

<b>Title:</b> Financial Needs and Nuptial Agreements <b>IA No:</b> LAWCOM0030  <b>Lead department or agency:</b> <b>Law Commission</b>  <b>Other departments or agencies:</b> <b>Ministry of Justice</b>	<b>Impact Assessment (IA)</b>		
	<b>Date:</b> 10/2013		
	<b>Stage:</b> Final		
	<b>Source of intervention:</b> Domestic		
	<b>Type of measure:</b> Primary legislation		
<b>Contact for enquiries:</b> Spencer Clarke 020 3334 3152			
<b>Summary: Intervention and Options</b>			<b>RPC Opinion:</b> RPC Opinion Status

Cost of Preferred (or more likely) Option			
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, Measure qualifies as One-Out?
£m	£m	£m	Yes/No   In/Out/zero net cost

**What is the problem under consideration? Why is government intervention necessary?**

The law governing financial provision on divorce or dissolution currently relies upon the exercise of judicial discretion. This allows "tailored" justice, but is necessarily costly and unpredictable. As family law moves increasingly towards non-judicial solutions, and as far fewer people have access to legal aid in relation to family proceedings, there is a new need for clarity and certainty. Intervention is necessary, first, to provide assistance to those who cannot afford to seek legal advice to settle matters outside court, or lawyers to represent them in court and secondly, to incentivise high net worth couples to resolve their disputes without recourse to lengthy High Court hearings which take up a disproportionate amount of court time.

**What are the policy objectives and the intended effects?**

The fundamental policy objective is to make the law of financial provision on divorce or dissolution clearer and more certain. First, guidelines produced by the Family Justice Council will clarify the existing law on financial needs, encourage consistent application of that law and assist couples who wish to settle their disputes out of court. Secondly, reform of the law would allow married couples and civil partners (or those planning to enter such a relationship) to make binding agreements before or during their marriage regulating their high-value financial affairs on divorce or dissolution.

**What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)**

Option 0: Do nothing. Option 1: Qualifying Nuptial Agreements ("QNAs") (preferred option): Introduce primary legislation allowing couples to make binding marital property agreements which will restrict the courts' discretion to make financial orders and be enforceable as contracts. Such agreements would be subject to strict procedural safeguards and would not be capable of restricting provision for financial needs. This option recognises the social value of autonomy and should improve certainty of outcome and reduce the need to litigate disputes over financial provision in high-value divorces or dissolutions.

Option 2: Family Justice Council Guidance (preferred option): the FJC will issue guidance on the meaning of "needs" in financial provision cases to make the concept clearer and consequently more predictable.

<b>Will the policy be reviewed?</b> It will not be reviewed. <b>If applicable, set review date:</b> Month/Year					
Does implementation go beyond minimum EU requirements?				Yes / No / N/A	
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.		<b>Micro</b> Yes/No	<b>&lt; 20</b> Yes/No	<b>Small</b> Yes/No	<b>Medium</b> Yes/No
What is the CO <sub>2</sub> equivalent change in greenhouse gas emissions? (Million tonnes CO <sub>2</sub> equivalent)				<b>Traded:</b>	
				<b>Non-traded:</b>	

**I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs.**

Signed by the responsible SELECT SIGNATORY: \_\_\_\_\_ Date: \_\_\_\_\_

# Summary: Analysis & Evidence

Policy Option 1

Description: QNAs

## FULL ECONOMIC ASSESSMENT

Price Base Year 2012/13	PV Base Year 2012/13	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate:

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate			

### Description and scale of key monetised costs by 'main affected groups'

Transitional costs: There may be an initial spike in cases testing the boundaries of the new law, increasing the workload for HMCTS.

On-going costs: There could be a loss in chargeable work for legal practitioners if parties who would otherwise have taken legal advice and gone to court use QNAs.

### Other key non-monetised costs by 'main affected groups'

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate			

### Description and scale of key monetised benefits by 'main affected groups'

Transitional benefits: There will be no transitional benefits.

On-going benefits: There may be a reduction in the number of financial provision cases going before the courts in general and some hearings in the family court will become shorter and simpler than they would otherwise have been; a few will only be simple enforcement proceedings. There may be an uplift in chargeable hours for legal practitioners as parties will need to seek legal advice before making their QNA. Binding QNAs may encourage wealthy couples to settle in England and Wales.

### Other key non-monetised benefits by 'main affected groups'

QNAs should increase certainty and promote autonomy; may encourage decisions to be made out of court and away from the adversarial system at times of great stress; may increase the marriage rate; may encourage wealthy couples to settle in England and Wales.

### Key assumptions/sensitivities/risks

Discount rate (%) 3.5

We anticipate that fewer financial provision claims would go before the court if some parties are able to resolve their disputes via a QNA. There is a risk that more QNAs will be challenged in the courts than we expect. We have estimated that the marriage rate is constant in each wealth bracket of the population. We have assumed that the divorce rate will remain stable.

## BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs:	Benefits:	Net:	Yes/No	IN/OUT/Zero net cost

# Summary: Analysis & Evidence

# Policy Option 2

Description: Family Justice Council Guidance

## FULL ECONOMIC ASSESSMENT

Price Base Year 2012/13	PV Base Year 2012/13	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate:

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate			

### Description and scale of key monetised costs by 'main affected groups'

Transitional costs: There will be no transitional costs. The members of the Family Justice Council work on a pro bono basis and so the guidance will be drafted without cost.  
On-going costs: There may be a loss in chargeable hours for legal practitioners if more couples decide their disputes out of court or go to court without legal advice.

### Other key non-monetised costs by 'main affected groups'

N/A

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate			

### Description and scale of key monetised benefits by 'main affected groups'

Transitional benefits: There will be no transitional benefits.  
On-going benefits: More couples may decide their cases out of court which would reduce the cost to the couple and also the number of financial provision cases going before the court.

### Other key non-monetised benefits by 'main affected groups'

The law will be clearer and more accessible which will benefit both separating couples and legal practitioners.  
Increase public confidence in the legal system by providing greater certainty for separating couples.  
More couples may choose to decide their disputes away from the adversarial court system; if they choose another form of dispute resolution, such as mediation, that could increase fees for such practitioners.

### Key assumptions/sensitivities/risks

Discount rate (%) 3.5

We assume that more couples will decide their cases out of court or will go to court without legal advice if the law is clearer.  
We assume that the number of litigants in person will increase following the changes to legal aid in family law cases.

