A fairer end to relationships

A consultation on reforming financial remedies on divorce and strengthening protections for cohabitants at the end of their relationship

Resolution's response to the Ministry of Justice

Resolution's 6,500 members are family lawyers, mediators and other family justice professionals, committed to a non-adversarial approach to family law and the resolution of family disputes.

Resolution members abide by a Code of Practice which emphasises a constructive and collaborative approach to family problems and encourages solutions that take into account the needs of the whole family, particularly the best interests of any children.

Resolution is committed to developing and promoting best standards in the practice of family law amongst both its members and amongst family lawyers in general.

We also campaign for better laws for families and children undergoing family change. Most recently, this was captured in our Vision for Family Justice[1], which put rights for unmarried couples at the top of our list of policy asks. Our other main ask was funding for initial legal advice and signposting, given the significant impact in family cases of the legal aid cuts in 2013, an outdated means test and low legal aid fees.

Over the years we have given parliamentary evidence (both written and oral) on many occasions, most notably (in the context of this consultation) to the Women and Equalities Committee in 2021 in its inquiry *The Rights of Cohabiting Partners*. We also responded to the Law Commission's proposals in 2007 and 2011 in relation to (i) unmarried couples' rights on separation and (ii) intestacy rights of unmarried couples; and liaised with the Law Commission/fed into their thinking ahead of their financial remedies scoping report in December 2024. Members have also been involved in the Nuffield Foundation's *Fair Shares* project, intended to give an evidential basis to any financial remedies reform.

This response has been prepared by members of our Finance, Pensions and Tax, Cohabitation and Domestic Abuse Committees, with contributions from our International Committee. We support reform across all three areas in the consultation and in broad terms support the scheme of what is proposed, subject to some suggestions and practical fine-tuning.

For further information please contact Rachel Rogers, Head of Policy, rachel.rogers@resolution.org.uk

[1] Resolution-Vision-for-Family-Justice-full-221123.pdf

Part 1: Reforming the law of financial remedies on divorce

1. 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? You may wish to give reasons.

Yes (subject to the suggestions below)

Resolution is supportive of the continued application of the sharing principle in financial remedies cases and agree that its primary objective is to give parties equal benefit of matrimonial property. We agree that the starting point should be equal sharing.

However, we feel that the objective as set out in the consultation is too narrow for two primary (related) reasons:

- The main purpose of codification is/should be to make the law easier to understand. However, we are concerned that the objective for the sharing principle as worded will make it *less* clear and accessible. It does not allow for nuance, for example where an asset is only partly matrimonial, so the sharing principle only applies to part of it.
- Second, as was made clear by Moylan LJ in *Standish v Standish* [2024] EWCA Civ 567 at §166: "*The submission...that, once an asset is matrimonialised and treated as matrimonial property, it must be shared equally is unsupported by any authority and would be contrary to the objective of a fair outcome*."

The core reasons for the sharing principle not resulting in an equal split are compensation and contributions (needs being a separate principle). Whilst compensation appears now to be incorporated within the checklist to be applied, mandating that sharing is *only* ever equal does not allow for compensation to be reflected in the sharing exercise. Please see our response to consultation question 10.

Establishing a greater contribution is a key reason why it cannot always be said that sharing must be equal, particularly where an asset is for example pre-marital (even if mingled), or where it has been enhanced by the addition of non-matrimonial property.

Equal benefit does not always mean sharing equally. And sharing equally can lead to unfair outcomes; for example, in domestic abuse cases perpetrators sometimes spend matrimonial money during proceedings and preserve non-matrimonial resources, resulting in difficult arguments over non-matrimonial property. There can also be needs-based reasons why equal sharing of matrimonial property risks leading to an unfair outcome (for example, where the majority of the wealth is non-matrimonial but has enabled a high standard of living, or where a victim of domestic abuse has greater needs as a result of the abuse perpetrated which can't be satisfied purely by equal sharing of matrimonial property).

We are also concerned that the blanket approach of equality does not allow for situations where an asset which would otherwise be divided equally is divided unequally. An obvious example is a matrimonial business, for which the starting point is equality but which, if retained on divorce, might well be shared unequally in the future. This would be to reflect the fact that the individual who retains the business takes on all the risk and makes an unmatched contribution post-separation trying to build up the value of the business, along with potential arguments as to the liquidity of that business asset.

Fair Shares[2] is a project looking at how property and money is dealt with on divorce, led by Professor Emma Hitchings of Bristol University and funded by the Nuffield Foundation. Their report dealt sensibly with this point by saying as follows:

> *"In White v White, Lord Nicholls had stressed that equal sharing of the parties' available wealth should be regarded as a 'yardstick' by which to assess fairness, but not a 'presumption'.*
>
> *In Miller; McFarlane he elaborated on the rationale for the 'equal sharing' principle:*
>
> > *'[It] derives from the basic concept of equality permeating a marriage as understood today. Marriage, it is often said, is a partnership of equals. ... The parties commit themselves to sharing their lives. They live and work together. When their partnership ends each is entitled to an equal share of the assets of the partnership, unless there is a good reason to the contrary.'*
>
> *Both he and Lady Hale noted that equality reflects what most people regard as the fair outcome but that all must depend upon the circumstances of the case. In Charman v Charman (No 4), the Court of Appeal went further by holding that equal shares should be the court's starting point, or presumption. The parties may therefore be expected to assess their future needs in comparison with their available resources and see if equal division of the latter will suffice to meet those needs. In the relatively rare case where there would be a surplus left over after satisfying needs (and any compensation), equal division of the total pool may be the 'fair' outcome. But where the pool is inadequate to meet the parties' respective needs, an unequal division may be fairer. For example, a parent with primary care of young children, who is unable to work full-time, or earn as much as the other parent, may need all or a larger share of the proceeds of sale of the matrimonial home to rehouse her or himself and the children and manage on a lower income, than the parent who is able to work full-time and build up savings towards another home. In the shorter (if not longer) term, each spouse is likely to be financially stretched and 'fairness' is to be found in fairly allocating the diminution in living standards."*

[2] Fair-Shares-report-final.pdf

The report further made clear that:

> *"We do not discuss here the voluminous case law concerning how to determine which of the parties' assets should be 'counted' in the sharing exercise. Where needs must be satisfied, prior ownership by one spouse of individual assets is irrelevant if they are required to help meet the other's needs, but 'non-matrimonial' property, generated or acquired by one spouse before or outside the marriage may be ring-fenced from 'sharing' once needs have been met."*

Resolution therefore suggests that consideration be given to an objective more along the lines of the following:

> "***The objective for the sharing principle is to achieve fairness as between the parties in respect of matrimonial property, by adopting a starting point of dividing matrimonial assets equally***."

Such an approach (a) makes clear that sharing of matrimonial property is just a starting point and (b) in doing so, doesn't rule out in lay litigants' minds the possibility of unequal sharing of matrimonial property, or possibly even raiding non-matrimonial property, to achieve a fair outcome. It also allows for flexibility in dealing with cases where *Standish* – which has in many ways muddied the waters yet further – doesn't answer the matrimonial/non-matrimonial property question.

We take support for this from the judgment of Peel J in *BR v BR* [2025] EWFC 88, in which he held at §101:

"*I reject the submission that because W, as a spouse of decades standing, is entitled in principle to an equal share of assets, it is in some way discriminatory, or confiscatory, for her to receive less than half the assets by value. The function of the court is to achieve a fair outcome; fairness is not necessarily met by an equal share by value. The courts are alive to the type of asset, and the proposed structure. There are numerous reported cases where a discount from (say) 50% is justified by a carefully calibrated balancing exercise which reflects the different nature of certain categories of assets*."

2. 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? You may wish to give reasons.

Yes (subject to the suggestion below)

If the intention is to codify and clarify the existing law, it is right that the sharing principle should be the starting point, per years of case law post-*White v White* [2001] 1 AC 596, with a needs cross-check.

But Resolution would delete the word "*equal*" from the government's view of the court's starting point so that it reads: "***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.***" This would better codify the existing legal position. And please see the reasons set out in our response to consultation question 1.

We are also mindful of the need to ensure that any principle should capture the wide array of financial circumstances on divorce, and especially the more 'run of the mill'/modest asset case that *Fair Shares* highlighted. We know from *Fair Shares* that equal sharing is not the norm; only 28% of divorcees reported receiving around half (between 40 and 59 per cent) of the total asset pool. The majority shared out their assets unequally, reflecting need, individual circumstances and differing motivations amongst divorcees, such as wanting a clean break.

As such, *Fair Shares* cautioned against a presumption of equal sharing -

> *"The current broad discretion provided by the law to shape financial arrangements to meet the individual circumstances of each couple, appears both appropriate and necessary, given the range and disparities in wealth and earning capacity of the divorcing population, and couples' own priorities and circumstances.* ***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****.*
>
> *Instead, policy makers need to focus their attention on how to enable and encourage couples to take full account of all of their assets and their future prospects when deciding on what would be the appropriate outcome for them and their family. In particular, greater consideration needs to be given to how pensions may more readily be factored into the arrangements that couples make, if real fairness, as distinct from notional 'equality', is to be achieved."*

Resolution agrees with these sentiments. We know from *Fair Shares* that around one-third (36%) of divorcees don't regard themselves as having made any financial arrangement with their ex. It is important, given that only a third (32%) of divorcees reported that they had used some form of legal advice in relation to their finances during the divorce process, that any principles guiding the unrepresented majority should not risk them agreeing to an unfair outcome that does not meet their needs, especially in the more modest asset cases.

3. 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? You may wish to give reasons.

Yes

Resolution agrees that codification of the distinctions between matrimonial and non-matrimonial property, with clear statutory definitions reflective of *Standish*, would be helpful for couples. This will necessitate agreeing how to distil complex legal principles, the application of which many specialist practitioners disagree over, into easy-to-understand terms.

We suggest that in addition, any definition of non-matrimonial property should extend to assets accrued post-separation, albeit this is quite complex to define. This is not addressed in *Standish*. The label of post-separation accrual may attach, for example, to assets which represent something distinct from a marital asset, such as a business endeavour set up after the end of the marriage which does not amount to a rebranded continuation of a venture during the marriage.

The hardest issue to address in this context will likely be discretionary compensation, for example a bonus which relates to a period of work which was significantly after the date of separation (a period just after separation being unlikely to warrant ring-fencing as a non-matrimonial asset). The extent to which post-separation assets can be deemed non-matrimonial will need to be considered against the ongoing contributions made by the other spouse to the family, for example providing primary care for the children during the relevant period. This difficulty is identified in case law and there is a divergence of judicial opinion, with for example Mostyn J suggesting a 12-month rule in *Rossi v Rossi* [2006] EWHC 1482 (Fam), namely that any bonus that related to a period of work within 12 months of separation would still be considered matrimonial. However, in *H v H* [2007] EWHC 459 (Fam), Charles J took a more cautious approach to a rigid cut-off date and instead held that there should be a case-specific approach that assessed the source and character of the asset in question, in particular identifying whether the post-separation accrual is independent of the marital partnership or forms a continuum with the income-generating capacity of other opportunities developed during the marriage.

Resolution also suggests that it should be made clear that matrimonial property will include assets acquired during seamless pre-marital cohabitation; and that there will be circumstances where the former matrimonial home will be non-matrimonial at least in part (for example in the case of a short marriage, where there are inherited assets and so on).

Codification should allow sufficient flexibility to reflect that in cases where the relationship between the parties has been abusive or coercive, even after long marriages where they have made a significant contribution, victim-survivors often have few or no assets in their name because of the nature of the relationship between the parties. This can be the case even if all the assets have been generated during the marriage.

4. 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? You may wish to give reasons.

Yes

Resolution considers that the statute needs to make clear that non-matrimonial assets can become matrimonial, and that determining the nature of any given asset should remain a discretionary exercise.

This will require a clear statement of the factors which will be applied in considering matrimonialisation.

We note the current state of the law as set out in *Standish*. With that in mind, we suggest that the key factors which should be identified for considering matrimonialisation are:

- The parties' treatment of the relevant asset (i.e. how the parties have dealt with it), including whether or not it has been mingled with the family finances and thereby treated by the parties as shared, and the period of time over which they have done so; and their intentions in relation to the relevant asset where it is not possible to ascertain intention from their treatment of the relevant asset.
- The duration of the marriage.
- The source of the asset and point in time at which the relevant asset was (i) acquired; and (ii) introduced to the family.
- The extent to which the parties used and enjoyed the relevant asset (if it was an asset that could be used and enjoyed).

