A fairer end to relationships – Consultation response

Mishcon de Reya

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About us

Founded in 1937, Mishcon de Reya LLP is a law firm with offices in London, Cambridge, Oxford, Singapore, Hong Kong and the UAE offering dispute resolution, employment, private client, corporate, innovation and real estate legal services to individuals and organisations.

We have extensive international links and established practices based in multiple overseas jurisdictions including Asia, the Middle East, Africa, Israel, India, Eurasia and the US.

Our family team specialises in assisting UK and international high net worth and high profile individuals in relation to divorce and dissolution, financial orders, pre and post nuptial agreements, cohabitation, domestic abuse, Children Act matters, surrogacy and assisted reproduction, abduction and enforcement (national and international). We routinely advise on trust, property, corporate and tax issues arising from relationship formation and breakdown.

Our private wealth team advises UK and international high net worth individuals, families and family offices on wealth structuring, succession planning, trusts, tax, philanthropy and estate administration. We act across multiple jurisdictions, frequently advising on cross-border and multi-jurisdictional matters involving complex asset structures. Our private wealth disputes team handles contentious trust and estate matters, inheritance and probate disputes both domestically and internationally. Together, these teams work closely with our family lawyers on matters where relationship breakdown intersects with wider wealth and succession issues, including disputes involving cohabiting couples with complex asset structures or trust interests.

Consultation Questions

Q1: Do you agree with the Government's view that the objective for the sharing principle is to give equal benefit to the parties of matrimonial property by dividing matrimonial assets equally?

While we agree that one objective for the sharing principle is to give equal benefit to the parties of matrimonial property by dividing those matrimonial assets equally, we are conscious that equal sharing of assets may not in fact give equal benefit. Where one party is significantly financially stronger than the other, an award of capital may permit that party to e.g. purchase a home for themselves and any children. Where the other party is in a less financially strong position, their share of the capital may end up being used to meet day-to-day living costs, such as rent, as a mortgage is unaffordable. We have in mind the view of the Nuffield Observatory "Fair Shares" report[1], that:

It is doubtful that laying down a strong legal presumption of equal sharing of assets would deliver a substantively fair outcome between divorcees or reflect their own priorities. To the contrary, it would be more likely to cement inequality as between husbands and wives, with mothers and older wives doing particularly badly. And

Achieving a fair outcome should therefore be about enabling parties to emerge from their marriage in a broadly substantively equal position to move to financial independence – which may require unequal sharing – rather than formally equal in percentage or cash terms.

We therefore suggest that any reform to the law should have equal division as a starting point, not an outcome that displaces the needs principle where it would leave one party unable to rehouse or achieve independence. We would suggest that the court should consider the forward-looking effect of a proposed division when assessing whether an equal split achieves a fair outcome.

Q2: Do you agree with the Government's view that the court should consider the sharing principle as the starting point and consider the needs principle where equal sharing would not allow needs to be met?

Views amongst practitioners within our group diverged. On the one hand, considering the sharing principle as the starting point, followed by the needs principle where equal sharing would not allow needs to be met, can be seen as a sensible approach, increasing predictability of outcome. However, there was some concern that that approach presupposes that the intention of the scheme is largely backwards-focussed (what are the matrimonial assets?), with the forward-looking element being restricted to need.

Q3: Do you agree with the Government's view that it should codify the distinctions between matrimonial and non-matrimonial property, in line with the Supreme Court's decision in Standish?

We agree that there are benefits in having a clearer approach through codification. The proposed approach may make it easier for parties (particularly litigants in person) to understand the likely outcome.

However, there are concerns in relation to a form of codification which has the effect of freezing the law at one point in time. Section 25 of the Matrimonial Causes Act 1973 permits the court to exercise its discretion widely, which has allowed flexibility in the approach, illustrated through case law over the years.

We queried whether the proposed approach to codify *Standish* is flexible enough to cope with future changes in the way that society views marriage. We wondered what mechanism, if any, there could be to update the codified definition as future developments change the way that wealth is created and held.

It is also not currently clear how detailed the codification will be – *Standish* leaves significant scope for factual disputes, including the assessment of whether the parties' treatment of an asset over time shows an intention to share it.

Q4: Should the court be able to consider how the property has been used, shared and treated by the parties, and over what time period, when deciding whether non-matrimonial property has become matrimonial?

We agree with this proposal. The parties' intention and their actual treatment of an asset during the marriage are, in our view, some of the most reliable indicators of whether an asset has become part of the shared marital enterprise, and are markedly more reliable than formal title, which the Supreme Court in Standish confirmed is not determinative.

We do, however, note that this approach necessarily leaves scope for argument and judicial discretion as to how those factors apply to any given set of facts. We do not see this as a reason to abandon the approach - a less flexible approach (for example, requiring an asset to have been mingled or jointly used for a fixed number of years) may be simpler to apply, but would produce arbitrary and potentially unfair results. We would suggest that any codification of the principle of matrimonialisation should be accompanied by non-statutory guidance, (such as the kind already published by the Family Justice Council on needs), to help practitioners and litigants in person apply the factors consistently. We also consider that clarification should be provided that tax-planning transfers between spouses (as in Standish itself) do not of themselves evidence an intention to share, since this is likely to remain a live issue in high-value cases, particularly those with international tax exposure.

