RESPONSE OF THE FAMILY LAW BAR ASSOCIATION

1. This is a response on behalf of ***The Family Law Bar Association*** ('The FLBA') to the Consultation known as: "*A fairer end to relationships*" dated June 2026.

The FLBA

2. The FLBA has approximately 2,200 members, who together comprise a substantial proportion of the practising family bar (2,900 barristers listed family law as their main area of practice, according to the Bar Council statistics for February 2025). The FLBA National Committee comprises approximately 60 of those practising family barristers, drawn from all levels of call, areas of practice and geographical regions, and is broadly representative of the membership at large. As such, the Association has a wealth of experience in dealing with cases across the spectrum of family work, both in our members' practice at the bar and for many in their role as members of the fee paid judiciary. Within the National Committee of the FLBA there is a sub-committee which deals with the 'money' and 'property' aspects of family law, which includes financial remedies applications between divorcing spouses, claims for financial provision for the children of (usually) unmarried parents, and claims regarding property interests between cohabiting, but unmarried, couples pursuant to the Trusts of Land and Appointment of Trustees Act 1996.

3. The sub-committee that has drafted this response, including those FLBA members who have been co-opted to assist, is comprised as follows:

a.	Peter Newman	(Chair of the sub-committee, called 2005)
b.	Leslie Samuels KC	(Chair of the FLBA)
c.	Lucy Reed KC	(Vice Chair of the FLBA)
d.	James Roberts KC	(Immediate past Chair of the FLBA)
e.	Samantha Hillas KC	(Leader of the Northern Circuit)
f.	Michael Horton KC	
g.	Katharine Bundell	(called 1991)
h.	Elizabeth Darlington	(called 1998)
i.	Greg Williams	(called 2006)
j.	Charlotte John	(called 2008)
k.	Mandy Tanner	(called 2009)
l.	Giorgia Sessi	(called 2017)
m.	Calum Smith	(called 2021)

4. The members of this sub-committee are full-time practising barristers specialising in matrimonial/family finance (with one co-opted member specialising in Chancery law). Some of the sub-committee also sit as part-time judges in the Family Court (Deputy District Judges,

Recorders and Deputy High Court judges) and as arbitrators in family cases. Most of us undertake work as evaluators for 'Private FDRs', as well as assisting in other forms of non-court dispute resolution, such as mediation.

5. The FLBA is perhaps uniquely placed to provide insight on these issues. Our members are at the 'coalface' of family law, dealing on a day-to-day basis with cases of vastly differing complexity and asset values, and across all parts of England and Wales. Between us we act for the full array of solicitors and clients, from 'high net worth' litigants represented by large central London firms, to low-income families represented by nationwide high street firms and litigants in person via 'Direct Public Access'. We see, first-hand, the application of the law in the courts throughout this jurisdiction and the real-world consequences for the full array of litigants and their families.

PREFACE

Reforms to the MCA 1973 as to financial remedies on divorce

6. The timeframe for responses to this consultation is quite short, and so we intend for this response to be a discursive overview of some of the issues raised. We hope, as this consultation progresses, that the Government will revert to the FLBA for further input on any granular issues.

7. The FLBA is encouraged by the title of this Consultation: "*A fairer end to relationships*". We firmly agree that fairness should be at the heart of the law on divorce, and should be the guiding principle – a prism through which everything else should be viewed. Principles of fairness are what have shaped the development of the jurisprudence in this area of law, and have enabled a statute written 53 years ago in 1973 to evolve and adapt (through jurisprudence) to changing societal norms, broadly keeping pace with changes to:

    a. the way spouses manage their financial and domestic lives;
    b. modern family finances and forms of remuneration;
    c. the housing and income needs of families in modern society;
    d. changes in attitudes towards unmarried cohabitation and marital intimate relationships;
    e. changes in attitude towards the arrangements for children of separated parents;
    f. the abolition of any need to ascribe blame for the end to relationships;
    g. a recognition that marital contributions come in many forms which are equally important and which do not justify discrimination towards the role played by one spouse over the role played by the other.