Again, all of this should be caveated that in abusive relationships, often very little is shared with the victim-survivors. This is particularly unfair when the victim's non-matrimonial property has been shared or spent during the relationship, but the perpetrator has kept their non-matrimonial property separate. Changing the approach to domestic abuse would ensure this is taken into account. As referenced elsewhere in this response, an October 2024 Resolution report, *Domestic Abuse in Financial Remedy Proceedings*, found that c.80% of professionals believe domestic abuse and specifically economic abuse is not sufficiently taken into account in financial remedy proceedings[3].

The factors suggested above are generally ones of observable fact and will be understood by parties. Resolution has some concerns that 'intention' is subjective and can often only be a matter of implication and/or inference. We therefore suggest that treatment of an asset should be the first consideration, with subjective intention only considered where it is impossible to ascertain intention from the objective assessment of treatment/conduct. We do have concerns that adducing and considering evidence of intention is likely to be both costly for parties and time/resource-consuming for courts,

[3] Domestic abuse in financial remedy proceedings

and in every case there would need to be robust, early case management to determine the strength of any evidence and the proportionality of adducing it, especially given that most cases will be needs-driven.

Indeed, Resolution does not consider that bringing in 'intention' as a standalone criterion would be helpful. This could lead to increased litigation reflective of the arguments in cases involving common intention constructive trusts and would run contrary to the general approach of the court which is not to undertake "*a rummage through the attic of the marriage*". It introduces the need to assess each party's subjective intentions, thereby increasing the likelihood that the court will be required to make a factual determination of the same, reducing the prospects of an early negotiated settlement (whether at a (private) FDR or otherwise), increasing litigation risk and increasing the parties' legal costs.

5. 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? You may wish to give reasons.

Yes (subject to the suggestions below)

For the reasons below, Resolution suggests that consideration be given to adding at the end of the overarching objective when making a financial order, '*as interpreted through application of the checklist and without discriminating against parties based on their role in the marriage'* so that it reads ***"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, as interpreted through the application of the checklist and without discriminating against parties based on their role in the marriage."***

At present, compensation is the third strand of fairness, and the current proposed wording of the overarching objective does not reflect that. We consider it does have to feature and given it is in the checklist in a revised guise of 'relationship-generated disadvantage', we consider the checklist should be specifically identified in this statement of the overriding objective.

The majority of people looking at finances on divorce will not seek or take advice[4] and so it is important to imbue the message that it is through application of the checklist, principles and reference to the relevant factual matrix that fairness is achieved, and the parties' roles in the marriage cannot be weaponised. This is of particular importance for victim-survivors of domestic abuse; perpetrators will often attempt to use the factual matrix or their version of events to their advantage, seeking to ring-fence or limit the share of assets/income by diminishing the role or contribution of the other party (i.e. if a party has not worked, even in circumstances where this has been at the perpetrator's insistence).

[4] Per *Fair Shares,* chapter 4.5

6. 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? You may wish to give reasons.

Yes, but only in part

Whilst Resolution supports enabling both parties to transition to independence if that can be achieved, our view is that protecting the vulnerable means that there should be some reference to *fairness* and *without hardship* in the objective for meeting needs. We would ask that the government gives further consideration to this.

The lack of reference to hardship, or fairness, risks being extremely prejudicial to financially weaker parties, and victim-survivors of domestic abuse, generally women. And we are worried about how "*as far as resources allow*" may be interpreted by some unrepresented parties.

The current state of the law is that parties should transition to financial independence without undue hardship, but Resolution would support now simplifying that by omitting reference to 'undue' (or any other adjective) attached to 'hardship', for the benefit of those without legal advice. Whilst invariably there will be considerations of hardship as part of fairness, the extent of hardship will inevitably depend on the facts of the case, for example the presence of children and the duration of the marriage.

7. Do you agree with the government's view that the court should apply the needs objective using a three-stage hierarchical approach? You may wish to give reasons.

No

Whilst we understand the government seeking to set out an explanatory approach to addressing needs, Resolution's view is that dividing needs into two different stages as expressed in the consultation paper (after the 'first consideration to the welfare of any children' stage) is unhelpful and risks making settlement of cases more difficult. It creates a grave risk that in needs cases, it will be increasingly argued by the payer that the financially weaker party should only have basic/essential needs met for house and pension, with no/restrictive provision for anything above this. This risks worse outcomes for the financially weaker party than the current system and has echoes of the pre-*White v White* "reasonable requirements" approach. In a nutshell, the concern is that in the modest money cases, payers may feel that they only have to meet 'needs lite'; and in the bigger money cases, notwithstanding any standard of living cross-check, the financially weaker spouse may not feel able to pursue level 3 needs, even if they were enjoyed regularly and not viewed as luxuries within the particular marriage.

The approach as proposed by the consultation may result in the needs of married parties without a qualifying nuptial agreement (QNA) being treated similarly to those of cohabitants, which would not appear to be the intention.

It may also lead to an increase in litigation concerning the classification of needs, with parties running Final Hearing arguments about what defines a discretionary need including detailed analyses of the parties' spending during the marriage, with a consequential impact on court resources and the public purse.

If the thinking is to reinforce the fact that only narrower needs will be available to unmarried couples (and not the discretionary/stage 3 needs open to married couples), Resolution has set out its view about this proposal in the context of unmarried couples in response to question 34. Resolution feels that there are more nuanced ways of achieving this. Of course, in terms of distinguishing features to reinforce a difference model, unmarried couples will not be able ordinarily to share resources built up during a relationship; will be able to avail themselves of opt out; and will only be able to claim 'spousal' maintenance in exceptional circumstances (though see the Resolution view on this suggestion in reply to question 38 below).

In summary, married couples should not, in our view, be worse off under any new scheme than under the existing law. Approaching the needs objective as presently suggested risks exactly that. There are other ways (as outlined above) to distinguish between rights for married and unmarried couples, should policymakers wish.

8. Do you agree that the stages should be focused on the following:
1) first consideration to the welfare of any children of the family;
2) capital and income needs, including their housing and pension needs in keeping with the standard of living during the marriage; and
3) where resources allow, discretionary need, in keeping with the standard of living during the marriage?
You may wish to give reasons.

No

Please see our response to consultation question 7.

Instead of placing a hard dividing line between core and discretionary needs at stages 2 and 3, stage 2 should reflect that needs exist along a continuum, to be viewed in light of not just the standard of living, but the other checklist factors (see our responses to consultation questions 9 and 10). Resolution considers that legislation should give priority to the core needs for housing and income now and in the future, including in retirement. It should also be careful not to lead to outcomes which discriminate against children, who risk seeing a marked disparity between their parents' post-marital standard of living on these proposals.

We note that while question 8 specifically refers to *"discretionary need"*, page 43 of the consultation document summarises discretionary need as being *"lifestyle 'luxuries'"* to include *"expensive cars or designer items"*. We consider that there is a significant gap between discretionary costs – which in lower asset/income cases can be the annual summer holiday – and luxuries such as expensive cars. If the three-tier approach was to be utilised, we would suggest that this wording be clarified.

Resolution is further alive to the possibility of regional disparities arising in treatment of stage 3. There already exists a different approach to needs between courts in the South-East (which see more high net worth cases) and those in other parts of the country. The presence of a third stage may be a significant hurdle to overcome for cases outside of the South-East.

The reference to standard of living in the definition of the stages risks elevating that factor in the checklist above others. That could lead to additional litigation as to what the standard of living was, with parties having to go into more detailed evidence regarding their lifestyle than is currently required.

Resolution considers that a two-stage hierarchical approach would be preferable:

1) first consideration to the welfare of any children of the family; and
2) capital and income needs, with priority given to housing and income now and in the future, including in retirement where appropriate in the individual case, viewed in the context of the factors in the checklist.

We consider that this formulation would provide codification and a greater degree of certainty for people going through a divorce and note that this is consistent with the recommendations of the Law Commission Report *Matrimonial Property, Needs and Agreements*:

- *1.24 We have not recommended any change in the law relating to financial needs. The courts have operated the law in a way that generally yields the most practicable outcomes in the circumstances and we have no quarrel with this. Nor had the majority of our consultees. Our consultation revealed no consensus supporting a change in the law here, whether for a change in levels of support to be provided between former spouses or for the introduction of any arbitrary time limits to the availability of that support.*
- *1.25 However, more is needed to make the law, and the courts' practice, transparent. We recommend that the meaning of "financial needs" be clarified in guidance to be published by the Family Justice Council, in order not only to ensure that it is applied consistently by the courts across the country but also that people without legal representation have access to a clear statement of their responsibilities and of the objective that their financial settlement should be achieving. That guidance will be addressed primarily to the courts and legal advisers, but it should also be published in a version suitable for the assistance of litigants in person.*

Resolution also considers that it may be helpful to state explicitly that parties' needs for income in retirement should be met, rather than explicitly setting out that pension needs must be met. This would bring into the ambit of the legislation cases where the parties do not have traditional pensions, but one party has e.g. investment properties designed to produce income in retirement. This reflects the recognition in *Matrimonial Property, Needs and Agreements* at Chapter 3 that needs includes *"provision for old age"* rather than specifically a need for a pension.

We agree with the proposition that *"it should be made clear that needs are not limited to those arising directly from the relationship, but all needs including wider circumstances, such as illness or disability."*

If the government decides to proceed with the proposed three-stage hierarchical approach, worked examples of needs will be essential, especially for the benefit of those without legal advice and non-legally trained family mediators, as well as in an attempt to provide judicial consistency around the country (and therefore greater certainty for couples as to how the court may approach their case). Resolution would wish to see the threshold for discretionary needs set highly, to reduce the risk of even the most basic needs being 'squeezed'.

9. 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? You may wish to give reasons.

Yes

Resolution supports the retention of the s25 factors in a checklist to be applied to both needs and sharing cases.

We are pleased that a degree of judicial discretion will be retained to balance fairness and certainty for divorcing couples, it being recognised in *Fair Shares* that the "*current broad discretion provided by the law to shape financial arrangements to meet the individual circumstances of each couple, appears both appropriate and necessary"*.

We suggest that consideration be given to whether a specific reference to the '*existence of any written agreement between the parties'*, such as a nuptial or separation agreement (which is not a valid QNA), or a cohabitation opt out agreement, should be added to the checklist of factors. Please also see our response to consultation question 20.

10. Do you agree that this checklist should include an explicit reference to any disadvantage suffered as a result of the relationship? You may wish to give reasons.

Yes

Resolution agrees with this approach and endorses the idea of treating compensation as one of the factors to be addressed in each case, rather than a competing limb to the sharing/needs approach as under the current system.

There is a clear link between compensation as a factor and greater recognition of conduct, including the impact of domestic abuse on victim-survivors. This underscores the importance of compensation being retained in some guise.

We note that the consultation states that a compensation factor *"can further aid clarity as to why the court will meet needs, including discretionary needs, in higher value cases."* We would caution that this seems to us to be unhelpful as it opens the door to arguments that discretionary needs can only be met where disadvantage can be evidenced, which may be regressive.

11. 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? You may wish to give reasons.

Yes[5]

Resolution welcomes the government's consultation on this issue and supports its desire to achieve fairer outcomes for victim-survivors.

As explained in our 2024 report[6], Resolution is clear that the current approach of the courts to s25(2)(g) of the Matrimonial Causes Act 1973 (i.e. conduct) leads to unfair outcomes for some victim-survivors of domestic abuse. Married victim-survivors can be disadvantaged by the practical operation of the law at present; unmarried victim-survivors currently have no remedy at all (a point to which we return below).

Resolution's survey of family law professionals in 2024 found that c.80% of professionals believe domestic abuse (including the long-term impact of economic abuse) is not sufficiently taken into account in financial remedy proceedings. Professionals are even more concerned when it comes to unmarried families, with 87% saying that the long-term impact of domestic abuse is not sufficiently taken into account in TOLATA proceedings between cohabiting couples, and 90% saying economic abuse is not sufficiently taken into account.

Family justice professionals have long been familiar with parties who attempt to prevent their former partners from receiving a fair financial settlement on separation.

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[5] Here, and in response to all of the questions at 11-18, we feel supported by the contents of the Nuffield Foundation report, *Dividing property and finances on divorce: what happens in cases involving domestic abuse?,* published in November 2024 [Final-Report-Dividing-property-and-finances-on-divorce-What-happens-in-cases-involving-domestic-abuse.pdf]

[6] https://resolution.org.uk/campaigning-for-change/dafpr-report/

Withholding funds, hiding assets, delaying, bullying, and breaching court orders are persistent problems that professionals and their victim-survivor clients must grapple with. In some cases, assets are not willingly shared between perpetrator and victim, but the victim's non-matrimonial property is spent on meeting the family's needs. It is only in recent years that we have better come to understand that behaviour during litigation is post-separation domestic abuse.