## BUSINESS ASSESSMENT (Option 2)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs:	Benefits:	Net:	Yes/No	IN/OUT/Zero net cost

## Evidence Base

## Background

The financial consequences of divorce, or dissolution of civil partnership, are governed by the Matrimonial Causes Act 1973 and the Civil Partnership Act 2004, which set out a list of the matters to be taken into consideration when determining how a couple's property is to be divided. The courts have developed general principles and rules for exercising their discretion. In very broad terms, the court will look to ensure that the financial needs of each of the parties are met, before sharing any remaining assets. "Financial needs" here has a technical meaning: roughly, the court will try to ensure that both parties have a place to live and can maintain a standard of living consistent with the one they enjoyed when together, so far as can be managed (which is often not the case).

Some couples are keen to regulate how their own financial affairs should be handled in the event that their marriage comes to an end. A marital property agreement is an agreement made between spouses or civil partners (or those contemplating marriage or civil partnership) stipulating how their property should be shared on divorce, dissolution or separation. Such agreements were traditionally regarded as being against public policy but this position has eroded over time.<sup>1</sup>

The Law Commission's project on Matrimonial Property, Needs and Agreements began in 2009, encompassed two consultation papers, and culminated in the Report which this impact assessment has been written to accompany. Our recommendations cover England and Wales.

## Problems

Regarding marital property agreements:

1. *Unpredictability*. In the case of *Radmacher v Granatino*<sup>2</sup> the Supreme Court considered marital property agreements and gave some guidance on how the court should treat them. Despite this there is still uncertainty over the extent to which the court will uphold a marital property agreement and in what circumstances they will be deemed unfair. Marital property agreements do not currently oust the court's wide discretion to make financial orders.

2. *Compromised capacity to regulate financial affairs*. The current position frustrates the capacity of adults to regulate their own financial affairs in advance of separation as the explicit intentions and desires of the parties contained in a marital property agreement may still be overturned by the court.

3. *The use of an adversarial system*. Separation, divorce and dissolution are often times of great stress and using an adversarial system to resolve disputes may heighten this tension. It is not surprising then, that such negotiations may turn into acrimonious and bitter disputes conducted at great financial and emotional cost to the parties and their children. There is evidence that an adversarial legal system is not the best environment to work out such fraught issues.<sup>3</sup> The capacity to make enforceable agreements in calmer and happier times before the break-up would have obvious advantages.

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<sup>1</sup> In *Radmacher v Granatino* [2010] UKSC 42, [2011] 1 AC 534 at [75] it was decided that marital property agreements that are freely entered into should be given effect unless a court concludes that it would be unfair to hold the parties to their agreement in the circumstances.

<sup>2</sup> [2010] UKSC 42, [2011] 1 AC 534.

<sup>3</sup> This is illustrated by the fact that family disputes currently give rise to more complaints to the Legal Ombudsman than any other type of dispute, with around half of the total relating to divorce specifically; Legal Ombudsman, "*What were the complaints about by area of law?*" available online at [http://www.legalombudsman.org.uk/research-decisions/data\\_charts/What\\_were\\_the\\_complaints\\_about\\_by%20area\\_of\\_law.pdf](http://www.legalombudsman.org.uk/research-decisions/data_charts/What_were_the_complaints_about_by%20area_of_law.pdf). Further, research has found that dissatisfaction levels are nearly twice as high in divorce cases than is the average across other areas of law, see Legal Ombudsman, "*The price of separation: Divorce related legal complaints and their causes*", available at <http://www.legalombudsman.org.uk/reports/divorce/index.html> (last visited 7 February 2014).

Regarding financial needs:

1. *Unpredictability*. The high level of judicial discretion in financial provision proceedings can mean that court ordered outcomes are relatively unpredictable, particularly for those without legal advice. There can be variations in approach depending on location or individual judge.<sup>4</sup> Without a definitive description of “financial needs”, or any overall direction in the law about what the judge is trying to achieve in financial provision cases, it is unsurprising that, for clients, it is difficult to predict what the court will order in any given case.<sup>5</sup>

2. *Lack of clarity and deciding disputes out of court*. The vast majority of settlements on divorce or dissolution are made outside of court via agreement or some form of alternative dispute resolution (ADR).<sup>6</sup> For those without legal advice, the lack of clarity in the law of financial needs may result in a vulnerable party accepting a settlement which does not meet their needs, ultimately resulting in a greater financial burden on the state. Even in the “run-of-the-mill” cases where parties have some understanding of their financial requirements, parties’ negotiations are often hampered not only by acrimony but also by the complex and uncertain rules for financial provision.

This is exacerbated both by the trend in family law for parties to seek resolution out of court, and also by the reforms to legal aid which came into effect this year<sup>7</sup> and are likely to have significant consequences, in particular so far as access to legal advice is concerned.<sup>8</sup> It therefore seems likely that more people will represent themselves in the future or will be encouraged to turn towards ADR. In either case the law on financial needs lacks the clarity and accessibility necessary to facilitate this shift.

3. *The use of an adversarial system*. (See above)

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<sup>4</sup> F Gibb, “Wives seeking divorce get better settlements in the city” 30 April 2013 *The Times*, available online at <http://www.thetimes.co.uk/tto/law/article3752161.ece> (last visited 7 February 2014); consultation response by the Law Reform Committee of the General Council of the Bar to the Law Commission 11<sup>th</sup> Programme; C Bradley and E Moore “The Maintenance Conflict: Crystal ball gazing versus a meal ticket for life” [2011] 41(Jul) *Family Law Journal* 733; S Beinhart, J Eekelaar and M Maclean *Family Lawyers: The Divorce Work of Solicitors* (2000) pp185 to 187; Law Society *Financial Provision on Divorce: Clarity and Fairness* (2003).

<sup>5</sup> In a survey conducted by Resolution in March 2012, practitioners were asked whether they were “able to predict accurately how the court will quantify your clients’ “needs” under section 25 of the Matrimonial Causes Act 1973?”, 14% said that they could “always” predict how the court would quantify needs, 80% said that they could “sometimes” do so and 6% said “rarely”. It should be noted that this survey analysed responses from only 336 family law practitioners and is not a representative sample. The survey results are available online at [http://lawcommission.justice.gov.uk/docs/cp208\\_matrimonial\\_property\\_Resolution\\_survey\\_results.pdf](http://lawcommission.justice.gov.uk/docs/cp208_matrimonial_property_Resolution_survey_results.pdf).

