, no reason why the actual formula used elsewhere should be appropriate in this jurisdiction. They work in the context of different legal and economic backgrounds; they may well be inappropriate here because of the differences between different countries in terms of social security, the labour market, house prices, earning capacity and so on. We think that a formulaic basis for spousal support could be devised so as to be workable in England and Wales, although a great deal of research and preliminary work would have to be done. The formula would have to be integrated with the issues of child support and the occupation of the family home where that was relevant. It would have to work alongside the sharing principle, as it does in other countries.

GIVING AN INCENTIVE FOR INDEPENDENCE

- 75 An issue that arises in all three of the reform possibilities discussed above is the extent to which support should be cut back in order to encourage or even force the payee to become independent. Should the law "err on the safe side" – as by and large it does now – and provide generous support so as to cover as many risks as possible, or should support be calculated in a way that is designed to be less generous so as to give people an incentive to make the effort to be independent?
- 76 It has been suggested that support should never be paid at all unless either the payee is very old, or he or she is caring for very young children. That is perhaps an extreme view; but there is force in it. To some extent, any system that provides support also enables, and perhaps encourages, dependence. A cut-off point, in either the level of support or its duration, can be said to encourage independence and to discourage career sacrifice made in the interests of family life. Some would feel that that is a good thing, others would disagree.

- 77 The law in Scotland makes for an interesting comparison here; generally, periodical payments in Scotland are limited to three years. That means that the payee – usually the wife – knows that independence is expected and required after that period. But the system is said to generate very harsh results for women. And there is nothing to prevent the payment of a single lump sum calculated to provide support for many years, in those few families where there are enough assets to do so; and therefore the rich are protected from the harsh results within the system. We are not attracted to a transplant of the Scottish system.
- 78 However we do appreciate the value of independence and we take the view that this must be borne in mind in assessing the level of spousal support to be paid, whether that is on a compensatory or a transitional basis or calculated by a formula.
- 79 We now look at two further case studies in order to give some more illustrations of the problems within the law and the options for reform.

Case Studies 2 and 3

CASE STUDY 2

Sophia and Michael have been married for six years and have no children. Sophia is a consultant orthopaedic surgeon who works with private patients and earns a six figure salary. Michael is a carer for the elderly and works part time. The couple live in a home in Central London worth £2 million, subject to a mortgage debt; the house was bought, and some of the mortgage debt paid off, using Sophia's earnings during the marriage. They enjoy a high standard of living with at least three overseas holidays per year and eat out at least five times a week. They have a housekeeper and team of domestic staff to run their home.

CASE STUDY 3

Pat and Chris entered into a civil partnership eight years ago and have no children. They are both secretaries and they met at work. They live in a rented flat. Whilst on holiday, Pat suffered a devastating cycling accident and was left paraplegic. After eight months in rehabilitation Pat returned to the couple's home and was cared for by Chris. Pat is now unable to work. Pat has no grounds to make a personal injury or insurance claim in relation to the accident.

- 80 It is not clear how a court would respond to Michael and Sophia in Case Study 2 under the current law. This is a relatively short marriage, but a very wealthy one. There is a capital asset – the matrimonial home. There is a significant disparity in earning capacity between the two parties, and that disparity does not seem to have been the result of the marriage, but it is not possible to know to what extent Michael might have made different choices had he not been married.

- 81 The case is unusual because of the wealth involved. But it highlights some issues in the current law that could be answered if the law were based on an identifiable principle.
- (1) Is Michael entitled to continue to live at the marital standard of living, and, if so, for how long?
 - (2) If not, at what level and for how long is Sophia obliged to support Michael?
- 82 These questions can be obscured under the current law because in practice Michael may be able to achieve a very high standard of living as a result of a half share in the value of the house. The issues are highlighted if there is no capital: it is not possible to say under the current law how much Sophia has to pay, nor for how long. Put another way, is Michael's level of need determined by what he had during the marriage, or by what he would have had but for the marriage, or by some other measure?
- 83 Turning to Case Study 3, again, it is not clear what a court would do under the current law. Pat "needs" a great deal of support; that need was not caused by the civil partnership. To what extent is Chris responsible for meeting that need? Again, this is an unusual case, but is useful in highlighting a gap in the law.
- 84 As we did for Case Study 1, we can look at Case Studies 2 and 3 to assess how the different possible bases for law reform might work.