Q5: Do you agree with the Government's view that the overarching objective of the court when making a financial order should be to reach a fair outcome through the application of the sharing and needs principles?

We agree, but take the view that the ability to consider the facts of each case and to apply judicial discretion within the statutory framework should be preserved. We consider that codification should have the effect of retaining judicial discretion within a clearer framework rather than replace it with a rules-based scheme akin to a matrimonial property regime such as those deployed in other jurisdictions. We support the adoption of "codification plus" among the four models identified in the Law Commission's scoping report. We do not, however, consider that codification should have the practical effect of limiting discretion beyond the level currently proposed. Given the varying different circumstances of families, and the overall steer towards an outcome that is "fair", discretion is important and should be retained.

Q6: Do you agree with the Government's view that the objective for meeting needs should be to enable both parties to transition to independence, as far as resources allow?

We consider that one of the objectives for meeting needs should be to enable each party to transition to independence. However, we would be concerned should any scheme prioritise independence at the expense of longer term security for financially more vulnerable parties, particularly those who have become significantly disadvantaged in the workplace following choices made during a lengthy marriage, or long-term commitment to raising children. We note the approach taken in cases such as *SS v NS (Spousal Maintenance) [2015] EWHC 1005 (Fam)*, that "A degree of (not undue) hardship in making the transition to independence is acceptable." While we agree that independence is a laudable and desirable aim of any scheme, we have some concern that a system in which it is considered appropriate for the financially weaker party to experience "hardship" (of any degree) while the financially stronger party does not, may undermine the principle of non-discrimination between breadwinner and home-maker. We consider that any revised scheme should consider the balance between the desirability of financial independence and the importance of "a gentle transition from [the standard of living enjoyed during the marriage] to the standard that she could expect as a self-sufficient woman" for the financially weaker party, as considered by Baroness Hale of Richmond in *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24.

Q7: Do you agree with the Government's view that the court should apply the needs objective using a three-stage hierarchical approach?

While we consider that a staged approach to meeting needs may help reduce discrepancies in the way that needs can sometimes be treated by different courts, we consider that very careful consideration would need to be given to how any such staged approach would work in practice.

It is unclear how the court would decide what is and is not a "discretionary" need. Where the parties have enjoyed significant wealth during the marriage, would the proposed stage 2 "housing need" include such matters as a holiday home? Would the needs of children (i.e. stage 1) consider the discretionary needs of the children? In cases brought under Schedule 1 of the Children Act 1989, the courts have taken into account the standard of living of the paying parent (such as in *Re P (Child: Financial Provision*) [2003] EWCA Civ 837) when deciding the appropriate standard of living for the child and parent whom they remain with. This could stretch beyond a spouse's "stage 2" needs. If that is the case, where, under the proposed scheme only stage 1 and stage 2 needs are to be met (such as where a pre-nuptial agreement has been signed), we foresee a risk of principles from Schedule 1 cases being imported and, in practical terms, a marriage with children being seen as more "valuable" than one without.

We further have some concern that creating "tiers" of need may lead to increased litigation, rather than considering need holistically in light of the circumstances of the case.

Q8: Do you agree that the stages should be focused on the following:
first consideration to the welfare of any children of the family;
capital and income needs, including their housing and pension needs in keeping with the standard of living during the marriage; and
where resources allow, discretionary need, in keeping with the standard of living during the marriage?

We have some concern with this approach, as set out in our answer to Q7 above.

Q9: Do you agree with the Government's view that there should be a checklist of factors that the court must consider when applying the needs and sharing objective?

We support the retention of a checklist of factors for the court to consider. We take the view that a crucial part of the court's task in achieving fairness between spouses is to maintain a degree of flexibility. However, that flexibility should be exercised on a principled basis, and a checklist provides the framework for that principled flexibility.

We are, however, concerned that a new scheme does not have the effect of limiting flexibility by rendering any checklist largely, or substantially, otiose. If the sharing principle is to be applied as a mathematical formula, it is unclear how any checklist of factors would affect that mathematical exercise. If need is to be applied in a more rigid, tiered way, it is again unclear how a checklist would affect whether e.g. a need is considered a "basic" or a "discretionary" need.

Q10: Do you agree that this checklist should include an explicit reference to any disadvantage suffered as a result of the relationship?

Views diverged within our group as to how compensation should be included in financial remedies, if at all. On the one hand, there was concern about the concept of compensation in respect of loss of notional earnings during a marriage. It requires speculation as to what "might" have happened. Many things "might" have happened or not happened had parties not married, and this form of "crystal ball-gazing" requires assumptions to be made that cannot easily be evidenced. There was also concern that claims for compensation can create the wrong tone in a case. It can be highly contentious. The breadwinner can feel that they have worked hard and are now being penalised. In our experience, it is an argument that is likely to prolong litigation.