<sup>6</sup> Figures show that last year 67% of all publicly funded couples resolved their concerns out of court with a qualified mediator, see Ministry of Justice, “New Mediation Laws to Help Separating Couples” 5 June 2013, available at <https://www.gov.uk/government/news/new-mediation-laws-to-help-separating-couples>. In 2012, 125,116 petitions for divorce, nullity or judicial separation were filed. 47,986 applications for one or more ancillary relief orders were made and 44,744 disposals were made. Of these disposals only 3,596 were contested. Of the disposals made in 2012, some will relate to a petition or an application made in previous years. However, by no means all separating spouses and civil partners apply for a financial order, and only a very small fraction of applications made (8%, using the statistics quoted) will be resolved by an order made after trial. Using the same statistics only 3% of petitions will lead to a financial order being made after trial. The majority will be resolved by agreement between the parties. For petition and disposal statistics see Ministry of Justice, *Court Statistics (quarterly) Main Tables* (2013) tables 2.1 and 2.6, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/264142/cs-q2-2013-main-tables.xls](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/264142/cs-q2-2013-main-tables.xls) (last visited 7 February 2014).

<sup>7</sup> Legal Aid, Sentencing and Punishment of Offenders Act 2012.

<sup>8</sup> Government estimates that 84% (210,000 people) of those who received some form of legal aid (Legal Help) in relation to family matters in 2010 will no longer be eligible for help under the new regime, Ministry of Justice, “Cumulative Legal Aid Reform Proposals: Impact Assessment” (2011), annex A, available at <http://webarchive.nationalarchives.gov.uk/20111121205348/http://www.justice.gov.uk/downloads/consultations/annex-a-scope.pdf> (last visited 7 February 2014).

## Rationale for intervention

The conventional economic approach to government intervention to resolve a problem is based on efficiency or equity arguments. The Government may consider intervening if there are strong enough failures in the way markets operate (for example, monopolies overcharging consumers) or if there are strong enough failures in existing government interventions (for example, waste generated by misdirected rules). In both cases the proposed new intervention itself should avoid creating a further set of disproportionate costs and distortions. The Government may also intervene for equity (fairness) and redistributive reasons (for example, to reallocate goods and services to disadvantaged groups in society).

With regard to marital property agreements, the problems highlighted above are strong enough to justify government intervention. Support has been expressed for marital property agreements to become binding,<sup>9</sup> which would bring England and Wales into line with many other countries in Europe where it is regarded as normal and uncontroversial to have a marital property agreement.<sup>10</sup> There is an argument that allowing these agreements to be binding will encourage wealthy couples from other countries to settle in England and Wales and this may contribute to the UK economy.<sup>11</sup>

The difficulties caused by the opaque definition of “financial needs” are also sufficient to warrant intervention as the current law’s inaccessibility to the public is a barrier to dispute resolution outside of court. The definition should be clarified to improve this situation and also to prevent any potential unfairness resulting from different judges interpreting “needs” in different ways.

The social benefit from having personal autonomy over one’s financial affairs is insufficiently recognised in the existing law. The value placed on the capacity for adults to independently regulate their own financial affairs can result in lengthy court battles to overturn first instance court decisions that run counter to the initial agreement. This is particularly the case for the “super-rich” who have the resources to fund these disputes.

## Policy Objectives

The fundamental policy objective is to address the problems outlined above by making the law more certain and easier to understand. This should reduce the need for, and scope of, court hearings and avoid costly and damaging disputes.

Our suggested statutory reform will introduce a law allowing married couples and civil partners (or those entering such a relationship) to make binding agreements to regulate their financial affairs on divorce or dissolution. The Law Commission’s recommendation for QNAs also includes numerous safeguards to minimise the risk of harm and avoid manifestly unjust outcomes.

Secondly, guidelines produced by the Family Justice Council (FJC) on the meaning of “needs” in financial provision cases will make the law in this area more comprehensible and predictable. A clear statement of the law will be especially useful to parties trying to settle their disputes outside of court or without assistance from lawyers.

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<sup>9</sup> Family law professionals have expressed consistent support for enforceable marital property agreements in the annual Grant Thornton Matrimonial Survey: Grant Thornton UK LLP, *Matrimonial Survey 2012* (2012) p 2, available online at [http://www.grant-thornton.co.uk/Global/Publication\\_pdf/Matrimonial-Survey-2012.pdf](http://www.grant-thornton.co.uk/Global/Publication_pdf/Matrimonial-Survey-2012.pdf) (last visited 7 February 2014). Furthermore, research conducted by the Nuffield Foundation showed clear support for the principle of autonomy – that people should be free to regulate their own affairs – though participants were also wary about the dangers of marital property agreements: A Barlow and J Smithson “Is Modern Marriage a Bargain? Exploring Perceptions of Pre-Nuptial Agreements in England and Wales” [2012] *Child and Family Law Quarterly* 304. See the Marital Property Agreements (2010) Law Commission Consultation Paper No 198 paras 1.52, 6.82, 7.29 and 7.60.

<sup>10</sup> See further the Marital Property Agreements (2010) Law Commission Consultation Paper No 198 at paras 1.37 to 1.41.

<sup>11</sup> It should be noted that the richest 1% of taxpayers by total income accounted for a 11.5% share of total income and 25.0% of tax liabilities, HMRC Income Tax Liabilities Statistics 2010-11 to 2013-14, p7, available at <http://www.hmrc.gov.uk/statistics/tax-statistics/liabilities.pdf> (last visited 7 February 2014).

## Scale and Context

### *Marriages and civil partnerships*

The number of marriages in England and Wales between 1981 and 2011 followed a declining trend. By the end of 2011 the number of marriages taking place had fallen by about 29%. During this period the median age of marriage for men has increased from 25.9 years in 1981 to 33.2 years in 2011, whilst the median age of marriage for women has increased from 23.4 in 1981 to 30.9 in 2011. See table 1 below.