COMPENSATING FOR THE LOSS CAUSED BY THE RELATIONSHIP

- 85 Suppose first that spousal support was payable on a compensatory basis, meeting the needs generated by the marriage or civil partnership. Looking first at Case Study 2: Michael does not appear to have lost out financially from the marriage. He is still working, and has been living a far more affluent lifestyle than he would have been able to achieve alone. If spousal support were based on compensation he should receive only what he needs to resume a single lifestyle that he can support. Note that this has no effect on his entitlement to capital under the sharing principle; if there is an owned house acquired during the marriage, Michael should receive a half share in its value on these facts.
- 86 If Michael did give up work for Sophia's sake, then again a compensatory basis would entitle him to what he needs in order to set up home alone and resume a single lifestyle funded by his own earnings. Compensation can be regarded as a joint responsibility; arguably, Michael should receive what he needs out of the couple's joint assets before the rest of the matrimonial property is shared.
- 87 Turning to Case Study 3, on a compensatory basis it is hard to see that Chris has any responsibility for Pat's needs arising from the disability, since they are not generated by the marriage. There are different points of view as to whether that outcome is right or wrong.

TRANSITIONAL SUPPORT

- 88 If support is given only for as long as it is needed for the payee to adjust to independence, then the transitional period for adjustment would be relatively short in Case Study 2, where there are no children to care for. Michael will have relocation costs, of course. The financial impact of the ending of the marriage on him is far greater than on his wife, and when support ends he will have a big change in his standard of living. Again, whether that is right or wrong is an issue on which opinions differ.
- 89 In Case Study 3, clearly no adjustment is possible; if support is based on how long it takes to transition to independence, liability has to be open-ended.

USING A FORMULA

- 90 Case Studies 2 and 3 look very different if support is calculated using a formulaic basis. For one thing, outcomes are more predictable – either absolutely if the formula is inflexible, or within a range, if the formula generates a maximum and minimum figure. There is no element of speculation; we do not need to know what would have happened absent the marriage or civil partnership, nor to consider what may happen in some years' time.
- 91 Another important difference is that the cause of the need for support does not have to be assessed; we do not have to consider whether Michael has lost anything as a result of the marriage. Sophia and Michael's case would be relatively simple; there is no child support to consider, any capital (the value of their house, in particular) would be shared equally, and a formula would be likely to be based upon the disparity in the couple's incomes and the length of the marriage, evening out the difference in earning power for a limited period.
- 92 Turning to Case Study 3, the fact that Pat's disability – and consequent lack of earning capacity – is not the result of the civil partnership is irrelevant. However, a formula might have to allow for special circumstances in order to give rise to an acceptable result in Pat and Chris' case. Views about that must vary, depending upon whether it is felt that funding long-term care for Pat is Chris' responsibility, or perhaps that of Chris' wider family if any, or whether financial responsibility for Pat should instead fall upon the state through the health service and welfare benefits.

Consultation questions about spousal support

- 93 The questions that we ask as a result of this discussion are quite lengthy because the issues – like people's lives – are complicated. We have set out our questions below. In the Supplementary Consultation Paper itself they are set out in two ways: like this, and also as a series of more abstract questions rather than concentrating on the Case Studies. We are very keen to receive answers to the questions in either format, or in both. These are difficult issues on which it would perhaps be surprising if we were to find consensus, because people's views about the responsibilities that survive divorce and dissolution are determined, in part, by deeply-held beliefs about the nature of civil partnership and marriage.

- 94 Despite the difficulties of making reform proposals, we believe that it should be attempted, because the uncertainties within the current law are likely to cause increasing difficulties in the future. It is likely that increasing numbers of couples will not have legal representation, nor any access to a court or to the discretion of a judge. The current law, with its mixture of mutually inconsistent rationales, is not going to serve these couples well in the future.
- 95 The idea of changing from the current law, which gives discretion to the court to devise a fair outcome, to a formula, which is one of the options we consider, is perhaps quite a difficult one to grasp. But it may also be impracticable for the law to continue on a discretionary basis. It is not just predictability may be better than individualised “fairness”; in the light of the withdrawal of legal aid for the future, individualised fairness is in any event largely unavailable.
- 96 The outcome of these questions will, we expect, be a recommendation in our Report for some further work. Experience in other jurisdictions indicates that extensive research and piloting is needed before a reformed basis of spousal support can be introduced, in order to avoid unintended consequences. If reform is found to generate results that cause hardship then it needs to be re-assessed. That is particularly the case with a formulaic basis, where different versions of a formula would need to be tested out while the current law is still in operation so as to test results and produce an acceptable range of outcomes.

Our case studies: the basis of support

We are asking consultees to choose between two different models of support; one addresses the losses caused by the relationship, whereas the other is neutral about causation but offers support to enable the spouses – in practice, the economically weaker party – to adjust to independence.