8. The concepts referred to in this consultation are ultimately derived from a desire to promote this overarching principle of fairness for families of all types, whether or not family life is built around a marriage. For example:

    a. The sharing of wealth accrued as a result of endeavours during a marriage, regardless of which party was the 'breadwinner';

b. The broad immunity from sharing of wealth that is not the product of the parties' endeavours during a marriage, such as wealth brought by one party to the relationship, or wealth inherited or gifted to one party during a relationship, save where that wealth has been treated by the parties over time as being shared between them;
c. The careful assessment of continuing relationship-generated needs which are brought about by the marital standard of living in any given case;
d. The respect for parties' personal autonomy which is provided by the principle that nuptial agreements, if freely entered into with full understanding of their implications, should ordinarily be upheld by the courts unless it is not fair to do so;
e. The question as to whether domestic abuse in all its forms should have a greater impact on outcomes, and the aptitude of the current threshold for this;
f. The question as to whether cohabiting but unmarried parties should be able to access forms of financial remedy to prevent disadvantage or need caused by the breakdown of a cohabiting relationship, and which goes beyond mere property rights and provision for children.

9. In our experience, no two marriages or familial relationships are exactly alike, whether in dynamic, lifestyle, income or capital wealth. There is no 'normal' case. If the goal is to ensure fair outcomes for all families, and not just those whose marriage or relationship fits within particular fixed parameters or perceived (but illusory) 'norms', any reformed law must be careful to ensure that it is drafted in such a way that it can cover a great number of particular or unique features which may be germane to any particular family. An overly rigid or prescriptive framework will bring about fair outcomes for only *some* families, but risks very significant unfairness for many other families.

10. It would, we suggest, be a significant failure of any reform to the law on divorce or the introduction of new law relating to cohabitants if those laws are written in such a way that would enable only *some* families to achieve a fair outcome, but with many families finding that the law simply does not do justice in their particular case. Therefore, whilst we welcome this consultation on 'Codification Plus', we are of the view that very careful thought must be given to ensuring that any new law allows the court to impose a fair outcome in the widest variety of cases. The 'holy grail' should be fairness in <u>all</u> cases. This will mean ensuring that any codification of existing jurisprudence, or of new principles, does not unduly fetter the ability of the court to ensure an outcome which is fair in all of the specific circumstances.

11. In some of the examples we give below, it can be seen why this remains necessary.

Judicial discretion must be retained to balance fairness and certainty for divorcing couples, it being recognised in the Nuffield Foundation report '*Fair Shares? Sorting out money and property on divorce'* (link) 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".

Parts 2-3 – Reforming the law for cohabitants on separation and intestacy

12. The FLBA considers that it is important that as far as possible there is Clarity, Consistency and Certainty:

    a. Clarity, in relation to the words and definitions used, so that couples are aware and understand what their new rights and responsibilities are under the new legislation.

    b. Consistency, as far as practicable having regard to policy constraints, between cohabitants and married couples or those in a civil partnership, and also between provision on separation and that on intestacy. This will reduce the scope for disputes in the Courts and also help understanding of the new legislation.

    c. Certainty: it is hoped that the new legislation will provide greater certainty as to the extent of cohabiting couples' rights and responsibilities than is presently the case.

A further opportunity for structural reform

13. The FLBA proposes that the Government takes the opportunity presented by its current proposal for family law reform to establish the Financial Remedies Court (FRC) as the specialist forum for the determination of all financial disputes arising from family relationships. This should include not only financial remedy proceedings arising on divorce and dissolution, but also claims between cohabitants brought under the Trusts of Land and Appointment of Trustees Act 1996 ("TLATA"), claims under the Inheritance (Provision for Family and Dependants) Act 1975 ("the 1975 Act"), Schedule 1 Children Act claims and any new statutory claims arising under the proposed cohabitation framework.

14. At present, parties are required to navigate a fragmented jurisdictional landscape. A cohabitant may pursue a claim concerning beneficial ownership of the family home under TLATA in the County Court or High Court, whilst related claims concerning children must be pursued in the Family Court. Following a death, a surviving partner may be required to pursue a claim under the 1975 Act in the Chancery Division notwithstanding that the dispute concerns the same family relationship, and often the same assets. This fragmentation of jurisdiction increases cost, delay and complexity and risks inconsistent judicial findings on overlapping factual issues. The introduction of a new species of right for cohabitants, without the structural reforms we suggest, would only exacerbate the current problems for litigants.