Table 1: Marriages in England and Wales, 1981 to 2011

	1981	1991	2001	2011
Total number of marriages	351,973	306,756	249,227	247,890
Median age (men)	25.9	28.4	32.1	33.2

Source: Office for National Statistics, Marriage Summary Statistics (Provisional), 2011

The most common age group within which those getting married fell was, for both men and women, between 25 and 29, whereas the most common age group to form a civil partnership was 30 to 34.<sup>12</sup> In 2012, there were 7,037 civil partnerships in England and Wales.<sup>13</sup>

The 2011 statistics show that approximately 70% of marriages were first marriages, 10% were between couples who had both been married before and in the remaining 20% one partner had been married previously. In 1981, by way of comparison, the statistics show that approximately 83% of marriages were first marriages for both, 5% were between couples who had both been married before and in 12% one partner had been married previously.<sup>14</sup>

### *Divorces*

The number of divorces each year declined over the 30 year period from 1981 to 2011. At the end of 2011 the number of divorces recorded for that year, relative to 1981, had fallen by just over 19%, see table 2 below.

Table 2: Number of Divorces in England and Wales, 1981 to 2011

	1981	1991	2001	2011
Number of divorces	145,713	158,745	143,818	117,558

Source: Office for National Statistics, Divorces in England and Wales, 2011

<sup>12</sup> Office for National Statistics, "Marriages in England and Wales (Provisional), 2011" (2013) p 8, available at [http://www.ons.gov.uk/ons/dcp171778\\_315549.pdf](http://www.ons.gov.uk/ons/dcp171778_315549.pdf) and Office for National Statistics, "Civil Partnerships in the UK, 2011" (2011) p 6, available at [http://www.ons.gov.uk/ons/dcp171778\\_274464.pdf](http://www.ons.gov.uk/ons/dcp171778_274464.pdf) (last visited 7 February 2014).

<sup>13</sup> Office for National Statistics, "Civil Partnerships in the UK, 2012" (2013) p 2 [http://www.ons.gov.uk/ons/dcp171778\\_329457.pdf](http://www.ons.gov.uk/ons/dcp171778_329457.pdf) (last visited 7 February 2014).

<sup>14</sup> Office for National Statistics, "Divorces in England and Wales – 2011" (2012) p 7, available at <http://www.ons.gov.uk/ons/rel/vsob1/divorces-in-england-and-wales/2011/stb-divorces-2011.html> (last visited 7 February 2014).

The number of divorces in England and Wales in 2011 was 117,558 and it was estimated that 42% of marriages end in divorce.<sup>15</sup> The number of civil partnership dissolutions granted in England and Wales in 2011 was 663.<sup>16</sup>

In 2011, the number of divorces in England and Wales was highest among men and women aged 40 to 44.<sup>17</sup> This compares with the mean age at civil partnership dissolution in 2011 of 38.9 years for men and 38.3 years for women.<sup>18</sup> Almost half (49%) of couples divorcing in 2011 had at least one child aged under 16 living in the family.<sup>19</sup>

There are competing views on whether recent trends indicate that marriage and divorce rates are levelling off. The knock-on effect of UK-wide financial hardship gives an increased risk of divorce, which is potentially delayed until the value of assets has improved as was seen during 1993 when both the divorce rate among men and women and the number of divorces peaked, following the 1990-92 recession.<sup>20</sup>

### Wealth

The economic well-being of a household is recognised as extending beyond the flow of income to include the stock of wealth. The Office for National Statistics identifies a household's net total wealth as the sum of net property wealth plus net financial wealth plus physical wealth and private pension wealth. Household wealth excludes business assets owned by household members, for example from a small business.<sup>21</sup>

In a survey conducted between 2008 and 2010 the median value for household total wealth was £232,000 and the top 1% of households each had a total household wealth greater than £2,807,000,<sup>22</sup> see table 3 below.

Table 3: Household Total Wealth Thresholds, Great Britain, 2008 to 2010.

Wealth Band	Total Wealth (£)
Bottom 10%	< 13,000
50%	232,000
Top 10%	967,000
Top 1%	> 2,807,000

Source: Office for National Statistics, Wealth and Assets Survey, 2008 to 2010<sup>23</sup>

In 2008 to 2010 the combined net wealth of all private households in Great Britain was £10.3 trillion. Wealth is highest amongst the 45 to 64 year old age group and remains relatively high for the 65 and over age group.<sup>24</sup> 43% of 45 to 64 year olds live in a household with a total wealth of greater than

<sup>15</sup> Office for National Statistics, "Divorces in England and Wales - 2011" (2012) p 1, above.

<sup>16</sup> Office for National Statistics, "Civil Partnerships in the UK, 2012" (2013) p 7, see footnote 13 above.

<sup>17</sup> Office for National Statistics, "Divorces in England and Wales - 2011" (2012) p 5, see footnote 14 above.

<sup>18</sup> Office for National Statistics, "Civil Partnerships in the UK, 2012" (2013) p 8, see footnote 13 above.

<sup>19</sup> Office for National Statistics, "Divorces in England and Wales - 2011" (2011) p 7, see footnote 14 above.

<sup>20</sup> Office for National Statistics, "Divorces in England and Wales - 2011" (2012) p 4, see footnote 14 above.

<sup>21</sup> Office for National Statistics, "Wealth in Great Britain Wave 2: Main Results from the Wealth and Assets Survey 2008 to 2010 (Part 3)" (2012) available at [http://www.ons.gov.uk/ons/dcp171776\\_274283.pdf](http://www.ons.gov.uk/ons/dcp171776_274283.pdf) (last visited 7 February 2014).

<sup>22</sup> Office for National Statistics, "South East has biggest share of the wealthiest households" (2012) p 2, available at [http://www.ons.gov.uk/ons/dcp171776\\_289407.pdf](http://www.ons.gov.uk/ons/dcp171776_289407.pdf) (last visited 7 February 2014).

<sup>23</sup> Office for National Statistics, "South East has biggest share of the wealthiest households" (2012) p 2, above.

<sup>24</sup> Office for National Statistics, "Total Household Wealth by Region and Age Group" (2013) p 1, available at [http://www.ons.gov.uk/ons/dcp171776\\_313608.pdf](http://www.ons.gov.uk/ons/dcp171776_313608.pdf) (last visited 7 February 2014).

£500,000.<sup>25</sup> The higher median age at first marriage and growing number of re-marriages suggests a greater likelihood of marriages between wealthy couples. There will be a commensurate increased incentive to protect wealth accrued prior to marriage or in the event of a marital break-down. There is evidence that the experience effect is particularly strong in re-marriages.<sup>26</sup>

A higher proportion of individuals in the South East live in wealthy households compared with other regions.<sup>27</sup>

### *The cost of divorce and going to court*

The average cost for an individual of resolving property and financial disputes in court is £4,000.<sup>28</sup> Although figures are unavailable, contested divorces involving high net worth individuals will be significantly more expensive, especially if the case goes on to appeal.