Case Study 2 highlights the contrast here. The current law appears to give Michael an entitlement to continue living at the marital standard of living, for an uncertain period. If spousal support is based strictly on compensation, Michael gets very little, because he does not appear to have lost out as a result of the marriage. A transition approach is likely to give him a higher award, evening out the disparity in the two lifestyles for a period proportionate to the length of the marriage.

Put very practically:

A. Should Michael be entitled:

- to live at the same standard as he would have lived during the marriage, and if so for how long?
- to as much as he needs to re-locate and to start again as a single person?
- to a more graduated transition to independence, with some income contributions from Sophia and, if so, for how long?

B. Should Michael's entitlement be calculated before the capital value of the couple's home is shared, or subtracted from that value before sharing what is left?

Consultees are also invited to consider Case Study 3 (Pat and Chris), and to tell us:

C. To what extent does Chris have a responsibility to provide for Pat's care after the ending of the civil partnership?

Our case studies: a formula or discretion?

D. Consultees are asked to look again at our three case studies. We have highlighted the difficulties in calculating levels of support on any basis; even if you feel that Sarah should be compensated for her past and ongoing losses as a result of the marriage, you may also feel that it is very difficult to calculate them. Imagine that Sarah and Ian – who cannot afford legal advice – could look up a calculation which gave a figure, or a range of values, for Sarah's claim (as, of course, they can for child support). Would they find that helpful because it gave them an answer? Or frustrating because that answer cannot be flexible or responsive to their individual circumstances or preferences?

E. We have also asked about incentives for independence. Should there be rules that place a limit on the length of time for which Sarah can be supported by Ian and, if so, how strict should they be? Do you feel the same way about Michael, after a childless marriage?

Our case studies: the factors that affect levels of support

We ask consultees to focus here on factors that might make a difference to levels of support. In particular:

F. Whatever your view of the level of support to which Sarah, Michael and Pat are entitled, how does your view change – if at all – if in each case the length of the marriage is changed. In particular, suppose Sarah and Ian had been married for twelve years not six? Sophia and Michael for ten years not six? By contrast, how would your view change, if at all, if Pat and Chris had been in a civil partnership for two years rather than eight?

G. We ask about the marital standard of living: should Sarah, Michael or Pat be entitled to carry on living at that standard? If so, why?

H. How important are continuing responsibilities? Do you agree that this should make a difference to levels of support in Case Study 1, where Sarah has ongoing care of the children?

I. Should Sarah be entitled to carry on living in the family home after divorce? Should Sophia? Or Ian? Or Michael? If so, in any case, why?

SHORT-TERM IMPROVEMENTS TO THE LAW RELATING TO NEEDS

- 97 A principled reform of the law relating to needs cannot be implemented immediately, as we explained above. Further research and piloting may take a significant length of time.
- 98 In the meantime, can anything be done to identify small-scale statutory reform, or non-statutory guidance (which cannot change the law but can influence practice), to improve the current law? We consider this under two headings: the balance between support and independence and the provision of information.

The balance between support and independence

- 99 One of the difficulties in the current law is that it is difficult to know how long spousal support is supposed to continue. The courts have to look into the future at issues such as the effect on employability of looking after children for years ahead, and pension provision. The judge has to assess at what point the former spouses can be financially independent of each other. That judgement must then be reflected in the amount awarded (whether as a capital sum or a share of the sale proceeds of the house or as periodical payments). Dissatisfaction may arise for two opposing reasons: one party may feel that inadequate provision has been made, and the other party may feel that support is being ordered for far too long.
- 100 We find within the current law evidence of the desire to encourage independence, as well as a recognition that independence is impracticable in cases where the financial commitment of the marriage has effects that reach a long way into the future. There have been clear statements from the higher courts that it is not appropriate for the possibility of support to be cut off where the payee is looking after school-age children. So the courts have a genuine dilemma. For the ex-spouses themselves, that dilemma may not be understood, and the outcome may be perceived as unfair by one or both. It seems that this is an area where there are significant regional variations in the practice of the courts.
- 101 Matters could be improved, we suggest, by the provision of better and more authoritative information, which we discuss below. There may also be a case for guidance for the judiciary. Is there also scope for amendment to the statute?
- 102 Currently the statute directs the court to consider the possibility of a clean break; but it does not direct the court to achieve one. The statute might be amended so as to require the court to bring the parties' financial obligations to each other to an end wherever possible. That could send an important message to the courts and also to people who are negotiating their own financial settlement.
- 103 Such a direction would be incomplete without a statutory statement of the opposing issue, namely the need to ensure the possibility of ongoing provision for parents who are looking after children. The message that the law should convey is that lifelong dependence is not what is wanted, and that self-sufficiency is expected but only where that is possible.