15. The FLBA considers that the principle of "one family, one court" should now be fully realised. The FRC has developed into a well-established specialist jurisdiction with expertise in resolving complex financial disputes arising from family relationships. There is no principled reason why disputes concerning beneficial ownership of family property or family provision claims following death should continue to be determined in separate jurisdictions when the underlying issues are frequently family-based and closely connected to proceedings that already fall within the Family Court's remit (specifically under the umbrella of the FRC).

16. Importantly, the legislative changes required to achieve this objective are modest. It has previously been suggested that a simple amendment to section 23(3) of the Trusts of Land and Appointment of Trustees Act 1996 and section 25(1) of the Inheritance (Provision for Family and Dependents) Act 1975, by adding the words "or the Family Court", would largely resolve the jurisdictional obstacle. This amendment was identified and recommended by Lord Justice Briggs in his 2016 review (link) of the civil courts structure and was subsequently recognised by the late Sir James Munby[1] as a straightforward and effective mechanism for bringing these claims within the Family Court's jurisdiction. The FLBA supports that proposal.

17. The Government should therefore:

a. Amend section 23(3) TLATA 1996 and section 25(1) of the 1975 Act to confer jurisdiction upon the Family Court;
b. Amend the Family Procedure Rules to permit TLATA and 1975 Act claims to be commenced within the Family (Financial Remedies) Court where they arise from family, matrimonial, cohabitation or domestic relationships;
c. Introduce specific transfer provisions enabling proceedings commenced in the County Court, High Court or Chancery Division to be transferred into the Family (Financial Remedies) Court where appropriate;
d. Make corresponding amendments to the Civil Procedure Rules to facilitate such transfers;
e. Permit the consolidation and joint case management of related proceedings, including:
    i. financial remedy claims and TLATA claims; cohabitation claims and TLATA claims;
    ii. Schedule 1 claims and TLATA claims;
    iii. financial remedy claims and claims under the 1975 Act; and
    iv. claims involving both proprietary and needs-based remedies.

f. Extend the existing FRC case management framework, disclosure obligations and importantly its dispute resolution procedures to all such claims.

18. The FLBA does not propose any substantive alteration to the actual law governing trusts, property ownership or family provision claims. TLATA claims would continue to be determined according to trust law principles, and claims under the 1975 Act would continue to be determined according to the statutory criteria enacted by Parliament. The reform is jurisdictional and procedural rather than substantive.

19. The benefits would be considerable. Parties would be able to resolve all financial disputes arising from a family relationship within a single specialist court. Costs and duplication would be reduced, judicial continuity improved and the risk of inconsistent factual findings minimised. Most importantly, litigants would have access to a clearer, more accessible and more coherent system of justice.

[1] 17th 'View from the President's Chambers: Divorce and Money: where are we and where are we going? [2017] Fam Law 607

20. The FLBA therefore recommends that the Government implement the relatively modest statutory amendments identified by Lord Justice Briggs and supported by Sir James Munby, together with the necessary procedural reforms, so as to establish the FRC as the principal forum for the resolution of all financial disputes arising from family relationships, relationship breakdown and death.

Resources

21. The FLBA considers that the success of the Government's proposed reforms will depend not only on legislative change but also on the provision of adequate resources to the FRC and the system around it, including legal aid. The impact assessment suggests that the reforms are likely to have no detrimental impact upon the number of cases coming before the court but a new statutory framework for financial remedies, qualifying nuptial agreements and cohabitation claims will inevitably require judicial interpretation and development, particularly during the early years of implementation.

22. It is therefore essential that the FRC is provided with increased sitting days and sufficient judicial capacity to meet this additional demand. These sitting days cannot be provided by reducing the days available to children work, which is already overstretched and facing significant resource challenges. Without additional resources for the Family Court as a whole, there is a significant risk that delays will increase, case management will become more difficult, and parties will experience longer waits for hearings and final determination of their disputes.

23. The FRC has proved successful because of its specialist judiciary, continuity of case management and focus on efficient dispute resolution. Those strengths should be preserved and enhanced. Increased judicial sitting days would assist in maintaining timely progression of cases, reducing backlogs and ensuring that the court remains able to provide authoritative guidance on the new statutory provisions as they develop.