The Resolution report was supported by the conclusions of the Fair Shares research finding that, "*Up to five years after their divorce, female domestic abuse survivors continued to be more likely than other women to be in financially precarious situations*''. It concluded that "*Domestic abuse survivors were more likely than other divorcees to perceive that their ex-spouse came out better financially from the divorce"*[7]. And the Domestic Abuse Commissioner subsequently commented in their *Everyday business* report in October 2025, that the current approach to practice in the Financial Remedy Court results "*in many orders being made that expose adult and child victims of abuse to the risk of further abuse and material harm.*''

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

Where domestic abuse has occurred, it should generally be considered in decision-making in financial remedy and cohabitation proceedings

Resolution supports the government view that domestic abuse/misconduct should be treated consistently by the Family Courts, across both financial remedies law and its proposed cohabitation framework. The misconduct principle should benefit all survivors of domestic abuse, irrespective of their relationship status, in terms of meeting needs. Victim-survivors of abuse may struggle to achieve financial independence as quickly as other parties, irrespective of their relationship status.

The government may also wish to consider whether both financial remedy and cohabitation law should make clear that perpetrating abuse should not lead to a better outcome for the perpetrator, to avoid the current costly arguments put by some divorcing perpetrators that they 'need' more of the family money after, for example, they have lost their job following a conviction.

Resolution has concluded that there should be statutory reform to s25(2)(g), so as to preserve the sub-section on conduct, and for there to be a separate sub-section in respect of domestic abuse.

Resolution has debated that new sub-section reading :

"any harm suffered by a party as a result of domestic abuse"; or

[7] Dividing property and finances on divorce: what happens in cases involving domestic abuse?, Chapter 6

"domestic abuse unless it is fair to disregard it".

Resolution does not agree that domestic abuse should only be considered in exceptional circumstances and/or where it has had a clear financial impact. The reality of the prevalence of domestic abuse is that it is very hard to persuade a judge that the abuse experienced is "*exceptional"*. Moreover, abuse that is not exceptional can still have long-term, devastating, consequences on the victim of abuse.

We also believe that only considering domestic abuse where it has had a clear financial impact would continue to generate unfair outcomes for victim-survivors. Abuse cannot always immediately be identified as such and the financial impact may take a long time to assess and become clear. Victim-survivors are rarely able to evidence that financial impacts are directly and specifically caused by abuse, despite research consistently showing that abuse has a long-term financial impact. The current approach has acted as a bar to women, and children in their care, who are largely the victims of domestic abuse. And, in our members' experience, the requirement for a financial impact invariably prevents abuse being taken into account when the victim-survivor is the person who is generating the money.

We agree therefore with Cusworth J in *LP v MP* [2025] EWFC 473 that ''*there is a real risk of unfairness to victims of violent or coercive controlling behaviour, if the lack of readily quantifiable financial loss prevents the courts from even considering the fairness of taking their assailant's behaviour into account in determining the outcome of a financial remedy application. Such behaviour may well have hard-to-predict but potentially far-reaching consequences, in some cases for the victim's prospects of achieving self-sufficiency, in others for a fair financial outcome in all of the circumstances. That does not mean that the fact of such behaviour will inevitably lead to a different award, but in the right case, it clearly should do.''* And we also agree with Master Bell in Northern Ireland who said "*to exclude genuine cases of coercive control from amounting to conduct in ancillary relief proceedings would be to fail to do justice to women for it is women who are disproportionately the victims of such conduct", Seales v Seales* (Ancillary Relief: Murder and Coercive Control as Conduct) *[2023] NI Master 6.*

13. 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?

Most financial remedy cases before the court are needs cases, where judges struggle to stretch available resources between two separated people. With a finding of domestic abuse/misconduct, it would be open to the court to prioritise the needs of the victim-survivor to ensure their need for housing, income or pension security is met. There are already principles in case law:

- Coleridge J's judgment in *H v H* [2006] 1 FLR 990 that "the proper way to have regard to the conduct is as a potentially magnifying factor when considering the wife's position under the other subsections and criteria.' This approach was more recently accepted by Macur LJ sitting in the Court of Appeal in *Goddard-Watts v Goddard-Watts* [2023] EWCA Civ 115.
- As part of an analysis of relationship-generated disadvantage, which Baroness Hale identified as part of the rationale of distribution in *Miller/McFarlane* [2006] UKHL 24.

Resolution supports the suggestion that a finding of the presence of domestic abuse should be treated as a lens through which a fair outcome is assessed. For example, there might be a greater award of pension assets to reflect that the victim-survivor is less able to create their own pension savings.

In addition, the court should be able to change the structure of the award following a finding of domestic abuse/misconduct in order to prioritise the needs of the victim-survivor. For example, maintenance orders are notoriously difficult in abusive relationships; perpetrators often stop paying spousal maintenance, and/or reduce the level at which it is paid to reflect their view that for example the victim owes them money, is in a new relationship and/or is/should be working. They do not go through court channels to apply to vary, leaving the victim-survivor with the overwhelming prospect of having to apply to enforce the maintenance order and disproportionate costs. In appropriate cases, following a finding of domestic abuse/misconduct, the Court could capitalise maintenance in circumstances where they would not usually do so, to protect the victim-survivor.

In respect of sharing cases, where there are more than sufficient assets to meet needs, we would support victim-survivors having a greater share of the matrimonial assets. There are already examples of such outcomes. In *LP v MP* [2025] EWFC 473, Cusworth J reduced the wife's sharing award by 40% to meet the justice of the case, including her "*deplorable conduct*". In *Gohil v Gohil & Ors* [2025] EWHC 3646 (Fam), Williams J increased the wife's notional 50% share of the matrimonial assets to just under 70% to reflect the husband's egregious conduct over a sustained period.

In respect of cohabitees (who have had a religious marriage) and married couples, Resolution supports greater case management and powers to combat dowry abuse, where the dowry is not returned to the wife. A finding of misconduct/domestic abuse in cases involving a dowry should cause the court to strive to make an order that fulfils the intended purpose of a dowry (to provide financial security to the bride upon breakdown of relationship, or that it will be inherited by the next generation when the wife dies) and that it is returned to the paying party (usually the bride and her family), rather than ruling consideration of the dowry out of proceedings as 'disproportionate'. For migrant women, this can be the only asset they have to meet their needs on separation.

As referenced elsewhere, the misconduct principle should benefit <u>all</u> survivors of domestic abuse, irrespective of their relationship status, in terms of meeting needs. In cohabitation proceedings our view is that the court should have the power to adjust any award to reflect a fair outcome in the particular circumstances of the case. Victim-survivors of abuse may struggle to achieve financial independence as quickly as other cohabitants. It should be open to the court where possible to prioritise the needs of the victim to ensure their needs for housing, income and/or pension security are met.

Resolution supports the indication that further consideration will be given to judicial powers, including in respect of enforcement issues for both cohabitees and married couples.

We would urge the government to give careful consideration to the inclusion of proposals along the lines below in future legislation:

- Legal services payments orders:
    - should be available to all separating families, including unmarried couples;
    - must be available for enforcement proceedings; and
    - in respect of married couples, the requirement to seek a loan before applying for a LSPO, where there are funds, should be removed, by amending s.22ZA ss (3) and (4) MCA1973 (given the huge expense, and additional worry for the victim-survivor, such loans attract). Preventing a former partner from having representation in financial remedy proceedings by withholding available funds, especially those generated within the marriage, and forcing the financially weaker party to take on high interest litigation loans or other commercial debts can fall within the definition of economic abuse set out in the Domestic Abuse Act 2021. The court should have regard to the principle that all assets, regardless of their source, can be utilised to meet parties' needs, including for legal fees and maintenance pending suit/interim periodical payments. This could be in the form of a presumption that each party should have access to marital assets during the proceedings, to avoid unfairness through the imbalance of access to assets. In the event that marital assets do not exist, the presumption should be that any other funds should be made available where one party cannot otherwise meet their needs and legal fees.
- A presumption that material sums dissipated or transferred to third parties in the 3 years prior to separation will be treated as part of the dissipating party's assets and will be taken into account, regardless of whether the court considers it is able to void the disposition. That is not to say that parties have to spend exactly the same as each other, or that they cannot meet specific needs in the lead up to, and after, separation. However, the current high bar for 'add-backs' in the case law means that the economically abusive party can dissipate family money without real fear of recourse.
- Changes relating to interim remedies, especially:
    - giving the court the power to order interim lump sums to prevent one party being in control of all family money during proceedings, and able to spend the family money whilst the other person has no access and pressure them to agree an unfair settlement; and
    - power to make interim orders for sale, particularly where there are mortgage arrears accruing.

- A presumption that lump sums will have a default sale provision for other assets.
- Giving the court the power to:
  - separate and allocate joint debt; and
  - permit changes to a mortgage product during proceedings, or to reallocate the payments to prevent mortgage abuse.
- Making it clear that parties who fail to disclose, or who create false liabilities, should not benefit from their misconduct as per Mostyn J in *NG V SG (Appeal: Non-Disclosure)* [2011] EWHC 3270 endorsed by the Court of Appeal in *Moher v Moher* [2019] EWCA Civ 1482.

More early judicial scrutiny and awareness of abuse would help ensure that default provisions for non-compliance could be built into orders, and/or funds could be set aside if enforcement measures are anticipated, and/or the Court should be given greater coercive powers (in line with the Law Commission recommendations) to ensure compliance.

Resolution welcomes the government's consultation on this issue, and the indication that further consideration will be given to procedural and particularly enforcement issues and would be keen to engage further as plans evolve.

14. 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)?

Resolution has reflected upon judicial concern in certain quarters that giving greater weight to domestic abuse will have an impact on Court resources, balancing that with professional concern about the perceived lack of fairness of outcomes for domestic abuse victim-survivors at present.

Resolution cautions against the argument that if courts are able more readily to take domestic abuse into account, this will inflame litigation to such an extent that it would not benefit victim-survivors to have it taken into account, or that it will increase the backlogs in the system. Our members would say it is frequently the cases where there is a coercive relationship that require extensive case management and judicial determination to secure a share of family assets for the victim-survivor. Any short-term disruption caused by placing greater emphasis on domestic abuse should be outweighed by the reality of the prevalence and impact of abuse being experienced and the longer-term benefits of meeting the needs of survivors of domestic abuse without further traumatising them

Domestic abuse issues are already in cases before the Financial Remedy Court, impacting on the length of cases and the costs of and overall experience of victim-survivors. Coercive and abusive dynamics are often evident within financial remedy proceedings, because it is those cases where there often have to be contested applications for disclosure, interim maintenance, litigation funding, or applications in respect of dispositions or dissipation of assets, or assets held in complicated structures to protect against claims.

Moreover, Resolution members would say that it is often the cases where there are abusive dynamics that require judicial determination to secure a fair share of the family assets for the victim-survivor anyway. Our view is supported by the findings of *Fair Shares* that "*Arrangements for divorcees reporting domestic abuse were far more likely to have involved contested court proceedings, with 17 per cent of female survivors reporting that their case had been determined by a judge and a further five per cent settled after financial proceedings have begun. This compares to only four per cent determined by a judge and three per cent settled after proceedings began for other women.*"

One of the benefits of reform for all parties would be to make clear the process to be adopted where domestic abuse is a factor before the court. We envisage that there would likely be an evolutionary period and then the law and practice would settle making cases easier to resolve both in and out of court. Judges would gain an increased understanding of abuse and sense of how to apply discretion based on the circumstances of abuse.

We believe that the more routine consideration of domestic abuse and assessment of fairness through that lens, removing the current approach of exceptionality, would eliminate arguments and fact finding over whether the current very high threshold is met; give victim-survivors more of a sense of justice that they have been able to raise their experiences and been properly heard; and assist our members instructed by perpetrators to provide hard, but important advice, if there could be financial consequences for them.

Whilst allowing some flexibility, we suggest that any domestic abuse should be taken into account at the first opportunity in proceedings, possibly by amending the Form A and/or Form E in financial remedy cases and with the judge assessing the evidence required on a case-by-case basis at the first composite hearing. In most cases, any domestic abuse could be dealt with alongside other factors in a narrative statement with exhibits. It would just be part of the evidence before the court at each stage and determined at the final hearing if the case has not been able to settle. An early conduct hearing would not usually be needed, but may be in some situations.

Resolution cannot see the need for 'fact-finding hearings' when resolving family finances, save in exceptional circumstances. Resolution calls for automatic disclosure of relevant evidence and findings from children proceedings to financial remedy or cohabitation proceedings.

Generally, domestic abuse could be dealt with alongside other factors in a narrative statement with exhibits. It would just be part of the evidence before the court at each stage and determined at the final hearing if the case has not been able to settle.

Victim-survivors would have more of a sense of justice that they have been able to raise their experience and been properly heard; and assist our members instructed by perpetrators to provide hard, but important advice if there could be financial consequences for them.