On the other hand, there was concern about the situation that arises when someone with a good career gives up that career to have children or look after the family and, at the end of the marriage, is expected to take a low wage job and endure a level of "hardship" purely to achieve a clean break. It was noted that the higher courts do not appear to have considered compensation in the context of pensions. Women have been more likely to work in the public sector than men[2], and may have lost the opportunity to accrue a defined benefit pension as a result of giving up work to look after the family. However, the best a woman in such a situation is likely to achieve on divorce is "equality" with the husband's pension (whether in capital or income terms), even if her own pension would have been more valuable than his had she not given up work and he has a higher income, allowing him to accrue a better pension going forwards.

It was unclear how, if compensation was included within a checklist, that would actually affect the determination. We could not see how it would impact the determination of matrimonial or non-matrimonial assets. If it was to be reflected within need, it was unclear how it would be said to affect need, particularly within the proposed three-stage classification of need.

Q11: Do you think that domestic abuse should more readily be taken into account in relation to the distribution of assets by the court in financial remedy and cohabitation proceedings?

We do not. Please see response to Q14 below. While we consider domestic abuse to be serious and abhorrent, with potential long-lasting effects, we do not consider that the law on financial remedy is the appropriate place for a form of "compensation" scheme for the victims of such abuse, or to create some form of "fine" for the perpetrators of such abuse.

Q12: To what extent should domestic abuse, if established, influence the court's decision-making in financial remedy and cohabitation proceedings?

We do not consider that domestic abuse should influence the court's decision-making in terms of the substantive outcome of financial remedy proceedings. We consider that the approach the court currently takes, i.e.: where domestic abuse is so severe that it has had a detrimental financial impact, is correct and proportionate. Where, however, a perpetrator of abuse seeks to use legal proceedings as a way of continuing that abuse, we do consider that courts should be better equipped to prevent litigation, including the disclosure process, to be used in such a manner.

Q13: If domestic abuse were more routinely considered in financial remedy and cohabitation proceedings, how do you think this should affect the division of assets between parties? For example, what principles should guide how misconduct is reflected in financial outcomes and how should this be applied in practice?

As above and below, we do not think that domestic abuse should have an impact on the division of assets, other than in exceptional circumstances and where it has a proven detrimental financial impact. We do not consider that domestic abuse should be more routinely considered other than in terms of ensuring that the litigation process is not itself used as a tool of abuse.

Q14: If courts were more readily able to take domestic abuse into account in financial remedy and cohabitation proceedings, what impact do you think this would have on those proceedings (for example, the length of cases, evidential requirements, costs to parties and the overall experience of victim-survivors)?

We are concerned that if courts were able to more readily take domestic abuse into account that this would have an overall negative effect.

Reality of survivors' experiences

We are conscious that, in many cases, perpetrators of domestic abuse are able to manipulate their victims to the point where they end up 'retaliating', or the perpetrator fabricates counter-allegations. We are concerned that if parties are aware that the court will take domestic abuse allegations into account, this increases the chances of survivors being re-traumatised by having to give evidence in an adversarial context, and potentially face counter-allegations, with the litigation itself being used as a further form of abuse and control. We have in mind the progress being made through "child-focussed courts" in Private Law Children applications, to provide a better experience for survivors of abuse. It seems likely that any change to the law of financial remedy would take place within the current, more adversarial system.

We are also conscious that, for many couples, the available assets are insufficient to meet the needs of the parties and any children, let alone for there to be any excess above those needs. We would be concerned if any scheme operated in such a way that domestic abuse was seen as a "trump" card, such that the needs of the financially weaker party would no longer be met. Particularly where, in many different-sex relationships, the woman is the financially weaker party, threats that proceedings will be delayed, and costs incurred, while allegations of abuse are determined, may be used as a method to pressurise a more vulnerable party into an early (unfavourable) settlement.

Legal costs and delay

Where allegations are disputed, some form of fact-finding hearing would be a pre-requisite if one party were asserting that domestic abuse should impact the financial outcome. Any such hearing would incur significant legal costs through (i) the preparation of witness statements and replies in advance of the hearing, (ii) the gathering and preparation of evidence, including expert evidence, (iii) counsel and solicitor's fees for attending court. Allegations of abuse will very often result in counter-allegations which will then further polarise the parties' positions, but also result in further correspondence, evidence and lengthier hearings all of which would take significant time before the work can be done of quantifying the assets available to the parties and how they might be divided so as to meet needs/ share the marital accrual.

Given the delays the family courts are currently facing, we also have some concern that the courts would not have the judicial capacity to deal with these further claims and hearings.

Practical impact on proceedings

Whether or not domestic abuse is established at any initial fact-finding hearing, proceedings will then inevitably be continuing from a polarised and contentious position. The party found to have committed domestic abuse may stop engaging, or conversely if no domestic abuse is 'found' then the party alleging the same may feel disheartened and similarly cease engaging while the other party feels emboldened.