24. Equally, for the new rights granted to be more than merely illusory, there needs to be a meaningful uplift in payment rates for those cases where one (or, rarely, more than one) party qualifies for legal aid. As discussed within the last round table consultation meeting on 6 August, it is increasingly difficult to identify providers or barristers who are willing to undertake legally aided work at current rates, and those legal professionals are unlikely to have the degree of specialist knowledge available within this area of work. Proper representation of both parties will lead to higher settlement rates and is therefore likely to mitigate, in part, the anticipated need for additional sitting days.

25. The FLBA therefore considers that investment in the FRC and legal aid should form an integral part of any programme of reform. A more detailed and comprehensive legal framework will only achieve its intended benefits if the specialist court responsible for administering it is properly resourced to do so and expert advice and representation is available to all. Additional sitting days, together with appropriate administrative support, expert advice and representation, are likely to be essential if the goals of greater certainty, accessibility and efficiency are to be realised in practice.

REPONSES TO SPECIFIC QUESTIONS

[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 in the text box.

26. We broadly agree with this, but we must qualify that agreement with regard to the word '*equal'*. There are some cases where 'equal' does not actually mean 'fair'. Jurisprudence has developed over decades to manage this potential unfairness. Any codification would need to be more nuanced than a simple or automatic equal division to encompass these safeguards. We provide a more detailed explanation below.

27. The word 'equal' is thus too categorical and would lead to outcomes which might not accord with the government's own view (as expressed in the consultation) 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.*

28. It is first important to establish what we mean by the 'sharing' principle and, importantly, what we mean by 'matrimonial property' (and 'non-matrimonial property').

29. The 'sharing' principle is the purest encapsulation of the overarching principles of fairness that underpin current matrimonial finance law and, we assume, will underpin any reform to that law. The principle can be summarised as follows: Once parties are married, or have been cohabiting in a way which seamlessly leads to marriage, they commit to sharing and intertwining their lives in a myriad of different ways. They become a partnership of equals, regardless of their distinct and particular roles.

30. There may be a traditional division where one party might undertake more of the domestic duties and childcare responsibilities and the other might be solely or substantially responsible for earning the money that fuels family life. Or there may be a more modern division where they might both share these family responsibilities in proportions and ways which are infinitely complex and varied – and which may well fluctuate over the course of the marriage.

31. Whilst parties may remain separate legal entities in which they can solely own property and assets, the existing law gives the court the power to look beyond that. This is because the different roles that each party might play in the marital partnership may result in one of them holding, in their sole name, more wealth than the other party even though it is the result of combined marital endeavour. To create a distinction between roles would discriminate between the parties within a marriage. If they are viewed as a marital partnership, the wealth accrued during the marriage is the product of that partnership, and not merely the product of any individual within it.

32. It is therefore correct that wealth that is *clearly* accrued as a result of endeavours during a marriage should be shared between the parties, and the starting point for that division ought to be equality. Anything other than equal sharing of actual marital accrual would, in most cases, be contrary to the overarching 'fairness' principle.

33. However, we disagree that the application of the sharing principle should *always* mean equal sharing of matrimonial property and we strongly caution against any codification that might have that effect. The primary reason for this is due to the nuances and degrees to which property might be described as 'matrimonial'. It is not always an 'all or nothing' distinction, nor one that can be easily identified. Secondly, there will be cases where precisely equal sharing of this category of wealth produces an outcome that is not fair overall.

34. Wealth clearly accrued purely as a result of endeavours during a marriage is very obviously 'matrimonial' in character and the only reason not to share such wealth - equally - would be to meet needs. As a result of jurisprudence developed over the last 26 years, culminating in *Standish v Standish* [2025] UKSC 26, this is now already an uncontroversial and wholly predictable feature of matrimonial law. However, it is noteworthy that, in *Standish*, the Supreme Court held that matrimonial wealth should "normally" be shared equally. The inclusion of that qualifier demonstrates that the Supreme Court recognised the dangers of categorical language in an area where judicial discretion remains an important safeguard.