Resolution does not accept the concern that parties would not be able to settle their case if domestic abuse was taken into account. Most children cases involve allegations of abuse and yet they settle. There is sometimes corroborative evidence of abuse from other family or criminal proceedings to inform the court, negotiations or other out of court processes.

The government may wish to consider the approach and impact of this type of reform in other jurisdictions. For example, in Australia as from 10 June 2025, family violence is now a mandatory consideration when assessing parties' financial contributions, future needs, and applications for spousal maintenance, to acknowledge that violence can profoundly affect a party's economic position beyond separation. Historically, as here, family violence was only taken into account in limited circumstances, such as where the violence caused physical injury or illness affecting earning capacity, or where it could be shown that the violence had a direct and measurable financial impact. The recent reforms formally codify the consideration of family violence in this process, such that courts may now take family violence into account when assessing each party's contributions, and/or considering current and future needs, reflecting growing recognition that family violence can significantly affect a person's ability to contribute to a relationship and their financial position after separation.

We understand from recent discussions we have had with Australian practitioners on the first anniversary of the coming into force of the new law that, to date, this has had little detrimental impact on the volume of cases coming before the Family Court of Australia and parties' ability to settle cases.

15. 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? You may wish to give reasons.

Yes

The "gasp factor'' test is from 2007, before the modern definition of coercive and/or controlling behaviour became central to the concept of domestic abuse. The "gasp factor'' applies an outdated understanding of domestic abuse, where there is a scale with serious physical violence at one end, and emotional abuse/coercive controlling behaviour at the other end. It is no longer appropriate, given our now greater and more sophisticated understanding of abuse, to retain the "gasp factor" test; and it means that the Financial Remedy Court is out of step with the rest of the Family Court.

Coercive and controlling behaviours can be subtle yet insidiously harmful. The impact on an individual's life, confidence, independence, earning capacity and health can be devastating and irreparable, without the abuse itself reaching the 'gasp factor' threshold. As the consultation paper says, in their scoping report on financial remedies on divorce the Law Commission said, "*we also observe that the frequency with which judges deal with allegations of domestic abuse may result in abusive behaviour being less likely to cause a "gasp" than it otherwise might.*" (para 9.93).

16. What forms of behaviour do you think should be considered as "misconduct"? You may wish to give reasons.

Whilst it would be helpful for the law to state clearly what forms of behaviour will be considered conduct, Resolution would caution against a non-exhaustive statutory list.

We consider that misconduct should include:

- Transfer of family assets to third parties, including businesses or trusts;
- Dissipation of assets that might otherwise have formed part of the assets available for division;
- False liabilities alleged that create 'liabilities' to family members, businesses or business partners to reduce the available pot;
- Deliberately stopping earning, or a party destroying their income or earning capacity to prevent it being taken into account in how the finances are approached;
- Failure to give full and frank disclosure of finances;
- Litigation misconduct (though it may be more appropriate for this to be visited in costs awards, more robust use of which should be made by the Family Court in appropriate circumstances in financial remedies cases; this is likely a matter for secondary legislation); and
- Such other conduct which it would be unfair to ignore (which may be regarded as clearer language than 'inequitable to disregard').

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

This will depend on the effect of the conduct on the other party in the given case. We agree with the Australian approach that it is best looked at through the lens of assessing each party's contributions, and/or considering current and future needs, in the context of the abuse experienced in the individual case.

Before that, at the computation stage, regard should be had to all of the factors set out in response to question 16, and the proposals set out in response to question 13 above.

- Transferring or dissipating sums should be treated as part of the perpetrator's assets – or at least the bar should be lowered for when they are taken into account;
- Failure to give full and frank disclosure should sound in costs;
- It is not uncommon to find that perpetrators of abuse present a false narrative about their finances, with some willing to stop earning, or destroy the value of the family business, in order to stop the victim-survivor having a greater claim to the assets. The court should be empowered in those circumstances to draw robust inferences about earning capacity (as opposed to just examining income) and the reality of ownership of assets, and thereafter to be able to change the structure of the order to ensure the victim-survivor receives their fair share.

When it comes to legal costs, there is often a legitimate reason why the party who does not have oversight or control of the assets, has to spend more money to receive a fair share. Victim-survivors of abuse often have to make applications for disclosure, or legal funding, or maintenance during proceedings which can lead to them having increased costs because of the perpetrators refusal to allow them evidence about the finances or interim funding. This should not be penalised in the final outcome as 'litigation conduct'.

We would also wish to look to Australia to develop thinking about the impact of post-QNA/pre-nup/opt out agreement abuse/misconduct, on the weight given to any such agreement at the point of relationship breakdown. There will certainly be circumstances in which, as a result of such behaviour between the date of the agreement and the relationship breakdown, the agreement in question should be given lesser (or no) weight[8][9].

18. 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?

It depends on the circumstances of the particular case.

Resolution campaigned for and welcomed the introduction of no-fault divorce. We agree with the government that the reasons for the breakdown of a marriage should not be considered relevant within financial remedy proceedings. In our view, there is a clear distinction to be drawn between i) ending a marriage and not allocating blame for that which, for example, made it harder for people to make agreements on finance and other issues and ii) domestic abuse, including economic abuse or misconduct that has removed assets and income from the family pot or otherwise had a material impact that needs to be taken into account to achieve a fair outcome.

[8] Jacky Campbell, November 2025 The Impact of Family Violence on Financial Agreements

[9] Jo Edwards and Polly Calver, March 2025 Domestic Abuse, Nuptial Agreements and Financial Remedies: A Cultural Shift?

The current jurisprudence which stems from *Wachtel v Wachtel* [1973] EWCA Civ 10 and *Miller v Miller; McFarlane v McFarlane* [2006, UKHL 24] was about not punishing people for certain behaviours leading to the end of a marriage. We suggest that its application to cases of domestic abuse, and other misconduct, has led to that behaviour being ignored, or inadvertently condoned.

Where misconduct has identifiable financial consequences, then it will inevitably be easier to remedy. Where there are no direct financial consequences of misconduct which may be categorised as domestic abuse, we consider that the court should still be required to consider that and assess what remedies, if any, will be appropriate according to the circumstances (for example, it might lean away from making an ongoing spousal maintenance order, and towards an unequal division of resources in the victim-survivor's favour, if there is evidence of abuse and concern that the perpetrator will use the existence of a spousal maintenance order to continue to exert control/economic abuse).

19. Do you agree with the government's view that the court should specifically be required to give consideration to pensions accrued and pension needs when making financial orders? Please explain your answer.

Yes

Resolution understands from the Ministry of Justice's comments subsequent to publication of the consultation that the government's view is that the court should in fact give consideration to pensions as a whole (not only those accrued during the marriage), and pension needs, when making financial orders. This is welcome.

In a financial remedies context, pensions need to be considered separately from capital and income – so there are three pots to which the principles need to be applied. The overwhelming majority of cases where pensions are in issue are needs cases and all pension assets from whatever source will be required to be dealt with on divorce to meet needs.

We agree with this proposal, and the suggested cultural shift so that pensions are not overlooked on divorce as they often are at present, for the reasons set out in the consultation paper. The Pension Advisory Group (PAG), a multi-disciplinary group of professionals specialising in the field of financial remedies and pensions on divorce, has also long recognised the need for better common understanding and consistency in cases involving pensions on divorce, and that pensions have simply not had the attention they deserved in the fair division of assets on divorce.

We are also fortified in our views by the findings of the *Fair Shares* report, which summarised the issue with pensions as follows –

> *"There was a lack of awareness, understanding or interest in pensions amongst many divorcees which fed through into how they had dealt with pensions in making their financial arrangements.*
>
> *Only 11 per cent of divorcees with a pension yet to be drawn had made an arrangement for pension sharing. Pensions were significantly more likely to be shared where they were of higher than lower value or where there were dependent or non dependent children. Where a pension not yet in payment was shared, there was an equal split of the participant's pension in only 22 per cent of cases. In nearly half of cases the recipient received less than half and in 18 per cent over half. General lack of interest in the pension, and a strong sense that it should remain with the spouse who has been contributing to it, were the main reasons for the failure to see it as a potential sharing resource."*

Pensions are different to, and in practice are approached separately from, other capital assets and property, potentially justifying the application of a different legal test. We are of the view that reform should go further than simply "considering" pensions. Pension sharing should be the default position in financial orders, as parties often lack understanding of the implications of offsetting and may be vulnerable to economic abuse. Offsetting, usually the family home vs pensions, has disadvantaged (typically) women for many years. The default position should include all pension assets (not only those accrued during the relationship and marriage) unless needs are more than met, in which case the court may consider excluding some pension assets. A rebuttable presumption would help ensure that the court, legal professionals and divorcing couples making arrangements outside of court, give proper consideration to pensions and meeting pension needs.

While we believe that pension sharing should be the starting point, judicial discretion will be necessary because it could be the case that a default pension sharing order would lead to the sale of a family home in circumstances where needs could not then be met by an equal sharing of capital. Allowing for deferred pension sharing may assist (although query protection for a claimant if the pension holder gets married and divorced again and shares all of the pension). We agree with what we understand to be the government's position, that equal sharing of pensions should not be the default, as that could have the unintended consequences set out above (for example risking a sale of the matrimonial home being necessary).

Resolution would urge the government to also give consideration to including in future legislation:

- Other related statutory provisions and changes suggested in Appendix V of the Report of PAG (Second Edition).
- The introduction of a new ground of jurisdiction for UK pension sharing orders after an overseas divorce.

As a practical consideration, Resolution agrees with the authors of the *Fair Shares* report that there is need to overcome gender stereotypes on divorce – women tending to focus on retaining the matrimonial home, men on their pension. There is also lack of awareness of the value of pensions in many cases, as *Fair Shares* highlights, and a need to make actuarial reports more accessible (both from a pricing standpoint but also reducing waiting times).

20. Do you consider that these proposed safeguards will ensure individuals understand the consequences of their agreement and provide sufficient protection against coercion? You may wish to give reasons.

Yes (subject to our comments below)

The law should provide for QNAs that are binding, unless this would result in manifest or serious injustice for either party. Couples need more clarity, understanding and certainty about the consequences of, and how a court would treat, any marital agreement made by them, especially given the increased use of nuptial agreements since *Radmacher v Granatino* [2010] UKSC 42.

Resolution makes the comments below on the safeguards proposed. We would stress that what has happened *after* an agreement has been entered into must be a factor which the court can take into account when considering the validity of a QNA.

Firstly, we suggest that there should be specific reference to misconduct, so '*undue influence, misconduct or misrepresentation'*. In the event of the agreement being entered into where the relationship has been found to be coercive or abusive, little weight should be attached to the agreement. As referenced in response to question 17 above, the impact of post-QNA conduct on enforceability of an agreement should also be relevant. In the event the evidence of abuse is only after the agreement has been signed, this does not mean that the relationship was not coercive at the time the agreement was entered into and/or that the existence of the agreement should negate the need for the court to consider the impact of the abuse – whenever it dates from – on contributions during the marriage and needs on divorce. The existence of post-agreement domestic abuse may also lessen the possibility of a financially weaker party seeking to renegotiate terms of a QNA further down the line despite changes in circumstances that may render the terms unfair; that should all be relevant to the weight given to a QNA in cases of domestic abuse.

Secondly, the proposed 28-day period before marriage for signing a QNA is too arbitrary and rigid and should be replaced with more flexible measures to ensure genuine informed consent. The 28-day period is overly prescriptive, puts additional pressure at a critical time on couples preparing for a wedding, and could exclude valid agreements. A hard limit can be manipulated by a financially stronger *or* weaker party. We would prefer to see a softer approach, similar to *Radmacher*'s principles, and timing factors other than a minimum number of days period should be considered. Time for negotiation and proper consideration is what is most important, perhaps a minimum period between provision of the first draft and signing.

If there is a hard time limit, we consider it particularly important that other agreements which are not a QNA can still be taken into account under s.25 (for example pre-nuptial agreements as under the present law). In other words, it should not be a 'QNA or nothing' situation (which may be especially relevant when it comes to international couples moving to England and Wales having signed overseas agreements which may not meet the QNA formalities).

Thirdly, it is not possible in practice to compel people to take and accept legal advice if they do not wish to do so. The *opportunity* to take legal advice should be the relevant threshold, rather than compulsion to do so. People may often be found to have understood the terms they were signing up to even without the benefit of specialist legal advice, as is the case at the moment.

It would be helpful for any legal advice requirement to make clear whether a valid QNA should include a statement signed by both lawyer and client to the effect that the client has been advised on specified matters, raising an evidential presumption that the advice has been given. Many existing pre-nuptial agreements now contain such a statement.