Having a 'no-fault' system of divorce removes any need to try to find fault at the end of a marriage, and acknowledges that relationships are complex, at times difficult, and have good times and bad. The no-fault system and the current approach to domestic abuse in financial remedy proceedings allows practitioners to 'nip in the bud' any suggestion that someone simply behaving badly or unkindly (i.e.: having an affair) should have an impact on the financial provision they are entitled to following a long relationship and requires parties to focus on the practicalities and next steps of dividing up the available assets. As family practitioners we often encounter clients who seek to argue they have been a victim of abuse when in fact the conduct in question has simply been bad behaviour arising when two people are no longer happy together. We are concerned that introducing a suggestion that domestic abuse should more readily be taken into account in financial remedy/ cohabitation proceedings will incentivise allegations of abuse and will lead to meritless/ petty claims which run up legal costs and polarise families. While all domestic abuse is abhorrent, we are conscious that some behaviour that one party may feel constitutes "abuse" is, on a more objective footing, at a lower level. In practice, we have tended to find that rather than re-visiting these incidents the parties (and their children) can be better served by ending their financial ties to each other as soon as possible and being able to move on with their lives and with financial independence.

Impact on cohabitation claims

One issue noted was that the factors proposed for cohabitation – such as stability, aren't necessarily there where the relationship is abusive – there is a risk that the "definition" of cohabitation would result in survivors of abuse not being able to bring a cohabitation claim.

On a separate note, we have concern about the Legal Services Payment Order system, by which financially weaker spouses seek assistance in respect of legal costs. The inability to pay for legal costs can be used as a form of control by a financially stronger party. Frequently, spouses have to turn to litigation lenders. It is unclear why, where there are clearly identified matrimonial assets (that will be subject to sharing) a financially weaker party must nonetheless turn to third party commercial lending and the associated interest that such borrowing accrues.

Q15: Do you agree that the language currently used to describe the threshold for considering misconduct in financial remedy proceedings (sometimes referred to as the "gasp factor") is inappropriate and should be replaced?

We do not agree with this proposition. While the phrase 'gasp factor' may not be considered suitable, the phrase is a shorthand to describe conduct which has been described as being 'obvious and gross' i.e. as reaching the threshold of being conduct which it would be 'inequitable to disregard'. We are concerned that the threshold for conduct to have an impact on the distribution of assets in financial remedy proceedings should remain at a high level. Otherwise, the practical reality would be that, in stark contrast to the introduction of "no-fault" divorce in April 2022, parties in financial remedy cases would be financially incentivised to refer to each other's "bad" conduct during the marriage. It would also risk the courts having to become involved in determining the financial "cost" of what would often be moral questions, i.e. what sort of conduct should be taken into account, where each party has engaged in different "bad" conduct, which is worse? It would be likely to lead to cases become far more complex, both in terms of the arguments advanced and the evidence presented, meaning they take longer to resolve and cost more in legal fees, as well as entrenching hostility between parties, which can directly impact on any children.

Q16: What forms of behaviour do you think should be considered as "misconduct"?

We consider that litigation misconduct should continue to be taken into account, albeit this should ordinarily be reflected in orders for costs. We also consider that, where one party uses litigation as a tool of oppression or abuse, the court should have available to it a better range of orders to help protect the more vulnerable party.

We agree with the current approach of the courts that conduct which has a direct financial impact may, in appropriate circumstances, be taken into account by the court. We do not, however, consider that non-financial misconduct (which does not amount to litigation conduct) should be taken into account other than in exceptional circumstances.

We consider that non-disclosure should continue to be taken into account by the courts. We take the view that the current treatment of non-disclosure, whereby the court may draw adverse inferences and seeks to ensure that any such inference is more favourable to the party who has been denied disclosure, is appropriate.

Q17: What sort of impact do you think misconduct should have on a financial remedies claim or a cohabitation claim?

Where a party has engaged in litigation misconduct, this could be reflected in orders for costs, or in stricter case management orders (for example, greater and more consistent use of "unless" orders and/or strike out powers).

Where the misconduct in question relates to non-disclosure, we agree that the court should be permitted to draw robust assumptions. We suggest that any such assumptions should always be designed to ensure that the party denied disclosure, should do at least as well in terms of outcome as they would, had disclosure been provided.

Where a party has engaged in financial misconduct, we consider that care needs to be taken to ensure that, insofar as it is taken into account, any investigation of that misconduct and any subsequent impact on an order of the court is proportionate. We agree with the current approach of the courts to arguments that a dissipated asset should be "added back", i.e. that for there to be an add-back, the dissipation would need to be wanton and deliberate.

Q18: If you believe misconduct should be more readily taken into account by the court, do you think misconduct which has financial consequences should be treated by the court in the same way as misconduct without financial consequences?

As above, we do not consider that conduct should more readily be taken into account.

Q19: Do you agree with the Government's view that the court should specifically be required to give consideration to pensions accrued during the marriage and pension needs when making financial orders?

We agree with this proposition. We consider that too frequently, the importance of pensions is not considered despite being an important resource to assist parties with meeting needs in retirement.

We consider that care needs to be taken to recognise that, while pensions are often illiquid and, for younger couples, cannot be accessed for some time, they remain valuable. We are concerned that, in too many cases, a parent with care of children agrees to remain in a property while the other retains their pension, often to the significant detriment of the party who remained in the home in the longer term.

Q20: Do you consider that these proposed safeguards will ensure individuals understand the consequences of their agreement and provide sufficient protection against coercion?