35. It is important to note the corollary of this, as made clear in *Standish*, namely that non-matrimonial wealth is not to be shared at all, save if needs require it. But again, this jurisprudential guiding principle only applies to wealth that is obviously and clearly 'non-matrimonial', and which can be easily identified as being so – and where the application of the principle does not offend against overarching principles of fairness when the overall outcome is surveyed.

36. If it was always straightforward to make a binary distinction between matrimonial wealth and non-matrimonial wealth, then a codification of these principes might be more straightforward.

37. However, the complexity arrives where there is an unclear distinction between the '*product of marital endeavours'* on one hand, and '*wealth accrued outside the span of the partnership or from an external source'* on the other hand. There are many classes of asset which could be said to straddle both categories, or which could be described as a mixture of both categories, or where a slavish delineation between the two categories (if it were possible) plainly and obviously would lead to an unfair outcome.

38. What the authorities do show is that in order to achieve a fair outcome overall, there are many situations which require careful thought and a nuanced approach. Below are some (non-exhaustive) examples for which a detailed explanation is provided, but they are:
    (a) 'Straddling' businesses – businesses which may have operated prior to the marriage but have continued to develop during it;
    (b) Matrimonial homes – may be brought into the marriage wholly or substantially by one party and, if the marriage is short, an equal division would result in unfairness;
    (c) Mingled assets – non-marital assets are often not held strictly separately;
    (d) Inheritances – if one party inherits and uses it to benefit the family but the other does not, how should that be treated;

(e) Post separation accrual – to what extent wealth accrued from post-separation income can be attributed to endeavours during the marriage or should be shared;
(f) Risk-laden assets versus 'copper bottomed' assets – should there be a rebalancing if one party keeps a risky asset e.g. a business shareholding and the other retains, for instance, the family home or cash in bank accounts.

39. It is also often difficult to delineate precisely when a marriage starts (given it will include seamless cohabitation) and when it will end, which may be subjective. This adds another complexity to what comprises assets accrued during the course of the 'marriage'.

'***Straddling' businesses:***

40. Often a divorce will involve a business which has been operating for many years prior to a marriage, and which is owned by one party prior to a marriage, but which has then continued in operation during the marital years. Often business shareholding assets (even of modest small businesses) are one of the most valuable assets in a case. Are these 'matrimonial' assets because the more recent years of operation are derived from marital endeavour, or are these non-matrimonial assets because the business was built (and the shareholding owned) before the marriage and was then just *maintained* during the marriage? Or are they partially matrimonial and partially non-matrimonial (which may well be the fairest and most factually accurate way of treating them)?

41. Should the courts adopt a 'linear' approach to this question by simply considering what proportion of the operative years of the business were within or without the span of the marriage, and then only sharing the business in that proportion? Or should the courts take a more forensic approach by considering (if possible) the value of the business at the outset of the marriage and uprating it by inflation – given this might be a tricky valuation process? Or should the courts take a more 'holistic' approach, taking into account all factors and context? The correct approach to take will always depend on the unique nature of the business itself.

Matrimonial homes:

42. It has been settled law since *White* and *Miller* that matrimonial homes are deemed to fall into the category of 'matrimonial' assets regardless of source and regardless of the length of the marriage. But should they *always* be shared equally for this reason?

43. In a number of cases (some cited by the Court of Appeal in *Standish*, but there are many more, reported and unreported) the courts have found that automatic equal sharing of matrimonial homes does not produce a fair outcome overall. It is particularly problematic in the (increasingly common) cases of second marriages or late-life marriage, where litigants often come to the marriage with pre-marital property (sometimes their award after divorce proceedings in their first marriage), which they then live in with their new spouse or which they sell in order to purchase a new home with their new spouse.

44. Some examples of this in practice:

a. A 55 year old woman has spent 30 years working hard and assiduously paying off the mortgage of her solely-owned home. Then she meets someone, marries them, and then lives with them in her home. Her home is now the 'matrimonial home'. They separate only 3 years after marrying. Should that property be automatically shared *equally* if they divorce, because it is deemed to be a 'matrimonial' asset?

b. A wife receives an inheritance during a long marriage. It is the only inheritance she will ever get because both of her parents have now died. She sensibly uses it to pay off the large mortgage at the family home. That decision enables the parties to have financial freedom, which sustains their quality of life for many years. The husband's mother is still alive when the parties separate but then the husband's mother dies and leaves him a similar amount of money. He keeps that money in a separate bank account. Should the husband's inheritance be entirely immune from sharing in these circumstances, while the family home is shared equally? This would allow the husband to share equally in the benefit of the wife's inheritance but not share a penny of his own inheritance with the wife. The wife is therefore disadvantaged simply due to the timing of her inheritance and her decision to spend it for the good of the family.