For the avoidance of doubt, we are of the view that this type of legal advice should only be given by those authorised to conduct reserved legal activities under the Legal Services Act 2007. The 'one lawyer, one couple' model would not be appropriate for QNAs (or non-QNAs); each party should instruct separate solicitors, to protect against coercion, and to reflect the often present power imbalance. Advising to seek individualised legal advice on a pre-nuptial agreement would be expected under the Resolution Together model.

Consideration also needs to be given to:

- the treatment of pre-existing agreements that meet statutory safeguards, having regard to the fact that advice given under previous regimes may differ.
- the treatment of international agreements which are generally unlikely to meet the requirements set out in the consultation.
- whether we are emphasising safeguards at the time of the QNA too much, at the expense of acknowledging the potential impact of changes in circumstances and abuse during the marriage. In reality, a judge would have to step back and consider the totality of the relationship, not just at the QNA moment, in assessing the weight to be attached to it.

21. 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? Please explain the reason for your answer.

No

Resolution is concerned about the proposed approach to discretionary needs in QNAs which risks a regressive move back to pre-*White v White* outcomes for married couples with a QNA and which is also a departure from the Law Commission's recommendations in 2014.

Although it is said that parties can't contract out of needs, under this proposal needs could be heavily circumscribed whereas in most pre-nups at present, the goal is to avoid sharing of pre-marital/extra-marital resources, with parties often being content to be generous in the needs provisions so as not to discriminate against any financially dependent children on divorce (and to enable pre-nuptial agreement negotiations to be conducted through the lens of fairness looked at through likely marital standard of living). Academics such as Dr Sharon Thompson have emphasised that needs are operating as the only real safeguard on relationship breakdown now and serve to temper pre-nup negotiations/provide a counter-balance for the financially weaker party. Placing limitations on needs could lead to serious unfairness; if someone knows they can contract out of meeting the other party's needs, that can be used as leverage and risks unfair agreements being entered into.

We do not understand the thinking behind further restricting needs if sharing is to be restricted, and why the proposed distinction should apply to QNAs specifically, particularly given that we understand that discretionary needs should equate to luxury. The current proposals effectively create an additional category which could potentially relegate marriage with a QNA to the status of cohabitation, which contradicts the goals of protecting vulnerable parties and preserving the distinct status of marriage. The approach to needs should be the same for married parties with or without a QNA.

If the thinking is to be clear as to the value of a nuptial agreement, we don't consider that this is the correct way to go about it. In reality, the vast majority of nuptial agreements are entered into because there is actual or anticipated wealth that one or both parties want to protect from claims on divorce. It is very rare for parties to enter into an agreement where the assets are more modest, and any claims would be needs-driven. In this, we do consider that some assessments that as many as 20%[10] of couples have a nuptial agreement is considerably wide of the mark. But if the law prescribes that a QNA could be entered into to limit a needs-based claim, the number of agreements is likely to increase (and such agreements could be forced upon victims of domestic abuse). If anything, we would be concerned about increased litigation (and therefore pressure on courts) related to parties trying to escape the terms of their agreement in those circumstances.

If a QNA (or indeed a pre-nuptial agreement if there is a second category of nuptial agreements) does not meet needs, then the claiming party should be able to make the same needs-based claims as any party seeking a financial remedy, to be assessed by application of the usual financial remedy principles. It is entirely open to the parties to have a QNA which is done properly so that it does meet needs, or clarifies that the proposed third tier, discretionary needs, should not be taken into account in the first X

[10] https://marriagefoundation.org.uk/research/one-in-five-weddings-begin-with-a-prenup/

years of marriage or if there are no children. However, to put an extra layer of complexity in by *only* allowing the equivalent of cohabitants' proposed needs makes no sense. It is overly complicated as to which needs assessment is then made. There should be one process/set of principles for assessment following marriage, taking the s.25 factors into account.

The term "*discretionary needs*" is ambiguous given non-discretionary needs are to be assessed as against the standard of living enjoyed during the marriage anyway.

What would be preferable would be a unified approach to assessing needs, suggesting that QNAs should not introduce a separate regime but rather follow the same principles as in other financial remedy cases, with the possibility for parties to contract out of certain provisions (or otherwise agree what provision will be made or how needs are going to be assessed) if properly advised; well-drafted QNAs, with clear definitions of needs and proper legal advice, would prevent disputes and ensure that agreements are fair and enforceable.

22. 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? Please explain the reason for your answer.

Housing, capital, income and pensions appear to be at stages 1 and 2 of the proposed needs hierarchy. They encompass all relevant financial needs, and specific circumstances such as disability or care requirements would be addressed within these categories. Chattels would be capital but we would add them to make it obvious that they are included if the current proposed hierarchy is retained.

23. 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? You may wish to give reasons.

Yes

Resolution considers that this should be clear on the face of new law, and agree with codification of the established case law principle. Parties need to be clear what a cohabiting relationship is and what constitutes seamless cohabitation (and we note consultation question 24).

We suggest that the government may wish to consider the extent to which the pre-marital cohabiting relationship should count towards the length of a marriage where the couple had opted out of the cohabitation legal framework proposed. Please see our further comment in response to consultation question 24.

24. 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? Please tick all that apply.

- **Existence of a joint household**
- **Stability of the relationship**
- **Financial arrangements**
- **Responsibility for children**
- **Presence of a sexual relationship**
- **Public recognition of the relationship**

Resolution agrees that all of these themes could be relevant factors and should be included in a non-prohibitive and non-exhaustive list of factors for guiding the court's determination of whether there has been seamless cohabitation prior to marriage.

The detail of these non-exhaustive themes may be more for consideration at Bill stage, but consideration might also be given, for example, to :

- Whether there should be reference to joint household(s) to capture, for example, where a couple live apart or across more than one home for valid reasons such as work (for example Armed Forces couples).
- Adding 'involving a sharing of daily household tasks and duties' to 'Existence of a joint household (or household(s)).'
- Whether 'Permanence and commitment to a shared life' would be more indicative of mutual commitment than the 'Stability of the relationship' (which will have broken down). It is also the case that an abusive cohabiting relationship might not be described as stable.

- **Other (please specify)**

We would add 'Existence of a written agreement between the parties', for example to take into account the relevance of any cohabitation opt out agreement.

Part 2: Reforming the law for cohabitants on separation

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

Yes

It will be important to be as clear as possible about those cohabitants who will benefit from/be subject to the new law, so that they and others know whether or not they are protected/affected by it. Couples may live together, but the important distinction is whether the relationship is committed and enduring. Applying the framework to all cohabitants would in our view be too broad. And cohabitation can mean different things to different couples and does not necessarily demonstrate commitment or mutual dependency. Living together as a couple in an enduring family relationship is already used in other contexts, for example, in housing law, so we do think it is an appropriate test.

We do not consider that use of the word '*romantic*' referenced in the consultation paper is necessary or indicative of commitment. This very much means different things to different people and would risk having an exclusionary effect. As such, we would hope not to see '*romantic*' used in future legislation, which we understand not to be the intention.

26. 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? Please tick all that apply.

- **Existence of a joint household**
- **Stability of the relationship**
- **Financial arrangements**
- **Responsibility for children**
- **Presence of a sexual relationship**
- **Public recognition of the relationship**
- **Other (please specify)**

Resolution agrees that all of these themes could be relevant factors and should be included in a non-prohibitive, non-prescriptive and non-exhaustive list of factors for determining whether individuals are cohabitants for the purposes of any new legislation (noting however that some couples choose to keep their finances separate).

The detail of these non-exhaustive themes may be more for consideration at the Bill stage, but consideration might be given to, for example:

- Whether there should be reference to joint household(s) to capture, for example, where a couple live apart or across more than one home for valid reasons such as work (e.g. Armed Forces couples). We understand that this wording matches what happens in other jurisdictions such as Australia and New Zealand.
- Adding 'involving a sharing of daily household tasks and duties' to 'Existence of a joint household (or household(s))'.
- Whether 'Permanence and commitment to a shared life' would be more indicative of mutual commitment than the 'Stability of the relationship' (which will have broken down). It is also the case that an abusive cohabiting relationship might not be described as stable.

27. 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?

Yes

We agree that it should be clear who is eligible for the framework. Resolution's view has always been that a framework is needed for those in a committed relationship who live together as a couple and either have lived together for a minimum period, demonstrating the permanence of the relationship, or who have a child together.

Those who are already married to one another or in a civil partnership are already protected as soon as they marry or enter into a civil partnership. We agree that those within the prohibited degrees of relationship for the purposes of marriage or civil partnership should also be ineligible.

Obviously, someone who is married but cohabiting with another person should still be able to have claims made against them by their unmarried partner, if they meet the eligibility criteria.

28. Do you agree that the minimum age to be eligible for the framework should be 18?

Yes (subject to the suggestion below)

Resolution suggests that consideration be given to mirroring the exceptionality rule under section 9(6) of the Children Act 1989. This would mean that anyone under 18 would not be eligible unless the court is satisfied that the circumstances of the case are exceptional. We have considered the position of 16- and 17-year-olds and have in mind particularly potential protection in exceptional circumstances for a 16- or 17-year-old who has had a child with a cohabiting partner.

The minimum age for marriage is 18 in order to protect against forced marriage. A minimum age of 18 for the cohabitation framework will prevent the most vulnerable 16- and 17-year-olds from bringing a cohabitation claim and will not protect them.

We understand that if the same 16- or 17-year-old goes on to cohabit with the father of their child for at least three years, they will be eligible to bring claims under any new legislation. However, it seems wrong to discriminate against someone because they were aged 17 years and 364 days, rather than 18 years, on the date of the birth of the child in these circumstances. Thought would also need to be given to circumstances in which the father was 18 but the mother was not.

29. 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?

Yes

Resolution broadly supports this proposal, although we see benefits to a period of two years as a minimum period, for the reasons set out below.

We agree that where there are no children of the family, there is a need for prescribed eligibility criteria requiring the need to demonstrate a certain level of commitment and likely interdependency. Where our existing law recognises rights and responsibilities for those living together, there is usually a minimum period of time required before cohabitation is established.

Whilst it can be argued that the requirement of a minimum period is arbitrary and that the level of commitment is not always related to the length of the relationship, the use of less definitive eligibility criteria than the length of cohabitation could cause uncertainty and lead to complex litigation.

Similar schemes in other countries usually require couples to have lived together for a minimum period of time, generally ranging between two and five years. The Law Commission suggested that a period of two to five years would be appropriate. A period of three to five years or more would arguably still ensure that those in longer term relationships, where it may be more likely that there is a financial imbalance, would be protected. But there can be significant unfairness where people have lived together for a shorter period, and we know that many people mistakenly believe that they already have 'common law rights'. To us, three years feels like the right balance and anything longer than that is too long as that would reduce the number of qualifying cohabitants, thereby reducing the effectiveness of the legislation. See what we say below about the proposed 3 years already excluding a significant swathe of cohabitants and depriving them of protection under any new law.

Two years is generally viewed as long enough to demonstrate commitment to the relationship, and to minimise the risk of unmeritorious claims or spurious claims by people in short relationships. The court can take into account the length of the relationship when considering what provision should be made. It is also consistent with existing domestic legislation : for example, a cohabitant of a deceased person may claim provision from his or her estate if they lived together for two years immediately before the death under the Inheritance (Provision for Family and Dependants) Act 1975 (the 1975 Act) or may claim compensation from a person responsible for his or her death under the Fatal Accidents Act 1976. The UK Immigration Rules refer to genuine relationships that have been ongoing for at least two years.

It will be necessary for future legislation to clarify whether breaks in the minimum duration continuity would be excluded when considering whether a couple has lived together for the minimum period, or indeed whether the clock 'resets' at the point of each separation, which risks having perverse consequences and is susceptible to abuse.

For example, the legislation might say that a period of three years cohabitation over a period of five years marked by breaks would qualify as the three-year minimum, which is analogous to counting periods of separation towards two years and five years of separation under the previous fault-based system of divorce.

We are particularly concerned about situations where the relationship is abusive. The victim-survivor may have tried to leave the relationship on a number of occasions before finally doing so, creating breaks in the period. And perpetrators may temporarily end the cohabiting relationship at say 2 years and 11 months. 'Permitted absences' would also better protect cohabitants where one or both of the couple are in the Armed Forces.

We have also identified a potential issue around the position of couples with a clearly documented non-legally binding marriage (religious or not) and how they will be protected in given circumstances in the emerging legal framework. We will give consideration to the recently published Weddings Law reform consultation before commenting further.