We agree that safeguards are appropriate, and agree that the requirements for contractual validity, sufficient notice and disclosure, as well as access to legal advice if desired are important safeguards. However, we question whether having taken legal advice (as opposed to having access to it) should be a pre-requisite to a nuptial agreement becoming binding. Many parties do not wish to take legal advice, whether due to cost, or any other factor. At present, since *Radmacher v Granatino* [2010] UKSC 42, the law does not consider taking legal advice to be a necessary pre-requisite. We do not consider it likely to be of benefit to couples to make taking legal advice a pre-requisite, as it risks those who choose not to do so, even if very well informed about their legal position, not being held to otherwise valid agreements.

In terms of protection against coercion, there will be situations (e.g. where the relationship is an abusive one) where the proposed protections may still not prevent coercion. We consider that the current requirement for it to be "fair" to hold parties to their agreement should be preserved, as permitting flexibility where the dynamic between the parties may not be sufficient to amount to duress, but would still lead to what was agreeing being considered to have been effected through coercion.

Q21: Do you agree with the Government's view that when considering meeting "needs" under the qualifying nuptial agreement model proposed, this should exclude discretionary needs, in the same way as proposed for cohabitants?

We do not agree with this proposal. While we can understand the Government's desire to limit any "top up" above the provision contained within a nuptial agreement to meet need, we consider this will not always be appropriate. Where parties have been married for a very significant period of time, and where great wealth has been accumulated (potentially during the marriage), we do not consider that it would be appropriate to have a statutory limit on the way that needs can be interpreted. Circumstances can change significantly following the signing of a nuptial agreement, particularly (but not only) where children are born. As per our response to Q7 above, we have concerns about the three-stage approach to need in any event. We consider that in lengthier marriages, limiting need to the first two stages could cause considerable unfairness to the financially weaker party.

Q22: Beyond housing, capital, income and pension, are there any other elements that you think should be included in, or excluded from, the assessment of "needs" within the context of qualifying nuptial agreements?

We consider that "needs" should be looked at within the context of the length of the marriage and available assets. Most nuptial agreements already serve to limit any sharing claim. Where very great wealth was generated entirely during a marriage, we do not agree that an appropriate outcome is one where not only does the financially weaker spouse lose their "share" of that wealth, but has their needs limited to the more basic elements of need. While we support nuptial agreements being able to limit or exclude sharing claims, and that an assessment of need may, where appropriate, be limited in light of the nuptial agreement, this should be a fact-specific determination, not a statutory limit.

Q23: Do you agree with the Government's view that the court should consider a pre-marital cohabiting relationship as counting towards the length of a marriage, where that relationship moves seamlessly from cohabitation to marriage?

We agree that pre-marital cohabitation should be taken into account as counting towards the length of a marriage, where that cohabitation is settled and there is a "seamless" transition from cohabitation to marriage. However, at present, the court considers a period of pre-marital cohabitation as counting towards the length of a marriage when determining whether assets are matrimonial or non-matrimonial – i.e. the period of cohabitation is directly relevant to the sharing element of a claim. The Government's proposal is that, within cohabitating relationships, any claim made at the end of that relationship would be limited to need. It is unclear how, on a principled basis, cohabitation leading to marriage should entitle a party to a share of assets accrued during the cohabitation, whereas the fact of that cohabitation would under the new statutory scheme, only create a claim based on need.

Q24: Which factors, as outlined by the Law Commission's 2007 report, do you think the court should take into account when assessing whether there has been seamless cohabitation prior to the marriage?

While we consider that the factors set out in *Kimber v Kimber* provide a useful starting point, as set out in our response to Q25 below, we have some concern that some relationships, particularly those entered into by younger couples, may inadvertently be classed as amounting to a qualifying period of cohabitation. We also have some concern that several of the proposed factors (e.g. stability) are not present in cases where there is domestic abuse. We would be concerned should any definition of cohabitation should not serve to exclude survivors of abuse, who are likely to be some of those most likely to require assistance at the end of a relationship.

Q25: Do you agree that cohabitants captured within the framework should be two people living together as a couple in an enduring family relationship?

The proposed definition targets romantic, committed, long-term, interdependent relationships showing stability and a shared life, mirroring the existing definition for adoption within existing legislation.

Relationships falling outside this definition would not benefit from the reforms, despite the government framing them as aimed at protecting vulnerable individuals.

This is a concern because vulnerability is arguably greatest in "uneven" relationships marked by a power imbalance and less mutual commitment, particularly those where abuse may be present. Those most in need of protection often least resemble the mutually committed ideal the definition favours, sitting uneasily with the aim of protecting survivors of abuse.

Q26: What factors, as outlined by the Law Commission's 2007 report, do you think the court should take into account when considering whether individuals are cohabitants?

We consider that, while factors such as living together for a sustained period and having an appearance to the outside world of being a couple are relevant factors, a reliance on factors such as stability may serve to weaken the position of survivors of abusive relationships, given those relationships are frequently characterised by instability and imbalance. We suggest that financial (or other) dependence by one party on the other is likely to be a factor in many cohabiting relationships, and one which can be particularly important in abusive relationships, where the perpetrator has sought to make the survivor dependent upon them.