- 104 Three further possibilities either for minor statutory amendment or as the subject matter of authoritative guidance are worth consideration.
- (1) The court might be directed by the statute, or encouraged by guidance, in all but exceptional circumstances to make an order for payments for a stated period, rather than an open-ended order which can last for the parties' joint lives. That would place the onus on the payee to apply for an extension, rather than leaving payment for life as a default option.
 - (2) Another possibility would be to create – by statutory amendment, or in non-statutory guidance – an expectation of independence within a stated period, in the absence of circumstances that make that inappropriate.
 - (3) It was suggested recently that parties to a marriage of less than three years simply be returned to the financial position they were in before the marriage, unless that would cause “significant injustice”.

Guidance and information

- 105 Although there is scope for statutory reform, matters might be improved by non-statutory means.
- 106 People going through divorce or dissolution may find it difficult to know what they are entitled to or what they have to provide for their former partner. We think that it would be helpful if guidance were to be published, setting out a checklist of financial needs, accompanied by topics to consider and questions for the parties to ask themselves. It might also indicate the priority to be accorded, normally, to different types of need, reflecting the importance that the courts attach in practice to housing for both parties and the children, and the importance of income levels, mortgage capacity, the costs of working and (where relevant) of retraining, of childcare, and of retirement provision. The guidance might also provide case studies within a searchable database.
- 107 Clearly a great deal of information is available to the public already. Increasingly, law firms are making information available on the internet; legal information provided by retail brands and insurance companies is becoming prevalent and is often hosted on a branded website. Some legal practitioners are now offering their services on websites which allow internet users to assemble their own court documents and submit them online to be checked.
- 108 What we have in mind, however, is guidance that will assist the courts as well as benefiting members of the public, so as to help eliminate regional inconsistencies in court orders.

- 109 If guidance is to be of use to the judiciary as well as to the public, it cannot be produced by a firm or commercial organisation, nor by a government department in view of the independence of the judiciary. One possibility is that the Family Justice Council might prepare Practice Guidance, after consultation. The Family Justice Council is an independent body whose members include experts from the legal, medical and social care fields. Among its tasks is “providing guidance and direction to achieve consistency of practice throughout the family justice system and submitting proposals for new practice directions where appropriate”. See <http://www.judiciary.gov.uk/about-the-judiciary/advisory-bodies/fjc>.
- 110 The guidance should be available on the internet. In November 2011 the Family Justice Review Final Report recommended the creation of an online information hub, providing a centralised source of information for family justice. The Government is working to provide such a service, and we think that it would be the right internet resource to provide access to the guidance.

Questions for consultees

- 111 Consultees are asked to give us their views about the following possibilities for statutory and non-statutory reform.
- (1) Statutory provision to the effect that the courts, in making financial orders, must aim to ensure that a payee spouse is enabled to become independent within a reasonable period, while bearing in mind also that independence is unlikely to be practicable until the children of the marriage or civil partnership finish their education.**
 - (2) An authoritative source of guidance for the courts and for members of the public about:**
 - (a) the considerations involved in an assessment of need;**
 - (b) the priority to be afforded to different elements of need.**
 - (3) Provision about the following either by way of statutory amendment or in the form of authoritative guidance:**
 - (a) the time within which independence is to be expected;**
 - (b) the normal form of orders for periodical payments (term orders or joint lives); and**
 - (c) the financial arrangements to be made after short childless marriages.**
 - (4) Who should provide that guidance? Would it be appropriate for it to be produced by the Family Justice Council in the form of Practice Guidance?**
 - (5) Publication of that guidance on the information hub to be provided in response to the Family Justice Review.**

- 112 **Consultees are asked to tell us about any other reform measures that would make the law relating to needs more consistent and accessible, short of the fundamental and principled reform discussed earlier in this paper.**
- 113 Our Supplementary Consultation Paper also contains a discussion of needs in the context of qualifying nuptial agreements – mentioned above at paragraph 5. We have taken the view that it should not be possible to use such agreements to contract out of making provision for needs.
- 114 This raises a difficult issue because the current law – as discussed above – is unclear as to what “needs” means. We think that this issue cannot be solved until there is a fundamental reform of the law relating to needs, following one of the options we have written about.
- 115 It would in theory be possible for the statute to provide a separate definition of “needs”, just for the purposes of qualifying nuptial agreements. We are not convinced that this would be useful. However, we invite consultees’ views as to whether, as well as stating that it shall not be possible to contract out of provision for needs by means of a qualifying nuptial agreement, statute should also specify the level of needs for that purpose.