Whilst there are competing data, we understand that around 46% of cohabiting couples stayed together for 3+ years per 2011 ONS data, and taking into account in addition those with children, the legislation proposed would capture about 60% of cohabiting couples. Whilst there is evidence that the average duration of cohabitation is *generally increasing,* there has got to be concern that the higher one sets the duration bar, the fewer couples will be eligible under the new legislation, meaning that the hardship of the current law will continue. As it is, on those statistics around 1.4 million of the estimated 3.5 million cohabiting couples will miss out under the new law on the proposed eligibility criteria. The societal impacts of that are clear – the risk of further, costly litigation (and using up court resources) pursuing remedies under the existing patchwork of rights and responsibilities; and the financially disadvantaged becoming financially dependent on the state.

Therefore, we would strongly caution against <u>any</u> attempts to increase the minimum relationship duration (where there are no children) or otherwise tighten eligibility criteria.

We also recommend considering ideas put forward by academics about a ‘hardship clause’ which exists in some jurisdictions, enabling a cohabiting partner to seek to bring a claim even if prescribed eligibility criteria haven’t been met, to take the hard edges off the timeframes. The eligibility timeframe could be disregarded if the case justifies it, which allows victim-survivors to bring claims in certain circumstances. There is not thought to be evidence of this safety valve increasing litigation in other countries where it exists, as most meet the eligibility criteria, and this would be for true hardship cases. In Australia, for example, to apply for a financial or property settlement on the ending of a de facto relationship, a party must meet at least one of four conditions:

- The relationship lasted for at least 2 years in total.
- You have a child together.
- The relationship is registered under a state or territory law.
- **One partner made substantial financial or non-financial contributions, and failing to make an order would cause serious injustice**.

Under the ‘serious injustice’ test after a short (sub-2 year) relationship, the court reviews the specific nature of what was contributed:

- Financial contributions: Significant salary input, property purchase payments, or major asset improvements.
- Non-financial contributions: Substantial labour put into building or renovating a home, or homemaker contributions that elevated the other party's asset position.
- The imbalance: Demonstrating that, without a financial remedy, one party would retain a disproportionate windfall of assets while the claimant would suffer a distinct financial loss or detriment without legal remedy.

[Separately, it will be noted from our response to Part 3 that Resolution supports reducing the suggested timeframes for cohabitant eligibility under new intestacy provisions, to align with the timeframes proposed for separating couples]

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

Yes

The minimum duration requirement should be disapplied where there is or has been a child of the family. This should include the sad situation of a couple having had a child who was stillborn or who has otherwise passed away before the date of any claim being brought. This would be captured by expanding the definition to the couple "*having had a child of the family*".

Living together and having a child together indicate commitment to the relationship regardless of how long the couple have lived together. The existence of a child or children also makes it more likely that one partner will have suffered economic disadvantage if s/he is the primary carer.

Children of the family will have to be defined. The definition should include those children who are over the age of 18 by the time of the making of the cohabitation claim to protect those in the vulnerable and objectively unfair position of Valerie Burns in *Burns v Burns* [1984] Ch 317.

Resolution suggests that consideration be given to whether the minimum period is disapplied where there is a child who has lived with the couple for a period of at least three years, but they did not have the child together (analogous to s10(5)(b) of the Children Act 1989). This position can be better protected by widening the definition of 'children of the family' to include a child of one of the parties who was treated by the couple as a child of the family. We appreciate that judicial discretion may need to be applied to this category on a case-by-case basis, but that is a better outcome than excluding children who ought to be protected.

31. Do you agree that a time limit should be introduced to prevent claims being made after two years have passed since the relationship ended?

No

If you disagree with the two-year period suggested, what period would you propose having instead?

3 years

Resolution would propose three years (which would give symmetry with the proposed eligibility criteria), with discretion to allow applications outside this in exceptional circumstances to prevent injustice in individual cases (see below), or subject to domestic abuse/misconduct and other exceptions.

We believe that a two-year time-limit is just too short a timeframe and risks putting more pressure on the Family Court (especially if there wasn't proper time for mediation and other forms of out-of-court dispute resolution). It may also prove oppressive for the mother of a young child and/or victim-survivor of domestic abuse, who is still processing their experience.

It will be noted that there is no time limit for bringing financial remedy claims, as confirmed in *Wyatt v Vince* [2015] UKSC 14. Personal injury claims must be brought within three years and contract/tort claims within six years. We are aware of the difficulties experienced in Scotland with prohibitively short timeframes for bringing applications and consider that three years balances the need for finality with practical realities.

We suggest that there should be the ability to disapply the time limit where the couple agree to do so. We have in mind where they choose to use an out-of-court dispute resolution process and would otherwise be forced to issue a court application protectively.

Resolution would wish there to be provision for an application to be made out of time (especially if government retains the proposed two-year limit for claims) with the court's permission, in certain circumstances. This is possible in Australia (where the time limit for a claim is two years, though the minimum duration of eligible cohabitation is also two years) if the court is satisfied that :

- hardship would be caused to the party or a child if leave were not granted, or
- if the application is for maintenance, that, at the end of the standard two-year application period, the claimant is unable to support themselves without an income-tested pension, allowance or benefit.

If you disagree with the two-year period, and chose a different period, please explain why.

There are mixed views on the need for a time limit for bringing claims, but on balance Resolution agrees that there should be a time limit. Without a cut-off, every claim would arguably need an order dismissing claims. And too long a period would result in too much uncertainty and leave people with too open-ended a commitment. But there should be enough time to take advice and negotiate before making a court application.

Most importantly there is a risk that the objective to protect the most vulnerable will be undermined by a two-year time limit without exceptions. There is a need to protect those coming out of an abusive relationship or suffering post-separation abuse, particularly if they are caring for a baby or very young child. They may need time to process their situation and what they have been through and/or not be in a position to make a claim within two years. Whilst it might be argued that it should not be possible to claim for longer than the time you are required to live together to make a claim, we believe that protection of the vulnerable requires this.

If the government is minded to proceed with a time limit of two years, we believe this should be subject to domestic abuse, misconduct and other exceptions.

Resolution notes that the Scottish Law Commission has made recommendations for legislative change in Scotland to afford the court discretion to allow late claims, subject to a test and absolute deadline, after which the court has no discretion to allow a late application. The Commission has also recommended that express provision should be introduced allowing cohabitants to agree, in writing, to extend their one-year time limit (by a specified amount with an absolute deadline applying), to enable them to negotiate with a view to settling their claims for financial provision.

32. Do you agree that "needs" should be the guiding principle the court follows for determining outcomes when cohabitants separate? You may wish to give reasons.

Yes (subject to the suggestion below)

Resolution is supportive of a "needs" model and welcomes it being the chosen model above a compensation model, which has presented difficulties in Scotland. However, the definition of needs would benefit from a broader definition, having regard to standard of living. Each couple which falls within the new law is likely to have needs that are specific to them, based on their standard of living. We have concerns about how narrowly it feels needs are defined within the consultation. Unmarried partners should not be left at risk of being in a position of undue hardship on separation. It will be clear that they will not be entitled to share resources built up during the relationship (unlike married couples) and that they will be able to opt out of the new framework (ditto). To go further risks discriminating against the children of unmarried couples.

It is further understood that the government is marking this difference in terms of the remedies available. It appears to us unlikely that the prescription of needs as proposed would be helpful or simplify the law, given also that the vast majority of cases are dealt with in terms of meeting basic or essential needs, primarily housing.

33. 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? You may wish to give reasons.

Yes

To mark a difference between marriage and cohabitation, and to allow finality, Resolution's policy has been that there could be a presumption in that each party should, as far as possible, be self-supporting.

But again, we have thoughts about the practical application of the consultation proposal and how realistic it will be to achieve, given that it appears to be proposed that ongoing maintenance should be available only in exceptional circumstances. Maintenance could be used as a tool in a sensible way. Please see our response to consultation question 38.

It should be recognised that victim-survivors of domestic abuse may struggle to achieve independence as quickly as other cohabitees. This is where a finding of conduct will be relevant to the outcome.

Although *Fair Shares* found that spousal maintenance orders are only made in 22%[11] of cases, that is not so statistically insignificant as to mean that they aren't useful in financial remedy cases. By analogy, they should be available to unmarried couples in appropriate cases, especially to meet needs as children go through education and where there is insufficient capital to achieve a fair outcome.

In practice, maintenance is likely to prove a useful tool in cases where there is insufficient equity in a family home or capital illiquidity in general, but the 'paying' cohabitee has a good income, as often found in London, the major cities and surrounding areas. To exclude maintenance as a tool in those circumstances on the altar of exceptional hardship risks placing many families in the same situation as they find themselves in under TOLATA and Schedule 1, with remedies that they would find challenging to access in practice. The use of maintenance as a tool should be kept for as short and as defined a period as possible, in the same way as intended in financial remedy cases, as set out in the Court of Appeal judgment in *McFarlane v McFarlane*: *Parlour v Parlour* [2004] EWCA Civ 872.

34. Do you agree that discretionary needs should be excluded from the consideration of needs for cohabitants? You may wish to give reasons.

No

In principle needs are needs, regardless of whether a couple are married or not married.

Most importantly, children's needs will be the same, and in principle they should be treated in the same way, whether their parents are married or not. The proposals as presented seem to us to undermine the aim to prioritise fair outcomes for children.

Resolution has concerns about differentiating between essential needs and discretionary needs and the practical application of this. Labelling needs in this way is artificial, and discretionary needs will be subjective and mean different things to different families in most cases. It will be difficult for discretionary needs to be interpreted and applied, especially by the public without legal advice, and by mediators, and even by legal professionals, risking unnecessary conflict, litigation, uncertainty and delay. We refer back to our responses to consultation questions 7 and 8.

We are unclear how needs for children will be distinguished from their discretionary needs and the justification for the drawing of a distinction between needs. There is no differentiation between 'needs' in Schedule 1.

We suggest that the needs of all cohabitants should be considered by reference to standard of living, having regard to the proportionality of how the family concerned lived during the relationship and what they need going forward. The principle of the distinct status of marriage would still be underpinned (in the absence of a sharing principle and

[11] *Fair Shares,* Chapter 9

a different approach to maintenance, even if in practice spouses often receive provision based on needs rather than sharing).

The current proposed approach also risks forum shopping and multiple claims, with potentially three sets of proceedings/avenues for claims : under the new framework, TOLATA and Schedule 1 of the Children Act 1989. The deficiencies of the latter two for cohabitants are well known, and would benefit from reform and adaptation in family law at least through secondary legislation, and with reference to interaction between the various remedies available, once the proposed new law is implemented.

If the government decides to proceed with the approach proposed, Resolution suggests that consideration be given to including an objective (or at least guidance), but not a test, that the outcome under the new framework for eligible couples shouldn't be worse than it would be under Schedule 1, especially as the intention rightly is that children's needs come first. This will mean that, in addition to achieving a fair outcome, there would be less forum shopping as it will be clear who is eligible for each of the three different sets of claims and that eligibility for the new framework will mean a guaranteed better outcome than under the other two routes available for claims.

35. 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? You may wish to give reasons.

Yes

Resolution welcomes this. There is no need for this to be qualified, although it would be understandable if the intention were to protect from hardship resulting from a vulnerable position arising in the event of relationship breakdown to further mark the distinction between the availability of these remedies for unmarried as opposed to married couples.

36. 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.

Yes

We would add:

- Standard of living (mentioned in the consultation text but not the list) as this is something that can be applied relatively easily given the use of this regularly in financial remedies on divorce.

- The existence or not of an agreement (cohabitation, opt-out, separation or compromise).
- Domestic abuse which may have impacted on earning capacity, income, accrual of savings and pension.

37. Do you agree with our proposed approach in relation to remedies for cohabitants?

Yes (subject to our comments below)

Resolution broadly agrees with the proposed approach in relation to remedies, save that we do not agree that the children of qualifying cohabitants should be treated differently to those of married couples.

We welcome the range of orders available to meet needs, including the ability to apply for pension sharing. The Scottish experience of reform has shown that a comprehensive menu of orders is beneficial.

38. In relation to maintenance in particular, do you agree with the follow statements. Please tick all that apply and if you disagree with any of the proposals above, please explain why.
• Maintenance should be awarded in exceptional circumstances (such as serious health issues or disability)

No

In our view this approach is too restrictive, and exceptionality is too high a bar.

Resolution's longstanding view is that cohabitants should be able to apply for maintenance for a limited period to reflect the economic advantages or disadvantages caused by the relationship which could not be redressed by other types of orders. This would enable a cohabitant to adjust to the loss of financial support before becoming self-supporting. It would mark a difference between marriage/civil partnership and cohabitation and ensure a clean break following the breakdown of a cohabiting relationship.

In many cohabiting cases, there will be insufficient or lack of ready access to capital to effect an immediate clean break, and in some circumstances only maintenance will be available to meet needs and facilitate transition to financial independence, for example, where the couple has a high income and mortgage without capital; or the couple has income but no capital and have been renting a home.