Q27: Do you agree that those who are already married or in a civil partnership with each other, or those who are too closely related to each other to have married, should be ineligible for the framework?

While we agree that those who are already married or in a civil partnership with each other, or those who are too closely related to each other to have married, should be ineligible for the framework, we query whether there should be an additional category of "excluded" relationships, or whether there should be an additional requirement for eligibility, or a filtering mechanism such as the court considering that the relationship is one where the intervention of the court is required.

Q28: Do you agree that the minimum age to be eligible for the framework should be 18?

We had some concern about the minimum age being as young as 18. While on the one hand, some couples enter committed relationships (and have children together) at younger than 18, we are also conscious that in the current economic climate, many young people end up living together with a girlfriend/boyfriend in order to save rent and living costs. Those couples are less likely to have access to legal advice or to be able to afford to enter into the formal "opt-out" procedure proposed in the consultation. We would have some concern should such couples automatically be caught by the provisions of the new scheme. We considered whether a higher minimum age (e.g. 25, or even 30) should be imposed, but appreciate that this may cause injustice to other younger couples in which one partner may e.g. give up work to look after children.

Q29: Do you agree with the Government's proposal that couples without children must have lived together for a minimum of three years, before they can access the cohabitation framework? If you disagree with the three-year minimum duration period suggested above, what period would you propose having instead? If you disagree with the three-year minimum duration period, and chose a different period, please explain why below.

Views diverged amongst practitioners in our team. While some considered three years to be appropriate, others felt that a longer period, such as five, or even 10 years should be considered. A question arose as to whether, if a couple separated after two and a half years, then reconciled shortly afterwards, the "clock" would be reset in terms of the length of the relationship.

Q30: Do you agree that where cohabitants are living together and there is a child of the family, the minimum duration requirement should be disapplied?

We consider that there is a stronger argument for a claim where a couple has had a child together, given that the parent with care of that child will almost inevitably have their ability to achieve financial independence impacted. Again, there was some divergence of views within the group, with some considering that there should nonetheless be a minimum period of cohabitation for a claim to be brought by a cohabitant on their own behalf, as opposed to availing themselves of a claim under Schedule 1 of the Children Act 1989 where the couple has never lived together.

Q31: Do you agree that a time limit should be introduced to prevent claims being made after two years have passed since the relationship ended? If you disagree with the two-year period suggested above, what period would you propose having instead? If you disagree with the two-year period, and chose a different period, please explain why below.

We note that claims following the breakdown of a marriage are not time-limited. Were there to be a higher threshold requirement for a claim to be brought at the end of a cohabiting relationship, we consider that a longer period may be appropriate. However, we agree that a time limit would be appropriate to prevent claims being brought many years after a couple has separated and, in particular where either of them has since married.

Q32: Do you agree that "needs" should be the guiding principle the court follows for determining outcomes when cohabitants separate?

We agree that the "sharing" principle should not apply in cohabitation cases. "Need" as an approach has the attraction of focusing on the future needs of the couple (and any children).

Q33: Do you agree with the Government's view that the objective for meeting needs should be to do so in such a way as to enable termination of dependence and obligations as soon as is just and reasonable?

We refer to our response to Q10 above – while termination of dependence is an important and laudable aim, and we agree there should be a greater focus on independence when cohabiting couples separate than when married couples separate, there will be certain cases whereby too great a focus on independence serves to create hardship for one of the parties.

Q34: Do you agree that discretionary needs should be excluded from the consideration of needs for cohabitants?

We would repeat some of our concern about the approach to needs set out in our responses to Q7 above. In some circumstances, where one partner has given up work and raised children allowing the other to accumulate great wealth, it seems hard to justify need being limited to the lower levels of need – without the efforts of the homemaker, the financially stronger party would not have been able to accumulate the wealth that they did. For cases where the commitment of the financially weaker partner has not been so significant, limiting needs may be more equitable. We would refer to our response to Q37 below in respect of the question as to whether there should be a filter mechanism or threshold criteria for claims to be brought – if such a threshold was met, providing for discretionary needs may be more appropriate.

Q35: Do you agree that the court should be able to take account of needs arising from wider circumstances than the relationship (for example, serious health conditions or disabilities) when determining financial provision?

We consider it important that the court has a degree of flexibility when considering claims. In some cases, such as where a party has a disability, it may be appropriate for needs related to that disability to be met. We would, however, as set out in our response to Q37, be concerned that any new scheme should not be such as to allow financially stronger but vulnerable parties to be taken advantage of.

Q36: Do you agree there should be a checklist of the matters the court must particularly consider when applying the needs principle? You may wish to give reasons in the text box.

We agree that a checklist would be likely to assist the court and parties when considering a principled approach to needs.

Q37: Do you agree with our proposed approach in relation to remedies for cohabitants?

While we welcome the proposal that those exiting cohabiting couples would have the ability to make financial claims in order to meet their needs in appropriate circumstances, we have some concern that the current proposals create a blanket class of claimant, even where the couple may not have intended to create any form of legal relations. We have in mind that many cohabiting couples consciously choose not to marry, particularly if they have already been married before. Given the number of couples who erroneously believe in "common law marriage", it seems inevitable that not all couples will be aware of any new regime and may find that, having consciously chosen not to marry, they are nonetheless expected to make financial provision for their ex partner.