## **Main stakeholders**

Legal community: family law practitioners and organisations such as the Law Society, the Bar Council the Family Justice Council, the Family Law Bar Association, Resolution

HMCTS and judges

Divorcing couples (including litigants in person)

Very high-income earners, or those with high net worth, and their dependants

## **Option description**

The options chosen for reform are set out below.

### *Option 0: Do nothing*

The “do-nothing” option assumes that the law in relation to marital property agreements remains unchanged. We would expect the position described in *Radmacher v Granatino*<sup>29</sup> to reflect good law for the foreseeable future, and therefore we can predict that marital property agreements will be entered into with similar frequency and at a similar cost as is currently the case, and that they will continue to be subject to challenge in the courts in the same proportion. The meaning of financial needs would also continue to be covered by case law.

Table 4: Option 0 – Key features and associated problems

Key feature	Associated problem
Judicial discretion	Uncertainty; and potential for inconsistency.
No clear statement of the law governing marital property agreements	Uncertainty; lack of clarity; lack of autonomy; and inaccessibility.
No clear definition of “financial needs”	Uncertain; lack of clarity; inaccessibility; no assistance to those wishing to resolve their disputes out of court; and lack of confidence in family justice.

<sup>25</sup> Office for National Statistics, “Total Household Wealth by Region and Age Group” (2013) p 1, above.

<sup>26</sup> I Smith, “The Law and Economics of Marriage Contracts” (2003) 17(2) *Journal of Economic Surveys* 202.

<sup>27</sup> Office for National Statistics, “South East has biggest share of the wealthiest households” (2012), see footnote 22 above.

<sup>28</sup> Ministry of Justice, “New Mediation Laws to Help Separating Couples” 5 June 2013, see footnote 6 above.

<sup>29</sup> [2010] UKSC 42, [2011] 1 AC 534.

### *Option 1: QNAs*

Our preferred option is to make marital property agreements binding, via the introduction of QNAs. This will be a clear statement that any marital property agreement that adheres to the strict procedural conditions (set out below) will be binding on the parties, subject to their needs being met. This will remove any residual uncertainty and promote autonomy whilst minimising the risk of harm and protecting those that would be vulnerable under such contracts. The case law governing marital property agreements has gone as far as it can and statutory reform is now necessary.

Primary legislation should be enacted to provide that such agreements will be enforceable as contracts but will be subject to the following procedural conditions:

- a QNA must be a valid contract;
- a QNA must be made by deed;
- a QNA cannot have been concluded within the 28 days preceding the date of the marriage or civil partnership;
- each party must have received independent legal advice which explains that the agreement is a QNA, meaning that the court will be unable to make orders that are inconsistent with the terms of the QNA except in relation to making orders to meet needs, and which also explains the terms and effect of the QNA; and
- each party must have received disclosure of material information about the other's financial situation.

If these formal requirements are met there is no restriction on the sort of property that can be protected, provided that neither party contracts out of making provision for the other's needs. This is an important condition which provides essential protection for the financially weaker partner. It also protects the interests of society and the state as it precludes arrangements that would leave one party reliant on state benefits. This also means that, in practice, these agreements will only be suitable for wealthy individuals or couples whose assets are greater than their needs separately evaluated, and for couples who are remarrying (probably later in life) and who wish to safeguard a house or other assets for children from that previous relationship.

These agreements will be available to couples who are already married as well as those who will marry in the future.

### *Option 2: Family Justice Council Guidance on the meaning of "needs":*

The Law Commission also recommends that the FJC produce clear and accessible guidance to clarify the meaning of "needs" in financial provision proceedings. Guidance is preferable to statutory reform here as the aim is to provide a restatement of the current law and best practice, for clarification and not to effect any change in the law. This will enable couples, outside the court, to negotiate financial settlements on an informed and realistic basis and encourage judges to exercise their discretion more consistently.

The guidance would include an explanation as to how needs are assessed, the factors affecting the length of time during which needs have to be met at this level, and the way in which support should be provided (whether by way of periodical payments or on a capitalised basis). To ensure the guidelines are useful, different versions will need to be created, tailored to the needs of both legal practitioners and litigants in person.

## Costs and Benefits

This Impact Assessment identifies both monetised and non-monetised impacts on individuals, groups and businesses in the UK, with the aim of understanding what the overall impact to society might be from implementing these options. The costs and benefits of each option are compared to the “do nothing” option. Impact Assessments place a strong emphasis on valuing the costs and benefits in monetary terms (including estimating the value of goods and services that are not traded). However there are important aspects that cannot sensibly be monetised. These might include how the proposal impacts differently on particular groups of society or changes in equity and fairness, either positive or negative, or enhanced (or diminished) public confidence.

Where possible we have spoken to practitioners to inform our view of the likely aspects to be affected by the change in policy and have used this as the basis for our calculations. Where it has not been possible to obtain a rough indication of numbers in this way, we have had to make a realistic estimate. In such cases we have taken a conservative approach and have tended to use figures that we consider likely to underestimate benefits and overestimate costs. We have used a range of estimates in our calculations. Some of the assumptions apply in both the cost and benefit calculations.

The price base year is 2012/2013 with any exception to this being clearly indicated.

### Base Case / Option 0

Under this option, it is assumed that the existing controls discussed above would continue to operate in the same way as they do at present, and that concerns remain about the quality of some expert evidence. Because the “do-nothing” option is compared against itself its costs and benefits are necessarily zero, as is its NPV<sup>30</sup>.

### Option 1 – QNAs

#### Costs

##### Transitional costs

##### *1. HMCTS and the judiciary*

There may be a slight spike in cases testing the boundaries of the new law, as with any new legislation. This spike could occur many years after the introduction of QNAs, when the couples who agreed them divorce.

This option will impact on the judiciary as there will be a need for training but this should not be at additional cost as the recommendations could be included within the current training programme of the Judicial College and in their family law e-letter.

##### *2. Legal professionals*

##### *a. Fewer financial proceedings.*

If, as we expect, enforceable QNAs result in fewer financial proceedings on divorce being contested in court, and that those that are contested will be on average shorter, legal advisers can expect to see a small reduction in chargeable business. This effect will be felt mainly by those solicitors’ practices or barristers who deal with high-value divorces.