NON-MATRIMONIAL PROPERTY

- 116 Finally, we consider non-matrimonial property. For many people, this is irrelevant. Not everyone has any; and even if they have, it can only be treated differently from matrimonial property if it is not required to meet the other party’s needs. In most cases, needs is the only issue and there is no scope to discuss whether or not anything might be shared or be exempt from sharing. But in some families, albeit a minority, non-matrimonial property is an important issue.

The current law

- 117 The current law has developed over the last 12 years. Since the introduction of the sharing principle people have felt the need to explore its boundaries. Is there any property that does not have to be shared, despite the new principle? In a number of cases property acquired or generated before the marriage, or inherited by either party, has not been shared in cases where it is not required to meet needs.
- 118 A further suggestion made in one of the cases is that business property that is owned by one party and entirely that party’s concern, and has not been used to support the family, may be exempt from sharing. But the courts do not seem to have followed this suggestion. Another unclear area is property acquired after the parties have separated – does that have to be shared?
- 119 The issues that have to be considered appear to be as follows.
- (1) Is the source of property relevant at all?
 - (2) If it is, should there be a rule that non-matrimonial property should not be shared? Or should that question remain in the court’s discretion?

- (3) If there is to be such a rule, should it be subject to the proviso that it can be accessed to meet needs?
- (4) What property is non-matrimonial?
- (5) Can non-matrimonial property become matrimonial?

(1) Is the source of property relevant at all?

- 120 Why is non-matrimonial property treated differently by the courts? The reasons for not sharing it relate to effort, emotional attachment, and family ties; the arguments are particularly strong in the case of second marriages (where each party may be concerned to keep the fruits of his or her own life's work, and may also wish to bequeath property acquired during the first marriage to the children of that marriage). The protection of non-matrimonial property feels important to the party who owns it not only in the obvious case of wealth, in whatever form, already gained through the owner's own efforts, or through inheritance, but also property that has financial and also emotional significance due to its age and its family associations. The source of the property is unrelated to the marriage; in addition, in some cases although not all, the source gives the property an emotional importance as well.
- 121 The arguments for sharing property acquired during the marriage are considerably stronger than the arguments for sharing absolutely everything. If what is being honoured by the sharing principle is the marriage partnership and the joint efforts of the couple concerned, it is difficult to bring pre-acquired, inherited or gifted property into that reasoning.

(2) Should the treatment of non-matrimonial property be a matter for rules or for discretion?

- 122 Should there be a rule that non-matrimonial property is never shared, or should this remain a matter for the court's discretion? There is a choice between:
- (1) an absolute rule that non-matrimonial property is not to be shared, and therefore is simply subtracted from the total family assets before the latter are shared;
 - (2) a rule subject to exceptions (in particular for needs);
 - (3) a discretion as in the current law, with added statutory guidelines; or
 - (4) no change – discretion as now.
- 123 However, it is difficult to answer this question without also having an answer to questions 3 and 4; it may be that a rule about non-matrimonial property would be unacceptable unless it could be overridden to meet needs, and conversely that a very broad definition of non-matrimonial property would have to be subject to some discretion.

(3) If non-matrimonial property is not to be shared, should it nonetheless be able to be accessed to meet need?

- 124 If there is to be a rule that non-matrimonial property is not to be shared, should the rule be modified by an exception so that non-matrimonial property can be accessed to meet needs? That seems to be the current law. We are committed to a policy of giving priority to needs; in particular, qualifying nuptial agreements will be subject to challenge if their effect is that needs are not met. So our preliminary view is that non-matrimonial property, while generally not shared, should be accessible to meet needs.

(4) What property is non-matrimonial?

- 125 If the law is to change at all with respect to non-matrimonial property there must first be a definition of that property. It seems clear that inherited property, property received as a gift, and property acquired outright (not subject to a mortgage) before the marriage or civil partnership are currently regarded as non-matrimonial property. It is not clear what should be the status of property derived from non-matrimonial property, such as bonus shares issued during the marriage or civil partnership. It is not clear whether or not other business property should be included.
- 126 There are strong arguments for and against regarding the family home as matrimonial property even if inherited, gifted or pre-acquired; we discuss this separately below. We also consider separately the status of property acquired by one party during cohabitation.