That is not to say that we do not support the introduction of rights for cohabiting partners. This is an area of the law that has been crying out for reform for many years. Where, for example, a couple has lived together for many years, one has given up a career to take care of the home and children and that relationship ends, we consider it wholly appropriate for the financially more vulnerable party to be in a position to make a financial claim.

However, if the criteria for a claim is as simple as having lived together for three years, we are concerned that claims may arise between couples who would never have intended their relationship to have such consequences. We have in mind, for example:

1. A couple who has lived together for four years. They are both in their early/mid 20s and decided to move into a flat together after university to save on rent. They had no idea that their relationship might lead to financial claims between them. One gets a good job, the other is still seeking a job. We would be concerned if, in such circumstances, a claim could be brought;
2. Parents purchase a flat for their child after university as a form of wealth-planning. The child's boyfriend moves in, as they are struggling to pay rent given the high cost of renting in the city. We would be concerned if, after three years, the boyfriend could make a claim particularly when the initial transfer of the property would, in matrimonial terms, be seen as wholly external to the couple;
3. An older person has exited a previous marriage and has adult children from that marriage. They intend the children of that marriage to benefit from any estate they may have on death. A younger carer moves in and the relationship becomes romantic. We would be concerned about the potential for abuse (on a par with so-called "predatory marriage") in such cases.

While we recognise that any form of "permission" stage to bring a claim would itself be likely to lead to further pressure on court resources and case management, we consider that care needs to be taken to ensure that, in ensuring those partners exiting cohabiting relationships who should be protected are provided with an appropriate remedy, the scheme is not cast so widely as to create injustice for those couples in which neither would have chosen such a scheme, or in a manner that the scheme itself would be open to abuse. We consider that there should be some form of filtering mechanism or threshold requirement, such as a requirement to satisfy the court that its intervention is necessary.

Q38: In relation to maintenance in particular, do you agree with the following statements. Please tick all that apply:

Maintenance should be awarded in exceptional circumstances (such as serious health issues or disability).

We have some concern that, particularly for older couples, the greatest need may be some form of ongoing provision (e.g. where only one party has a significant pension, and there is limited capital). While a strong steer towards a clean break may be appropriate, a threshold of "exceptionality" may go too far.

Any maintenance order should be time-limited, with no open-ended "joint lives" orders.

We do not agree with a requirement that an order *must* be time limited, albeit a strong steer towards time limiting orders would be appropriate. There may be circumstances where only a longer term maintenance order would be sufficient to meet a party's properly assessed needs.

A maintenance order term may not be extendable beyond the original period set by the court.

We do not agree with this proposal. The court must always engage in a degree of speculation when deciding what term to impose on an order for periodical payments. There may be circumstances (e.g. subsequent ill-health of a child) which significantly impacts the needs of the financially more vulnerable partner and which would properly justify an extension to a term of maintenance.

Q39: Do you agree there should be an explicit requirement that the court cannot award cohabitants a higher award than one which would have reasonably been made if they were a married couple divorcing?

We do not consider that such a provision would necessarily be helpful – there can be significantly different outcomes for spouses on divorce, depending on the circumstances. Likewise, depending on the circumstances, different outcomes may be appropriate in cases involving cohabitants.

Q40: Do you agree that all of the safeguards listed above should be required in order for an opt-out agreement to be valid? If you disagree, please explain which safeguards you would either add or remove and explain why.

We are concerned that many couples will be unlikely to either be aware of or understand the scheme, let alone to take active steps to opt out and it may also be expensive and time-consuming to opt out. Further, a cohabiting relationship may look very different in its first six months than after six years. To be fully effective, an "opt out" agreement would need to be reviewable after e.g. three years. In reality, we would not expect many couples to avail themselves of such procedures.

We consider that any opt out would need to be simplified and easily recorded, with appropriate publicly-available advice, in order to allow couples to make an informed choice without the process becoming sufficiently burdensome that couples fail to engage with it.

We also query what the position is in respect of existing relationships. The consultation is not clear as to whether the reforms are intended to be retrospective in effect (i.e. extending to existing relationships) or not. If they extend to existing relationships, many cohabiting couples will find that their partner already has the right to make a claim, even though neither partner expected or intended that. If the reforms do not apply to existing relationships, and only new relationships or those which subsist a further three years, there is a prospect that financially stronger parties in existing long relationships will seek a speedy exit in order to protect their financial position.

Q41: Do you agree an opt-out should not be able to prevent an application being made on behalf of a child?

We consider that Schedule 1 of the Children Act 1989 should continue to provide a remedy, regardless of whether couples have opted out of any claims they may have as between themselves on the ending of a cohabiting relationship.

Q42: What do you think is the most effective way to communicate these reforms to the public, particularly to help dispel the common law marriage myth and raise awareness of the new legal rights?