##### *b. Training*

There will be transitional costs for training of legal advisers but we assume that these will be negligible as the training of practitioners is budgeted for in legal professionals’ time, through Continuing Professional Development or in-house training.

##### On-going costs

##### *1. Spouses or civil partners (or those contemplating marriage or civil partnership)*

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<sup>30</sup> The Net Present Value (NPV) shows the total net value of a project over a specific time period. The value of the costs and benefits in an NPV are adjusted to account for inflation and the fact that we generally value benefits that are provided now more than we value the same benefits provided in the future.

There will be legal costs for those who wish to make a QNA. We do not yet know how much this legal advice will cost. However, recent research regarding current practice, timed to fit in with our project, found that, among the focus groups of 24 practitioners interviewed the average cost (per client) of a marital property agreement was around £5000,<sup>31</sup> which provides an indication of what a QNA might cost.

There may also be some couples who face the costs but do not get the benefits, for example, if they make a QNA but their circumstances change so significantly between the agreement and their divorce that they no longer have assets that are surplus to meeting both parties' needs on divorce, therefore allowing the court to make orders concerning the whole of their assets and leaving the QNA no assets on which to operate.

## **Benefits**

### Transitional benefits

There are no transitional benefits

### On-going benefits

#### *1. Spouses or civil partners (or those contemplating marriage or civil partnership)*

##### *a. Certainty and reduced need to take court action*

Enforceable QNAs will allow couples whose assets exceed their needs to regulate their own financial affairs on divorce or dissolution. This will allow more certain protection of family property, inheritance, and businesses. This could save a couple money on divorce or dissolution if they are encouraged to follow their agreement or negotiate rather than take court action.

Assuming only 1% of the population is sufficiently wealthy to utilise QNAs then around 2,550 couples who marry each year will be in a position to consider a QNA; if 5% of the population have the requisite wealth then there would be 12,750 such couples annually.<sup>32</sup> We conservatively estimate that around one third of these couples would actually be prepared to contemplate a QNA, that is, around 850 couples within the top 1% of household wealth or around 4,250 couples in the top 5%.<sup>33</sup> We estimate therefore that there will be between 850 and 4,250 QNAs contracted annually by couples who marry.

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<sup>31</sup> Mean £5407 and median £4500 from E Hitchings, *A Study of the Views and Approaches of Family Practitioners Concerning Marital Property Agreements* (2011) p 52.

<sup>32</sup> This is based on the fact there were 247,890 marriages and 7,037 civil partnerships in 2011: Office for National Statistics, "Marriages in England and Wales (Provisional), 2011" (2013) available at [http://www.ons.gov.uk/ons/dcp171778\\_315549.pdf](http://www.ons.gov.uk/ons/dcp171778_315549.pdf) (last visited {} ) and Office for National Statistics, "Civil Partnerships in the UK, 2012" (2013) available at [http://www.ons.gov.uk/ons/dcp171778\\_274464.pdf](http://www.ons.gov.uk/ons/dcp171778_274464.pdf) (last visited {} ).

<sup>33</sup> This estimate is based on research showing that the concept of a pre-nuptial agreement is inimical to some individuals and others will be unable, or unwilling, to negotiate prior to marriage. In a national survey 58% of people agreed that "binding pre-nuptial agreements are a good way of allowing couples to decide privately what should happen in the event of divorce", 21% disagreed and 21% took a neutral stance. Note that this figure was higher for 16-24 year olds at 73% but lower for those over 75 years, 46%, and for those who had been previously divorced, 55%: A Barlow and J Smithson "Is modern marriage a bargain? Exploring perceptions of pre-nuptial agreements in England and Wales" [2012] *Child and Family Law Quarterly* 304, at 307. We are also aware that individuals have an "optimism bias" which means that they believe that negative outcomes like divorce are unlikely to happen to them and therefore fail to make provision for them. Finally, we know that younger people in particular tend to be optimistic about the lifestyle and wealth they will achieve. It is very possible that couples who do not have the requisite wealth to make a QNA, that is, do not have assets exceeding the financial needs of the parties, will nevertheless make QNAs, in the belief that they will have such assets in the future if they ultimately separate.

## b. Increase in the marriage rate

There is a possibility that this will also have a limited uplifting effect on the marriage rate. Those who had previously been advised that remaining unmarried was the best way to guarantee certainty may now feel they can marry with confidence.<sup>34</sup> We have also noted in our Consultation Paper that QNAs may be particularly useful for spouses who have remarried and wish for their assets to be protected as an inheritance for their children.<sup>35</sup> It is likely that this subset of individuals, already previously affected by divorce, would be especially well disposed to entering into pre-nuptial agreements.

## c. Encourage couples to settle in the UK

The introduction of QNAs may also remove a disincentive for wealthy foreign couples to settle in the UK as foreign solicitors will be able to ensure that their marital property agreement meets the criteria of a QNA. Attracting these wealthy couples, who may spend more than the average and may employ UK nationals, may contribute to the UK economy.<sup>36</sup> There is also anecdotal evidence that these issues are of concern to some senior overseas executives considering employment in England and Wales, whose expertise could be influential in the success of UK industry.

## 2. *Legal professionals*

The services of legal advisers will be required to ensure that the strict procedural conditions of QNAs are met. These include the requirement that both parties to the agreement receive independent legal advice, and that there be a disclosure of material assets. We can therefore expect the costs to legal professionals outlined above, due to the reduction in litigation of high-value divorce cases, to be offset by the extra work which is generated, which will probably flow to the same solicitors' firms. Our expectation, therefore, is that the on-going cost of QNAs may be broadly neutral to legal advisers.

There will also be some cases in which parties will take legal advice in order to challenge the QNA on separation. It is impossible to say in advance of the law being implemented the extent to which this will happen. It will depend on the professionalism of those drawing up and advising on the agreements but also on the propensity of the parties to litigate. Both of these are unquantifiable. What we can say is that it is likely that some agreements will be subject to challenge, for example, where a couple no longer have the financial resources they did at the time of signing the agreement or where one party is simply aggrieved following the marriage breakdown. However, it is to be hoped that, first, the issues to be litigated would still be narrower than in the typical high-value financial provision case and, secondly, that there would be fewer of these cases over time as the courts give a firm steer on how the new law is to be applied.