Issues 2, 3 and 4 together

- 127 Clearly these three issues are closely linked. Views about whether there should be a rule that non-matrimonial property is not to be shared must depend in part upon whether that rule is subject to provision for needs, and upon the breadth of the definition of non-matrimonial property. Broadly the choice comes down to two options. Either the statute provides that non-matrimonial property, defined as pre-acquired, gifted and inherited property, should not be shared, subject to provision for needs; or it is amended to introduce a broader definition of non-matrimonial property, which may or may not be shared at the court's discretion, again subject to provision for needs.
- 128 Arguably a continued discretionary basis, even if hedged around with some extra guidance, will not provide any increased certainty. The current uncertainty is troubling because it may amount to a disincentive to marriage. We have heard from some solicitors that they have to advise clients that the only way to protect pre-acquired property is not to marry.
- 129 So we favour a rule that non-matrimonial property is not to be shared unless it is required to meet needs. With that view goes a relatively uncontentious definition of non-matrimonial property, comprising property owned by one party, acquired by gift or inheritance at any time, and property acquired before the marriage or civil partnership, and excluding the other possibilities mentioned above. Couples who want to protect further property from sharing could do so by agreement; absent an agreement, they would be a matter for the court's discretion.

130 We provisionally propose that non-matrimonial property, defined as property held in the sole name of one party to the marriage or civil partnership and:

(1) received as a gift or inheritance; or

(2) acquired before the marriage or civil partnership took place

should no longer be subject to the sharing principle on divorce or dissolution, save where it is required to meet the other party's needs.

Do consultees agree?

THE FAMILY HOME

131 The definition proposed above would mean that if the family home was solely owned by one spouse and had been acquired by gift or inheritance, or before the marriage or civil partnership, it would not be shared on divorce or dissolution.

132 The family home has a special position. It is a place to which both parties are, normally, emotionally attached. It “belongs”, during the marriage or civil partnership, to both – each can say it is “my home” and neither can say “it is not your home”.

133 Does the emotional attachment to the family home inevitably lead to the conclusion that its value must be shared, since the home itself cannot, as a home, be shared any longer? Such a conclusion can feel very counterintuitive in the case of an inherited home. Consider also the case where, for example, the wife had a house before the marriage, and the husband had a house, and while they are married they live in his house and she rents out the other. Does it make sense in this case to say that the value of his house has to be shared because they have lived in it, while hers remains non-matrimonial property?

134 However, leaving aside the unusual cases it may be that for the vast majority of families the central position of the matrimonial home in the parties' lives means that it is inappropriate to treat the family home as non-matrimonial property. It may also be impractical because of the inevitability that both parties will have contributed to it in some measure during the marriage. Whether through payment of bills, carrying out practical maintenance, or changing décor both spouses tend to contribute in a variety of ways, some of them difficult to quantify and some clearly substantial, to their matrimonial home. We consider the effects of mingling non-matrimonial property with matrimonial property below; the problems outlined there are likely to be at their most marked in relation to the family home.

135 It may be that the court's discretion would ensure – for those who can afford to access discretion – that inappropriate results can be avoided. In the unusual case where an inherited family home is of great antiquity or value, it is likely that the parties would have ready access to legal advice and would take it.

136 We ask for consultees' views on whether the family home should be excluded from the definition of non-matrimonial property proposed above.

PROPERTY ACQUIRED BY ONE PARTY DURING COHABITATION

- 137 Property acquired during cohabitation would, on the basis of the definition proposed above, be non-matrimonial. We have to consider if that is right. In some cases the courts have treated property acquired during cohabitation, before marriage, as matrimonial and subject to the sharing principle.
- 138 The treatment of periods of cohabitation is particularly significant for civil partners whose relationship began before the commencement of the Civil Partnership Act 2004. They were previously unable to formalise their relationship in such a way as to be entitled to financial orders at the end of the relationship, and so there can be no suggestion in cases of pre-2004 cohabitation that it was the parties' choice not to formalise their relationship.
- 139 It may be suggested that to regard property acquired during cohabitation as matrimonial detracts from the status of marriage and civil partnership; but it is the subsequent marriage or civil partnership that gives rise to the obligation to share, so the formal relationship or status is still the key.
- 140 We ask for consultees' views on whether property acquired by one party during cohabitation with the other party should be excluded from the definition proposed above.**

(5) Can non-matrimonial property ever become matrimonial?