We are concerned that, particularly in its early days, a new scheme will not be well known about and may cause confusion or misunderstandings. Where a couple purchases or rents a property together, a requirement that they are provided with advice prior to signing a tenancy agreement or TR1 may be appropriate. This would not, however, protect couples who live together after one has already acquired an interest in or begun renting a property. While public awareness campaigns and information in schools would help, there is a risk that, as with the concept of "common law marriage", many people will fail to understand the law and its implications.

Responses to Q43 – Q49 have been provided by the Private Wealth & Tax (PWT) and the Private Wealth Disputes (PWD) team at Mishcon de Reya.

As a general comment, we do not recommend that cohabitees should have rights under intestacy because the current legal position is well established with the general public and introducing rights under intestacy for cohabitees would lead to more confusion, potential for abuse and fraud and a potential increase in claims under the 1975 Act from other claimants.

The Government should consider carefully what specific problems under the intestacy rules or 1975 Act claims a cohabitee regime would fix. We are unaware of a critical mass of cases, high profile or otherwise, of cohabitees who do not share children being economically disadvantaged under the intestacy rules, especially since the 1975 Act is well established legislation that is available as recourse in these circumstances. Although we are aware of confusion over rights on a separation during lifetime for cohabitees, this confusion does not, in our view, extend to rights on death. If anything, the general public are more likely to assume that cohabitees would not inherit on intestacy, and arrange their affairs accordingly.

We would also caution the Government against action that would discourage individuals from making a Will. Intestacy rules should not be considered a first port of call for the administration of an estate on death, and including cohabitees may discourage individuals from making a Will. Our legal system is such that the administration of an estate is easier with a Will than without, and we should be cautious about creating confusion between our common law system and a system equivalent to a civil law jurisdictions with well-established forced heirship regimes where Wills are less common. That said, if cohabitee rights are given during lifetime then we understand there may be a view that equivalent rights should apply on death to keep the systems aligned. If this is the case we recommend caution in implementing such rights, especially given the potential for abuse of vulnerable individuals and confusion for persons who may not have married deliberately in order to preserve their estate for their children from a previous relationship.

Q43: Should qualifying cohabitants receive the same intestacy rights as spouses or civil partners?

No, for the reasons above. If the Government decides otherwise then we recommend only if the couple share children, with a minimum period of two years cohabitation provided there is an evidenced intention to create a family unit. Cohabitees can currently bring a claim under the 1975 Act after two years – we would encourage the Government to consider whether there is any evidence that the 1975 Act is not fit for purpose for cohabitees.

Q44: Should qualifying cohabitants have the same priority as spouses and civil partners to apply for a Grant of Administration where their partner dies intestate?

No, for the reasons above. If the Government decides otherwise then it should be in accordance with the restrictions outlined above.

Q45: What, if any, are the other factors the Government should consider when deciding on the definition of a cohabitant for the purposes of intestacy rights?

We do not think cohabitees should have intestacy rights. If they do, then consider factors such as children and the existing framework under the 1975 Act for cohabitees plus other applicable case law such as *Nutting v Southern Housing Group Ltd [2004] EWHC 2982 (Ch)* with the evidential burden falling on the claimant.

Q46: What do you consider to be an appropriate minimum duration period where the couple do not have a child together? What are the potential unintended consequences of setting either a shorter or a longer minimum duration period?

We do not think cohabitants who do not share children should have intestacy rights for the reasons outlined above. We are especially cautious of the potential for fraud and abuse of vulnerable older individuals who lack mental capacity and may be unknowingly "cohabiting" with another individual who intends to make a claim after their death. That is a material risk regardless of the minimum duration period, but the risk lessens with a longer period and higher evidentiary criteria with the burden of proof on the claimant. An unintended consequence of a longer minimum duration period is that genuine couples who are cohabiting could be excluded from their partner's estate, contrary to their partner's intention. However, we invite the Government to research how many cases of this type have been brought and how commonplace this is. Our view is that most couples in such circumstances are aware that they should make a Will to provide for an unmarried partner, and the 1975 Act is an existing framework for recourse.

Q47: What do you consider to be an appropriate minimum duration period where the couple have a child together? Are there any specific risks or benefits you have identified that the Government should consider when setting a minimum duration period for couples with a child together?

If the Government do introduce intestacy rights for cohabiting couples who share children, we suggest a minimum duration period of two years but there must be evidence of intention to be a family unit. A benefit of a shorter period is that having a child together and cohabitation already reaches a certain intentional hurdle in most cases for a couple to have established a bond and expectation of support. One major area for consideration is the definition of "child" for these purposes: must they be genetically related to both parties? Adopted? What about instances of sperm or egg donation? Or cases where the child was from a previous relationship but the cohabitee raises that child as if they were their genetic or adoptive parent but has not formally adopted them?

Q48: Do you agree with the Government's proposal to extend eligibility for I(PFD)A 1975 claims where cohabitants have shared children?

No. See below.

Q49: Are there any wider impacts of extending eligibility for I(PFD)A 1975 claims where cohabitants shared children that the Government should consider?

We recommend an impact assessment addressing court capacity. There are already cases under the 1975 Act establishing whether a two year period of cohabitation has been reached, presumably additional rights for cohabitees will increase evidentiary claims for cohabitation, establishing a family relationship and the status of the children in the household.