## 3. *HMCTS and the judiciary*

We expect that there will be a reduction in contested high-value divorces reaching court in the medium to long term. This is largely because, provided needs are met, financial settlements to which QNAs apply will be outside the discretion of the courts. Furthermore, the law surrounding marital property agreements will be clarified and so this should minimise the complex litigation in this area. Finally, the couples for whom QNAs are an option will tend to overlap with those who have the resources to pursue their cases at the greatest length. The savings that QNAs bring will therefore tend to be focused on those cases which currently take up a disproportionate amount of the courts' time.

As QNAs will be a type of contract they will be enforceable as such provided that there is no challenge on the basis that the provision under the QNA does not meet one party's needs so, in a few cases of those where the QNA is challenged on divorce, only simple enforcement proceedings will be required.

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<sup>34</sup> The Institute for Family Business (UK) has told us that "families are increasingly adopting an unofficial policy of requiring marrying family members to establish prenuptial agreements ... . The prenup will seek to exclude such assets from the shared pool of assets that would be divided in the event of separation, establishing a form of 'firewall' in order to protect the business against a possible cash call". In E Hitchings' research (*A study of the views and approaches of family practitioners concerning marital property agreements* (2011) Law Commission pages 22 to 24) it is noted that practitioners do currently advise wealthy clients that the best way to protect their wealth is not to marry, but that very few actually take this advice.

<sup>35</sup> Marital Property Agreements Consultation Paper Law Com No 198, para 5.51. In 2011, 66% of marriages were first marriages, 15% were between couples who had both been married before and in the remaining 19% one partner had been married previously: Office for National Statistics, "Marriages in England and Wales (Provisional), 2011" (2013) p 10, available at [http://www.ons.gov.uk/ons/dcp171778\\_315549.pdf](http://www.ons.gov.uk/ons/dcp171778_315549.pdf) (last visited {}).

<sup>36</sup> It should be noted the richest 1% of taxpayers by total income accounted for a 11.5% share of total income and 25.0% of tax liabilities, HM Revenue & Customs, "Income Tax Liabilities Statistics 2010-11 to 2013-14" (2013) p 8, see footnote 11 above.

Such simpler proceedings will be faster, and cheaper, in terms of the use of judicial time and resources. However, where greater relief is sought by a party, rather than simply enforcing the financial provision provided under the agreement (on the basis that that greater provision is required in order to meet their needs) the case will have to be heard in the family court. QNAs could also have the effect of reducing the number of financial provision cases which appear before the courts generally. Where hearings in the family court are necessary they should become shorter and simpler in cases where there is a QNA because there will be a narrower range of issues for the court to consider.

It is important to note that these changes could effect an efficiency of time and resource for HMCTS, rather than a financial saving, depending on how they are implemented. The family courts' caseload is such that any freed resources will very likely be needed elsewhere. However, it is also clearly correct that cases which can be dealt with faster, at less cost to the parties, and at minimal cost to the state, outside the court system, ought to be removed from it.

## **Net effect of Option 1**

The introduction of QNAs is expected to provide net benefits and incur negligible additional cost to the state in the long-term, after any initial and short-term increase in the workload of the courts establishing the new law's boundaries. In the medium to long-term the workload of the family court that would otherwise be attributable to financial relief disputes in high net worth cases should decrease. The financial effect on legal practitioners should be broadly neutral with work drafting QNAs replacing any decrease in litigation. We do not foresee any non-monetised costs due to the introduction of QNAs but do foresee significant non-monetised benefits. The impact of a QNA will be to distribute a couple's property differently to the way in which a court would have ordered under section 25 of the Matrimonial Causes Act 1973 and any change would be a wealth transfer between the parties. To ensure this does not create hardship we have provided that a QNA will not allow couples to contract out of the provision of financial needs, and so neither party will be left reliant upon the state.

## **Option 2 – Family Justice Council guidance on the definition of “needs”**

### **Costs**

#### Transitional costs

##### *1. Family Justice Council*

We expect that this work will be undertaken as part of the normal activities of the FJC and will not impose a cost burden on them. Their members work on a pro bono basis.

##### *2. Legal professionals*

There will be transitional costs for training of legal advisers following the publication of the guidance but we assume that these will be negligible as the training of practitioners is budgeted for in legal professionals' time, through Continuing Professional Development or in-house training.

##### *3. HMCTS and the judiciary*

There will be no transitional costs for this option as the recommendations could be included within the current training programme of the Judicial College and in their family e-letter at no additional cost.

#### On-going costs

##### *1. Legal professionals*

There may be a decline in the proportion of litigants taking professional legal advice as the guidance will aim to provide clarity to the current law to the extent that a layman would be able to understand the concept of needs. This may encourage litigants to represent themselves or to resolve disputes outside of court informally.

## Benefits

### Transitional benefits

There are no transitional benefits.

### On-going benefits

#### 1. Spouses or civil partners (or those contemplating marriage or civil partnership)

Our recommendations will apply to all couples who go through financial provision proceedings following divorce. In 2011, 117,558 couples divorced in England and Wales.<sup>37</sup> It is estimated that the percentage of all marriages ending in divorce is 42% (assuming 2010 divorce and mortality rates throughout the duration of marriage).<sup>38</sup> As mentioned above, a high rate of financial provision claims are not decided in court<sup>39</sup> and of those that go to court, a large minority will involve a litigant in person.<sup>40</sup>

The guidance will make the law more accessible and certain. This will aid couples in their negotiation outside of court and so may lead to an on-going cost saving if they decide against going to court or instructing legal professionals. Such guidance should also help to increase public confidence in the legal system by providing greater certainty. The number of litigants in person is likely to rise in the coming years following the reduction in the availability of legal aid and so this is an important change which will help those who represent themselves.

#### 2. HMCTS and the Judiciary

If couples are encouraged to settle their disputes out of court this may also lead to a reduction in the number of financial provision claims reaching the court.

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<sup>37</sup> Office for National Statistics, "Divorces in England and Wales - 2011" (2012), see footnote 14 above.

<sup>38</sup> Office for National Statistics, "Divorces in England and Wales - 2011" (2012) p 1, see footnote 14 above.