Awarding maintenance only in exceptional circumstances will fail to protect the vulnerable and their children. A victim-survivor of domestic abuse coming out of an abusive relationship might not have an earning capacity for some time, in which case there would be reliance on taking capital out of the family home to effect a clean break. Victim-survivors should not have to face a high bar of establishing exceptionality.

Where there are children, Schedule 1 unfortunately provides an insufficient safety net to meet the needs of children in many cases. It is only possible to apply for maintenance or other orders for the benefit of the child where the paying party's income is over £156,000 gross per annum. Certainly, at District Judge level there is no guarantee that payment of rent for where the child lives will be taken into consideration, let alone awarded.

One party may need maintenance until retirement provision begins after an extremely long relationship.

More than the limited approach to "exceptional circumstances" as proposed is needed. We suggest that consideration be given to permitting maintenance for such period as enables it to be used as a tool as described above in reply to this question (and in reply to Question 33). This should be clear on a case-by-case basis with reference to the payer's income at the point of separation. This also reflects s.28(1A) Matrimonial Causes Act 1973, pertaining to the duration of orders.

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

Yes

We agree.

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

Yes (subject to our comments below)

We broadly agree, unless exceptional circumstances apply. It should not be easy to extend, but the ability should be there.

39. 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?

No

Resolution does not agree that there should be such a requirement. We simply do not see how this type of requirement could be applied practically and be part of a clear and accessible framework.

It will invite further argument and assessment of a claim as if the couple was married against what the couple has agreed under the new cohabitation law. We doubt that most people could properly apply such a test, unless this were to be applied judicially, and even that may prove time-consuming and have the unintended consequence of clogging up the courts.

We are firmly of the view that having the suggested requirement will make it harder for those seeking to reach agreement between themselves, or using out of court dispute resolution to achieve a settlement. An assimilation test will also take up more court time (or if not, there is a risk that the court will err on the side of being unduly mean in its award to a cohabitant, if there is 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, but there is insufficient judicial time to make the 'on divorce' assessment).

In any event it serves no real purpose, where the new law will be a difference model based on needs, underpinned by the principle of preserving the distinct status of marriage.

We consider that the appropriate balance would be for the government to set out the distinct status of marriage in the new legislation and also explain the difference between financial remedies on divorce and cohabitation remedies. This is better achieved by way of an objective and guidance, as opposed to the application of a strict test.

40. Do you agree that all of the safeguards listed should be required in order for an opt-out agreement to be valid?

Yes (subject to our comments below)

Resolution has always favoured a model allowing cohabitants to opt out of a cohabitation framework by means of a valid agreement (rather than requiring them to opt in) and we are pleased that this is the model proposed. We recognise the tension between protecting victims of abuse on the one hand, and respecting people's autonomy on the other. As such we have sought, in our response, to take a moderated, realistic approach, which reflects the realities and which doesn't set the opt out bar so high that people have legitimate complaint about the state imposing rights/obligations that they never signed up to. What is most important is to achieve *some* reform and for the financially weaker party not to be in a worse position than under the law at present.

We are also aware that different groups will have different needs. The Gen Z couple who have just hit three years cohabitation may not want to acquire rights/responsibilities (though that may change if, two years later, they go on to have a child together). Likewise, an older couple with first marriages behind them may wish to preserve their respective estates for their children and protect against cohabitation claims. And there will be those, of any age, who have made a conscious decision not to marry (although often that is the will of one but not the other). In all of those circumstances, a desire to opt out should be respected, subject to safeguards.

A valid opt out agreement should bind the parties unless this would result in manifest or serious injustice for either party. Cohabitants may not wish to incur mutual rights and responsibilities and should be able to opt out at any time during their relationship (from the beginning to the point of any separation).

We agree with the government that a key advantage of an opt out scheme with safeguards is that it means protections apply automatically to those who may otherwise be left unprotected, including those who continue to believe in the common law marriage myth and/or who may be financially vulnerable. This has to be balanced against not setting the bar for opt out so high that people's autonomy is not respected.

Couples should have flexibility to determine their arrangements, subject to misconduct and manifest injustice safeguards.

It is not possible in practice to compel people to take and accept legal advice if they do not wish to do so. The *opportunity* to take legal advice should be the relevant threshold, rather than compulsion to do so.

A practical way of achieving opt out agreements would be for a standard agreement to be filed or registered by the parties via the government gateway, with clear signposted encouragement to, and an opportunity for parties to, get legal advice. The opt out agreement could be kept very simple and standard to say what it is and does, in the same way as for example a Notice opting out under the Landlord and Tenant Act 1984 or a side agreement to an employment contract opting out contractually from the EU working time directive.

We are of the view that this type of legal advice should only be given by those authorised to conduct reserved legal activities under the Legal Services Act 2007. The legal professional could separately certify and file or register on the government gateway that advice had been given about the opt out agreement and the party advised had understood the implications. Again, the 'one lawyer, one couple' model would not be appropriate.

Statutory guidance on what the legal professional would need to do to fulfil their role might be helpful. We would expect legal professionals to screen for domestic abuse, particularly coercive and controlling behaviour, as part of the process, and adopt the appropriate safeguarding measures. This would provide a check and balance as far as possible, albeit that this should be tailored to be a standard service that most legal professionals should be able to provide.

We have also considered whether the safeguards as proposed will be sufficient to protect a victim-survivor of domestic abuse, including economic abuse and coercive control. They arguably are (under undue influence), but there is no specific reference to duress in the proposals, which is a high bar to reach and difficult to prove in practice. We suggest that examples of contract invalidity include '*undue influence, misconduct or misrepresentation*', which should be made clear on the face of a Bill in due course.

We suggest that consideration also needs to be given to:

- the role of partial opt out agreements, which could be defined as cohabitation, separation and compromise agreements. These could specify what couples would like the arrangements to be so that the specific opt out wording could be disapplied, and the bespoke wording that is agreed by the couple is included. These will probably be agreements prepared by legal professionals, and similar to the ones that are currently in practice and regularly advised on and prepared by our members, subject to these tweaks. We would favour couples having autonomy to tailor their opt out to suit their circumstances, rather than it being all or nothing. This may include the birth or adoption of a child, sudden and unexpected deterioration in the financially weaker partner's health and/or anything adversely affecting their earning capacity. An opt out should not be regarded as iron clad in those circumstances.
- including power for the court to review a situation where a couple had opted out, but due to change of circumstances such as disability or post-signature domestic abuse, this would result in manifest or serious injustice. The 2007 Law Commission report recommended scope for change in circumstances being relevant.
- clarification that existing cohabitation agreements should not be regarded as valid opt out agreements.
- clarification of whether:
    - foreign cohabitation agreements (whether or not they satisfy the framework safeguards) are non-qualifying agreements; and whether
    - a valid opt out in a foreign jurisdiction would be a valid opt out also for the purposes of the proposed framework. Given the proposed needs-led framework for unmarried cohabiting couples, providing for foreign opt-out agreements that waive all protection and with no safeguards beyond normal contract law would not seem to us to be right.

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

Yes

We agree that an opt out agreement should not be able to prevent an application for child maintenance via the Child Maintenance Service, nor an application being made on behalf of a child under Schedule 1.

42. 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 don't believe that there is one quick and effective way to dispel the common law marriage myth. Government communications are probably better focused on the new legal rights and the opt out provisions, rather than dispelling myths. There is a need to have in mind how best to protect the vulnerable.

In our members' experience, general coverage of a change in the law and its implementation does raise awareness among the public who may then consult our members and NGOs who can support and refer them. Previous changes, such as no-fault divorce and the need to be assessed for mediation before issuing a family court application, do seem to have seeped into public consciousness. Many cohabitants will continue to consult our members in any event and it will be welcome to advise them on new options.

It is of course the case that married couples who are divorcing have to go through a process, but for unmarried couples who are separating there is no formal process around the ending of the relationship and potentially no interaction with the state, so not the same opportunity to signpost. There are, however, other points of interaction for cohabitants with the state and/or the legal profession, for example, when buying a property together or having a child together. Information might be provided on Land Registry forms, on the birth of a child, or when taking out insurance.

It is for government to decide what education, advertising and/or social media campaign they wish to launch in advance of the change in the law. This may include discussion with and encouragement of financial services providers or consumer rights champions, who may be best placed to publicise the new law, and its benefits.

Again, lessons may be learned from Australia, who it is understood undertook a major public awareness campaign in 2009 (primarily through legal sector guidance, community organisations, relationship support networks, and government-funded family advisory services to reach people undergoing separation before new laws around de facto relationships came into force, as well as via court and government publications, leading to some couples deciding to split and others to formalise their position).

Resolution would be happy to support any campaign.

Part 3: Reforming the law for cohabitants on death

43. Should qualifying cohabitants receive the same intestacy rights as spouses or civil partners? You may wish to give reasons.

Broadly yes - A qualifying cohabitant (as defined for these purposes) should have intestacy rights, but not necessarily the *same* intestacy rights as spouses or civil partners

Studies and industry research, such as surveys by Aviva and STEP, have consistently shown that 70% to 74% of cohabiting adults do not have wills in place. This is more than in relation to the general adult population with the National Wills Report 2025 reporting that 37% of UK adults have made a will. This, and the issues we raise in response to Part 3 of the consultation paper, highlight the need for continuing education on the importance of making a will and general encouragement by government and others for people to do so.

We have long argued that a qualifying cohabitant of the deceased should have an entitlement on intestacy in order to provide a protective approach and due to the perception of some that cohabitants are already included in the intestacy rules. When the cohabiting relationship is ended by death rather than separation, it can be assumed that at that point the relationship is still subsisting and that both parties remain committed to it (albeit it is no longer possible to ascertain what the deceased's overriding wishes would have been, save that there may be hints from nominations in respect of death in service benefits, life insurance etc). But under the present law, surviving cohabitants have <u>no</u> entitlement on intestacy and must, if they are unable to reach agreement with those who are entitled (or if there are beneficiaries who cannot consent, i.e. minor children or incapacitated adults), bring proceedings for family provision under the 1975 Act, with the emotional and financial costs that this involves. This requires the deceased to be domiciled in England and Wales and is limited to the maintenance needs of the claimant (which can be capitalised) and can be highly disproportionate in smaller estates.

If the proposal for qualifying cohabitants to receive the **same** intestacy rights as spouses or civil partners proceeds were adopted, we believe that, in the majority of cases, and whether or not the deceased had any other surviving relatives, the cohabitant would take the whole estate (under default intestacy provision regardless of needs and due to the relatively modest nature of most estates, meaning that there may be no more than the statutory legacy of (at present) £322,000, all of which would go to the cohabitant under these proposals). Whilst there may be circumstances where the appropriate default **would** be for the cohabitant to receive the same intestacy rights as a spouse or civil partner, having discussed this part of the consultation within Resolution and with colleagues who specialise in private client work, we believe that in practice a more nuanced approach will be needed to better recognise modern society, the range of family types and blended families and the complexity of real-life situations.

We suggest that as these proposals are taken forward, further careful thought needs to be given with stakeholders to how the intestacy rules will work and can be practically used to better support modern families and relationships, providing for cohabitants whilst providing a more nuanced hierarchy under the rules. In particular, we suggest that consideration should be given to whether:

- Qualifying cohabitants without children (see our response to question 46) should be treated in the same way as any parents or siblings of the deceased.
- Qualifying cohabitants with children (see our response to question 47) should have the same automatic entitlement as any children of the deceased. This would also protect children of the deceased from any previous relationship/s. We note that making an application on behalf of a minor child under the 1975 Act is as challenging and expensive as it is currently for most cohabitants; and adult children may have limited prospects of bringing a successful claim.
- Qualifying cohabitants should be entitled to remain in the home they shared with the deceased for a specified period after the deceased's passing, to allow time for them to adjust before it is required to be sold to divide the estate.

We also believe that consideration still needs to be given to avoiding unintended consequences, for example including safeguards to protect the most vulnerable, including older vulnerable people at risk of predatory cohabitation; and to protect against claims by live in carers.

Other jurisdictions take varying approaches to intestacy and hierarchy rules for competing claims (ranging from marriage stopping recognition of a claim by a cohabitant or prioritising marriage, to treating a de facto partner equally to the surviving spouse or even recognising the 'most intense' relationship). We would wish to consider more closely the range of experiences in other jurisdictions to ensure that the right balance is struck. If it is decided that cohabitants should receive the same intestacy rights as spouses or civil partners, we suggest this should be with no entitlement if there is a surviving spouse or civil partner (as recommended by The Law Commission).

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

Yes

In principle we consider that a surviving cohabitant should have at least an equal entitlement to a Grant of Letters of Administration, unless there is also a surviving spouse or civil partner, in which case we do not believe there should be a right to the grant. Otherwise, there is too much risk of conflict and litigation before the estate can even be administered, as well as being an administrative minefield.