- 141 Property is not static; it is used, it grows, it depreciates, and can be sold or exchanged; it can be changed by the financial contribution or by the efforts of another person. Once we start out upon the road to the evolution of rules for these situations it rapidly becomes apparent that difficult decisions have to be made. One option is to decline to make them as part of a law reform project, on the basis that the spouses can make their own arrangements for what happens over the long term, by marital property agreement, and the courts can resolve difficult points as they arise. But these issues will arise; we have to consider how far it is worth anticipating them, and we take the view that they should be considered in the round. Default rules will in any event be needed in the context of qualifying nuptial agreements, in case the parties make contractual arrangements by reference to specific items of property but fail to set out what is to happen if that property changes over time.
- 142 Can non-matrimonial property ever become matrimonial? It can under the current law. The longer the marriage, the courts have said, the less likely is non-matrimonial property to be kept separate and not shared on divorce. But under the current law it is not possible to say how long the transformation takes. If we were to recommend a rule that non-matrimonial property is simply taken out of account before the rest is shared, it would be important to know precisely whether and when it becomes matrimonial, in whole or in part, and if the latter to what extent.
- 143 We also find a more narrow approach in the current law. Circumstances where the source of assets may become less important have been described as follows.
- (1) Where so much matrimonial property has been built up that the property brought into the marriage by one party alone now seems insignificant.

- (2) Over time the non-matrimonial property has been mixed with matrimonial property.
 - (3) The non-matrimonial property has been invested in the purchase of a matrimonial home which, although vested in his or her sole name, has been treated by the parties as a central item of matrimonial property.
- 144 On that view, time alone does not make non-matrimonial property become matrimonial and liable to be shared. We can build on that thinking by considering:
- (1) non-matrimonial property that has been spent and not replaced;
 - (2) non-matrimonial property that has remained unsold but has been used for the family;
 - (3) non-matrimonial property has been sold and substitute property bought; and
 - (4) the consequences of investment in non-matrimonial property.
- (1) NON-MATRIMONIAL PROPERTY THAT HAS BEEN SPENT AND NOT REPLACED
- 145 This is the simple case: where the non-matrimonial property has been spent on something other than replacement property, for example on holidays or school fees, there is no property left and no question about whether anything remains non-matrimonial.
- (2) NON-MATRIMONIAL PROPERTY THAT HAS REMAINED UNSOLD BUT HAS BEEN USED FOR THE FAMILY
- 146 What we have in mind here is, for example, a holiday property inherited by one party, but used for the family's holidays. Equally, an investment might remain unsold and its income be used to support the family. Should non-matrimonial property retain that status only if it has nothing to do with the marriage or civil partnership, remaining something uninvolved with the family members and never used for their benefit? That would seem to be a very restrictive view; it does not represent the current law. It would also be a difficult view to put into effect. What counts as involvement? A single visit? Regular use? Hanging a picture? And do we distinguish between the physical use made of a cottage or a car, and the use of income from an investment?
- 147 One option is to accept that the mingling of lives within normal married or civil partnered life means that non-matrimonial property inevitably loses its status over time, and avoid evidential difficulties inquiries by providing that it all becomes matrimonial on a gradual basis, perhaps by a percentage every five years.
- 148 That would remove the protection that was to be given to the source of the property. We take the view that involvement in, or enjoyment of, a non-matrimonial asset need not in itself give a right to share its value; we do not think that a rule that non-matrimonial property automatically becomes matrimonial, on a sliding scale over time, is appropriate. Nor do we feel that it is appropriate that mere use of the non-matrimonial property by the family makes it matrimonial.

- 149 We provisionally propose that non-matrimonial property should not lose its status as such merely by virtue of having been used by the family.**

Do consultees agree?

- 150 We noted above the relevance of these issues to the rules to be devised for qualifying nuptial agreements. Such an agreement might provide for specific property not to be shared in the event of divorce or dissolution; we would expect that the use of such property for the family would not change its contractual status.

(3) NON-MATRIMONIAL PROPERTY HAS BEEN SOLD AND SUBSTITUTE PROPERTY BOUGHT

- 151 Consider here an inherited holiday property. It might be sold and replaced with another (one property for another); it might be sold and the proceeds used to buy the family car and a caravan for family use; it might be sold and the proceeds either used to buy a family home in whole or in part, or to pay off the mortgage on the jointly-owned family home. If the marriage or civil partnership is dissolved, what is the status of the new property? And if sale proceeds have been invested in matrimonial property, does that property become partly non-matrimonial?

- 152 It may be that the key to these instances is whether or not the owner in spending the sale proceeds has chosen to treat them as matrimonial property. If property is sold and the proceeds used for something different – a picture kept in the bank is sold to buy a holiday property, for example – then there is a deliberate choice to purchase a different kind of property, to invest in the family, and non-matrimonial status should be lost.