<sup>39</sup> In 2012, 125,116 petitions for divorce, nullity or judicial separation were filed. 47,986 applications for one or more ancillary relief orders were made and 44,744 disposals were made. Of these disposals only 3,596 were contested. Of the disposals made in 2012, some will relate to a petition or an application made in previous years. However, by no means all separating spouses and civil partners apply for a financial order, and only a very small fraction of applications made (8%, using the statistics quoted) will be resolved by an order made after trial. Using the same statistics only 3% of petitions will lead to a financial order being made after trial. The majority will be resolved by agreement between the parties. For petition and disposal statistics see Ministry of Justice, *Court Statistics (quarterly) Main Tables* (2013) tables 2.1 and 2.6, see footnote 14 above.

<sup>40</sup> In a sample of ancillary relief cases from 2000, 31.7% involved a litigant in person (the applicant was unrepresented in 4.3% and the respondent in 28.9%): R Moorhead and M Sefton "Litigants in Person: Unrepresented Litigants in First Instance Proceedings" (2005) *Department of Constitutional Affairs Research Series*, pp 311, available at: <http://www.law.cf.ac.uk/research/pubs/repository/1221.pdf>. It is likely that an increasing number of people will decide to represent themselves or resolve their claims out of court following the coming into force of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, as legal aid is no longer available for family cases involving divorce, financial provision or the residence and contact arrangements for children, unless there is evidence of domestic violence. Divorce and financial provision cases where there is no evidence of domestic violence do not come within the class of cases defined in Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012, sch 1, s 9. Government estimates that 84% (210,000 people) of those who received some form of "legal help" in relation to family matters in 2010 will no longer be eligible for help under the new regime. Ministry of Justice, "Cumulative Legal Aid Reform Proposals: Impact Assessment" (2011), annex A, see footnote 8 above. Another factor which has the potential to increase the number of litigants in person in the future stems from the Jackson Report which recommended that the hourly rate recoverable by litigants in person in circumstances where the litigant cannot prove they have suffered financial loss through spending time on legal work should be increased from £9.25 per hour to £20 per hour: *Review of Civil Litigation Costs: Final Report (The Jackson Report)* (2009) at p 145, available at <http://www.judiciary.gov.uk/NR/rdonlyres/8EB9F3F3-9C4A-4139-8A93-56F09672EB6A/0/jacksonfinalreport140110.pdf>. At a press conference in September 2012 the then Lord Chief Justice of England and Wales (Lord Judge) expressed concerns about the number of litigants in person and that there had already been a significant increase of such litigants in all courts even before the changes to legal aid, see: <http://www.judiciary.gov.uk/Resources/JCO/Documents/News%20Release/lcj-press-conference-270912.pdf> (last visited 7 February 2014).

However, it is important to note that while these changes may effect an efficiency of time and resource for HMCTS, there is no cost saving as the family courts' caseload is so large that any freed resource will very likely be needed elsewhere.

### *3. Legal and Other Professionals*

If the provision of guidance leads to more couples choosing to reach a financial settlement on divorce outside court that could increase the work, and fees, of those legal and other professionals who offer alternative forms of dispute resolution such as mediation.

## **Net effect of Option 2**

For Option 2, no change to the law is proposed, and nor is any statutory reform required to effect this recommendation. The cost of initial outlay should be minimal but will depend on how the FJC decide to fund the project, that is, whether they decide to do so by redirecting their existing resources or by using additional funding. There will also be some publicity costs once the guidance is complete (for example, a printing the guidance in the form of a leaflet to be made available to the public, and making the guidance freely and easily accessible on the internet). We expect this guidance to be useful to legal practitioners and divorcing couples, in particular those without the benefit of legal advice.

## **Risks and assumptions**

### QNAs

In estimating {at page 12 above} the number of couples who will make QNAs we have made the following assumptions:

- These agreements will only be suitable for those with assets that exceed their individual needs. We do not know the level of wealth that will be required but have given estimates for the eventuality that it is the wealthiest 5% of the population and the wealthiest 1%.<sup>41</sup> There is a risk that we have over or underestimated the level of wealth that will be required to make use of QNAs; for example, because some couples may choose to make QNAs on the basis of anticipated, rather than current, wealth.
- We assume that the marriage rate is constant regardless of the wealth of the parties.
- Using a national survey of opinions towards marital property agreements and an estimate of optimism bias we anticipate that around one third of couples with the requisite assets to be in a position to make a QNA would contemplate one.<sup>42</sup>
- Though we accept that some young couples may over-estimate the wealth they will accrue in their lifetime and make a QNA,<sup>43</sup> we have assumed that couples without the requisite wealth will not make such agreements.
- We acknowledge the uncertainty of how people will react to the changes generally. We do not know how many people will make QNAs or use the FJC's guidance and this means that there is a risk that some of the benefits we outline above will not materialise.

If any of these assumptions have led to an over or underestimation in the number of QNAs made each year then this would affect our prediction of a reduction in the number of financial provision cases before the courts and so our estimated savings in court resources (subject to our observation that demand from other categories of case, such as children proceedings, is likely to negate any such saving by filling any 'void' due to a reduction in financial provision cases).

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<sup>41</sup> See p 12 above.

<sup>42</sup> See p 12 and footnote 33 above.

<sup>43</sup> See p 14 and footnote 33 above.

Furthermore, we anticipate that fewer cases will reach the courts if couples are able to decide their financial affairs in happier times before any divorce. As the couples able to make these agreements must have more than enough wealth to cover needs, we also anticipate that this will mean that there are fewer drawn-out court battles between those who can afford long-term legal advice. There is a risk that even if couples do make QNAs, a higher proportion than we estimate will challenge their QNA, for example over how they should assess their needs or whether the procedural requirements were met in making the agreement. This would also affect our estimated savings in court resources (with the same caveat as above).

#### Family Justice Council guidance on “financial needs”

We have assumed that more couples will decide their disputes out of court if the guidance regarding “financial needs” is clearer.<sup>44</sup> If this does not turn out to be the case then there will be less of a reduction in the number of financial provision cases before the courts than was anticipated. This will impact our estimated savings both for couples paying to take their case to court and in court resources.

We also estimate that the number of litigants in person will increase following the changes to legal aid in family cases.<sup>45</sup> Litigants in person would clearly benefit from our recommended guidelines and so these guidelines may have less of an impact if the majority of couples continue to seek legal representation.

#### **One in, one out impact**

QNAs and the Family Justice Council guidelines are out of scope as there is no business or regulatory impact.

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<sup>44</sup> See p15 above.

<sup>45</sup> See footnote 40 above.