It would need to be clear what the order of priority will be where the deceased had adult children from a previous relationship. The intestacy rules should be as simple and clear as possible to avoid problems for administrators and difficulties in dealing with what are in most cases likely to be quite modest estates.

45. 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?

For the purposes of the intestacy rules, we suggest that a cohabitant could be defined along the lines of a person who immediately before the death of the deceased:

(1) was living in the same household as the deceased, and as if that person and the deceased were a married couple or civil partners; and
(2) was neither married to nor a civil partner of the deceased.

This would reflect the definition in the 1975 Act which has been honed by case law, for example, as to the meaning of '*immediately before'*, '*in the same household*', and '*as if…married…or civil partners*'. '*Immediately before the death*' is a requirement already adopted in many other jurisdictions.

It will be necessary for a definition to exclude individuals who fall within prohibited degrees of relationship (for example, where one is the parent or sibling of the other). However, that's not to say that the government should not separately consider protection for close family members living together.

46. What do you consider to be an appropriate minimum duration period where the couple do not have a child together?

3 years

This would align with the proposed scheme for cohabitants without children on separation and be easy for the public to understand. We make this proposal in the context of suggesting that qualifying cohabitants should not necessarily have the *same* intestacy rights as spouses or civil partners, but the more nuanced approach we suggest in response to question 43. If that suggestion were adopted, we cannot see any logical reason for differentiating between the position on separation or death. However, even if cohabitants were given the *same* rights on intestacy as spouses or civil partners, we can see force in the qualifying period being shorter than 5 years.

In terms of claiming under intestacy and/or family provision rules in other jurisdictions that do make provision for cohabitants, we understand from academics that they tend to use the same minimum duration periods for both separation and death claims.

What are the potential unintended consequences of setting either a shorter or a longer minimum duration period?

The impact on those who would otherwise have been the beneficiaries, such as a competing spouse or children, needs careful consideration. But see our suggestions for consideration in response to question 43.

Choosing a different period than 2 years immediately before death (as under the 1975 Act) could create confusion and discord between a cohabitant and other surviving family members, although it acknowledges the difference between a shorter cohabitation where provision *might* be appropriate (under the 1975 Act), and a longer cohabitation where (subject to the deceased making a will) provision is more likely to be appropriate.

If the surviving cohabitant were simply to inherit as if they were a spouse, then a longer (but not excessive) minimum duration period would reduce the number of minor children of earlier relationships who would be disinherited by such a change.

47. What do you consider to be an appropriate minimum duration period where the couple have a child together?

No minimum qualifying period

Again, this would align with the proposed scheme for cohabitants on separation and be easy for the public to understand.

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?

It is likely to be important to consider the definition of a 'child of the relationship' for these purposes, to avoid unintended consequences by disinheriting children of the deceased who were not children of the cohabitant or providing for a cohabitant in circumstances where the only children of the family were the surviving cohabitant's own children (i.e. not children of the deceased), potentially to the exclusion of the deceased's own children.

Hence, our suggestion in response to question 43 that cohabitants with children should have an automatic intestacy entitlement (treated as a child of the deceased) with no minimum qualifying period.

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

Yes

Resolution welcomes this proposal, which is in line with our policy to allow cohabitants with children to make a claim under the 1975 Act.

We query whether domicile remains the appropriate gateway for a 1975 Act claim. It is only if a deceased is domiciled in England and Wales that a claim can be made which clearly leaves both spouses and cohabitees of a deceased person who is habitually resident but not domiciled in an impossible position. Given the numbers of couples who cohabit combined with the number of people living in England and Wales who are not domiciled in England and Wales, this seems to us to be a lacuna.

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

It seems right to us to consider shared children's welfare and interests to achieve a fair outcome, but the impact on other beneficiaries needs careful consideration, in particular the impact on any of the deceased's children from another relationship.

A note about capacity in the Family Court and legal advice

We are aware that there may be concern about (a) the impact of any reform on demand in the family justice system (especially in respect of unmarried couples on separation and any greater weight being given to domestic abuse) and (b) the need for legal aid reforms to achieve the government's objectives, so wanted to add Resolution's perspective.

A. *Family justice system & the Family Court's ability to deal with any reform*

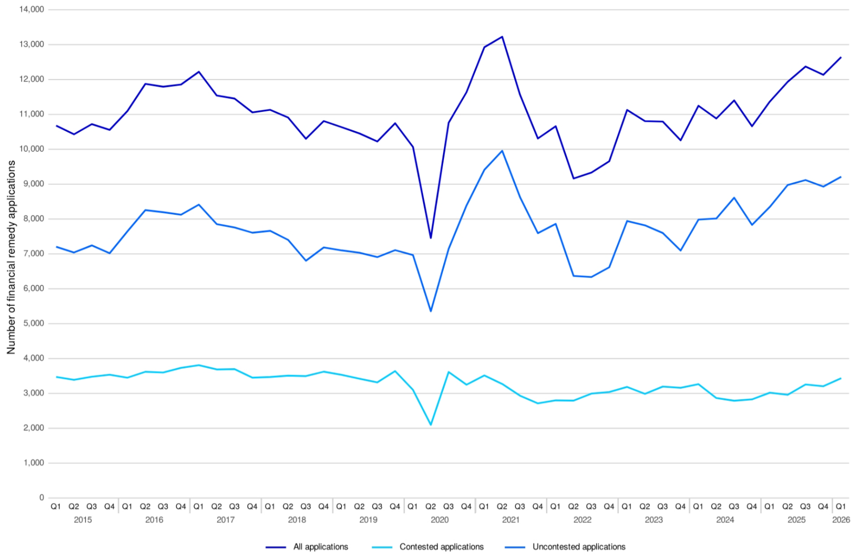
Although it is right to think carefully about the impact of any new reform and the Family Court's ability to deal with any influx in demand, for the reasons set out below we are confident that there will not be significant additional demand; that to the extent there is, it will be transitional and fleeting; and that the Family Court will be well-placed to deal with it.

Among the reasons we say this –

1. In relation to divorcing couples, the *Fair Shares* report[12] shows that use of the Family Court to go through contested proceedings to get a final financial order is rare – of the 50% of those who had made an arrangement in relation to some/all aspects of their finances, only 6% needed a judge to determine their finances on divorce (with a further 5% having settled after court proceedings started). Around 2 in 5 of those who reached a financial arrangement had no order, and just over half had a consent order.

2. Although there has been an uptick in the number of financial remedy applications since 2022, the number of *contested* applications has remained relatively flat/has not seen a commensurate uptick, as illustrated below[13] :

[12] Chapter 4
[13] Family Court Statistics Quarterly: January to March 2026 - GOV.UK



3. Senior family judge HHJ Edward Hess has suggested that based on there being c3.5 million cohabiting couples per ONS statistics compared to 13 million married couples, cohabitation reform could lead to a 27% increase in financial remedies cases, generating around 13,500 additional cases annually, of which he says 9,400-10,800 would be by consent and about 3,500 contested. This is also challenged by Resolution. As set out in reply to question 29 above, the eligibility criteria as set out in the consultation would bring about 60% of cohabiting couples, or around 2.1 million, into scope. Many of those would choose to opt out of the new scheme. Therefore, we agree with the impact assessment suggestion that there may be about 4,500 to 5,000 additional consent applications and about 1,950 contested applications as a result of the reform proposed. The positive impact of the matters set out below should serve to offset any such increase in demand (and of course there are obvious positive social, welfare and justice benefits deriving from reform).

4. There's evidence that the changes to the Family Procedure Rules which took effect in April 2024, to put greater emphasis on non-court dispute resolution, to tighten the MIAMs requirement and to reinforce judicial powers to keep cases away from court, is having the desired effect and increasing use of NCDR. Practitioners have noted a perceptible shift in the tone and culture of family proceedings, with a greater openness to mediation and other forms of NCDR. All of this should translate to cases involving unmarried couples.

5. The impact of changes to codify the existing law around financial remedies, to fine-tune other aspects and to give a statutory footing to nuptial agreements, should only be positive. By making the law clearer and more accessible, more people should be able to reach their own agreements, with or without legal advice.

6. With unmarried couples, the government's decision to propose a simple needs model, with clear eligibility criteria, should mean that many can navigate the

new law on their own (unlike if the remedies were based on complex concepts of relationship-generated disadvantage). The fact of reform in this area is also likely to reduce the number of Schedule 1 and TOLATA cases in the Family Court, which can be complex and hard to settle.

7. On the weight to be given to domestic abuse/misconduct – in both financial remedy and unmarried couple cases – the professional organisations who work in this area are understood to be united in the need for a changed approach and few who practice in this area day to day envisage that meaning significant additional burden on the Family Court. See our response to question 14. In the *Fair Shares* report about domestic abuse cases[14], it was noted from current data that whilst fewer female survivors come to financial arrangements than the general divorcing populace, when they do so they are more likely to have it made into a court order. That suggests that domestic abuse-focused cases are going to final hearing anyway under the law as it stands and if anything, reforms which give greater prominence to domestic abuse ought to make it more likely that perpetrators will be more incentivised to settle cases at an earlier stage.

8. There are other changes Resolution advocates, in the context of cases involving domestic abuse, which may serve further to alleviate the burden on the Family Court. More early judicial scrutiny, awareness of abuse and more proactive interim orders could help to ease some of the court time pressure and ensure that default provisions for non-compliance could be built into orders. If acts such as withholding funds for legal advice or interim financial support were included as conduct within the definition of economic abuse set out in the Domestic Abuse Act 2021 and procedural changes were introduced to deal with these situations, it could reduce court applications/the overall length of proceedings. Making clear the process to be adopted where domestic abuse is a factor before the court would have the benefit of making cases easier to resolve both in and out of court.

9. The coming into force of any new law usually sees an uptick in the immediate aftermath and then a settling down of the number of applications. That has been the experience of other jurisdictions bringing in cohabitation reform; it was the experience of England & Wales with the coming into force of no fault divorce in 2022. Of course, laws for cohabiting couples would be new whereas divorce was not. But taking into account the simplification/codification of financial remedies law, the greater weight being given to nuptial agreements under the proposals, the proposed simplicity and navigability of new laws for cohabitants, not setting the opt out bar so high as to not be able to respect people's autonomy, the moves afoot to simplify weddings law and ongoing moves to put non-court dispute resolution front and centre, there isn't any serious concern about capacity.

[14] Final DA Briefing Paper.pdf

B. Legal aid reform needed first?

As referenced elsewhere, Resolution predicted the effects of the legal aid cuts in 2013, which is seen most starkly in the statistics about self-representing litigants in the family justice system – half (49%) of Family Court cases now see *neither* party represented; in only 13% of cases are both parties represented[15].

Whilst Resolution has campaigned, and will continue to campaign, for changes to the means test and the improvement of legal aid rates, it would be especially important with any new law coming into force to consider again funding for initial legal advice and signposting. Resolution has consistently made the case for funding for early legal advice, including in our written response to the Ministry of Justice's 2023 consultation, *Supporting Earlier Resolution of Private Family Law Arrangements*[16], and oral evidence to the Justice Select Committee on the same consultation[17]. In Scotland, a World Bank report found that for every £1 spent on legal aid in family cases, the state saves £5 elsewhere (through, for example, reduced court spending and fewer people relying on benefits). Early legal advice in the context of any reform would help people understand their legal rights and responsibilities and understand where court is inappropriate; would be a point of appropriate referral away from (or to) court to resolve issues; and manage expectations on outcomes.

Although, as we say in the previous section, we don't feel that the changes proposed will lead to significant ongoing influx into the Family Court, it feels like a sensible moment to bring funding for initial legal advice (and wider issues around legal aid) back into the conversation. One option would be to widen the hugely successful mediation voucher scheme[18] so that (a) it applies to money cases (in isolation) and (b) people can spend the voucher as they wish (including for tailored initial legal advice and signposting), rather than it only being available for mediation.

To be clear though, we don't feel that the proposed reform can or should wait.

Having made these points, we confirm that we endorse the government's equalities impact assessment which accompanied the consultation. Additionally, we consider that cohabitation reform itself is more likely to reduce pressure on public finances, which offsets the concerns that others have already expressed or are likely to express in response to this consultation[19].

Children and victims of domestic abuse have waited many years for change to happen. They should not be made to wait any longer.

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[15] Family Court Statistics Quarterly: January to March 2026 - GOV.UK
[16] Resolution-response-to-MoJ-Early-resolution-June-2023.pdf
[17] committees.parliament.uk/oralevidence/13327/pdf/
[18] Families spared time and money during separation thanks to Government action - GOV.UK
[19] Graeme Fraser, May 2025 https://financialremediesjournal.com/how-cohabitation-reform-could-reduce-pressure-on-public-finances/

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Resolution, 13 August 2026