- 153 We have also said that use by the family does not in itself mean that non-matrimonial property becomes matrimonial. The word “different” in the preceding paragraph reflects the fact that where non-matrimonial property is used for the family, and then sold and replaced with something of the same kind (a holiday cottage in Wales is sold and a cottage in Cornwall purchased with the proceeds), it does not seem appropriate for that transaction to cause the property to change status.

- 154 But if non-matrimonial property is sold and the proceeds mingled with matrimonial property, perhaps by paying off some of the mortgage debt on the family home, or being pooled with jointly-held funds in order to buy something new, the non-matrimonial status of the funds should be lost.

- 155 We provisionally propose that where non-matrimonial property has been sold and substitute property bought, that property should be matrimonial property if it has been bought for use by the family, save where the substitute property is of the same kind as the property sold.**

Do consultees agree?

- 156 We provisionally propose that where non-matrimonial property has been sold and the proceeds invested in matrimonial property, the property (following that investment) should be matrimonial property.**

Do consultees agree?

- 157 Again, we have to consider the relevance of these provisional proposals to property specified in a qualifying nuptial agreement. Where an agreement provided, for example, that an inherited shareholding was not to be shared in the event of divorce or dissolution, we would expect that the owner of those shares would be free to sell them and replace them with other shares without changing their contractual status. But where the owner sold them and used the proceeds to pay off the mortgage on the family home, we think that the position changes. A choice has been made to end the contractual non-matrimonial status of that property.

(4) THE CONSEQUENCES OF INVESTMENT IN NON-MATRIMONIAL PROPERTY

- 158 We have to turn now to the even more difficult – but common – situation where non-matrimonial property changes in value over time because effort and/or money has been invested in it. This may be by the owner, or it may be by the couple together.
- 159 So at one end of the spectrum the owner manages his or her property, as the owner did before the marriage or civil partnership, albeit not as a full-time activity – for example, a portfolio of properties is managed, perhaps by the owner on a spare-time basis, perhaps by paying managing agents. At the other end, the non-matrimonial property represents the owner's career and full-time occupation, as would naturally happen in the case of the family business. A further variation occurs when the other spouse joins in, perhaps by investing money, or by working full-time or part-time in the business but not formally as a partner.
- 160 Does any of this activity make the property, or more likely a proportion of it, liable to sharing? If not, what level of investment by the other spouse, if any, should change the status of the property?
- 161 We ask consultees to tell us whether they think that it is possible to devise rules – or a guided discretion – for the treatment of cases where non-matrimonial property has grown due to the investment of one or both the spouses. What values should be expressed in those rules?**

RESPONDING TO THIS CONSULTATION

- 162 We recognise that the project we have undertaken, even in its now extended form, is not the full-scale review of financial orders that some would like to see. Nevertheless we take the view that this examination some of the most difficult areas within that context has the potential to improve the law considerably both in the short and the long term.

163 There are no “quick fix” solutions; but the Commission believes that the law can be improved and is keen to hear from as many respondents as possible. The consultation period is open until 11 December 2012. Responses can be sent by email to propertyandtrust@lawcommission.gsi.gov.uk or alternatively by post to Property, Family and Trusts team, Law Commission, Steel House, 11 Tothill Street, London, SW1H 9LJ. For more details about the consultation, including a full copy of the Supplementary Consultation Paper please see the Law Commission website, www.lawcom.gov.uk.

GLOSSARY

“Clean break”: an order which imposes no ongoing financial liability on either party.

“Family Justice Review”: the wide-ranging examination of the family justice system in England and Wales chaired by Sir David Norgrove. The final report was published on 3 November 2011.

“Financial orders”: we used this term to refer to financial orders made on divorce and dissolution.

“Marital property agreements”: agreements made before or during marriage or civil partnership which seek to regulate the couple’s financial affairs during the relationship or to determine the division of their property in the event of divorce, dissolution or separation. Often referred to colloquially as “pre-nups” and “post-nups”, and sometimes in legal writing collectively as “nuptial agreements”.

“Needs”: a very broad concept with no legal definition, discussed fully in Part 2 at paragraph 2.14 and following.

“Periodical payments”: a series of payments made for a definite or indefinite period of time, typically paid on a monthly basis.

“Qualifying nuptial agreement”: a term used in our 2011 Consultation to refer to a marital property agreement which is enforceable, providing certain conditions are met, without the need for the agreement to be scrutinised by the court in its discretionary jurisdiction. Such agreements are not available under the current law.

“Spousal support”: we use this term in a sense wholly synonymous with “needs”, and therefore encompassing capital as well as income requirements (for example provision for housing).

“Spouse”: we use this term to refer to one of the parties to a marriage or a civil partnership.