Mingled Assets:

45. It is very common for non-matrimonial wealth to become 'mingled' with matrimonial wealth. Spouses do not expect to get divorced and do not therefore maintain a strict separation of their 'matrimonial' wealth and their 'non-matrimonial' wealth. It is not realistic to expect that spouses might ever do this. If a codified statute demands that non-matrimonial wealth is not shared (save to meet needs), how should the court strive to identify the scale of the non-matrimonial contribution and then exclude it from sharing? To what extent should the economic growth of the non-matrimonial contribution since it was first received be taken into account?

46. These questions often depend on the timing and extent of the contribution, the nature of the asset in question, the extent of the 'mingling' and the length of the marriage.

Inheritances:

47. An inheritance is ostensibly a paradigm non-matrimonial asset and the courts already seek to avoid applying the sharing principle to inheritances. However, a significant amount turns on the timing of receipt and the use to which the inherited wealth has been put (see the example given above in 'matrimonial homes'). Most people, when they receive an inheritance during a marriage, do not squirrel it away in a separate bank account whereupon it can be easily identified and quarantined from sharing in the event of a divorce. They often use their inheritance for the good of the family, whether it be for purchasing cars, holidays or reducing marital debts, paying off mortgages, purchasing investments, or generally mingling the inheritance with other wealth which is of a 'matrimonial' nature.

48. If only inheritances which are kept entirely separate and preserved can be excluded from sharing, it thus penalises parties who choose to deploy their inheritance for the good of the family. Either the inheritance is seen as being invested into assets that will be deemed

matrimonial (eg: family homes), or it will have been spent, or mingled with other, matrimonial, assets such that it becomes difficult to identify the inheritance and quarantine it from sharing. The corollary of this is that spouses who do not use their inheritance for the good of the family, either by keeping it separate or by receiving it very shortly before (or after) the end of a marriage are unfairly rewarded by being able to quarantine it entirely from sharing.

49. Indeed, there may be marriages with an abusive dynamic where one party purposefully engineers such a situation, and the law will need to remain flexible in order to ameliorate it.

Post-separation accrual:

50. People are now paid in a variety of different ways. Many people's remuneration from employment does not simply come from a PAYE salary, but is paid by way of drawings/dividend, commission, discretionary bonus, stock options, restricted stock units and other forms of deferred remuneration, as well as income from trusts. In the sphere of private equity, vast remuneration can be paid via contingent 'carried interests' which are notionally valueless until future hurdles are met but then might become very valuable further down the line, but which would not be held by a spouse but for marital endeavours. In the more common sphere of self-employment, people pay themselves with dividends which might in reality have accrued as a result of work done many months or years prior.

51. In many of these cases, it could be argued that the *endeavours* which led to the award of remuneration was during the marriage, even if the *receipt* of the remuneration was not. In many cases there might be an element to the remuneration that derives from efforts during a marriage, but also an element which relies on continuing efforts after the marriage has ended.

52. For example: A husband is granted, as a form of bonus, valuable unvested shares by his employer as a result of his endeavours at work during the marriage, but in order to realise those shares in the future he must continue to work hard for his employer for several years after the marriage has ended to ensure that the shares will vest. Will those shares, once vested, be matrimonial, non-matrimonial, or a bit of both? And given every case is different (and every award of deferred remuneration has its own quirks) how will the extent of this be determined?

53. Consider these contrasting examples:

    a. The parties separate and immediately live in different homes. The wife accrues further savings from her income, but the husband runs up debts. Should their combined wealth (including debts) at the date of trial be shared equally - or should the post-separation savings/debts not be shared at all? Fairness would suggest no sharing.
    b. The parties separate and stay in the same home because they have no other option. Apart from the physical intimacy of their relationship, nothing else changes 'on the ground'. The wife continues to run the home and primarily care for the children, the husband works and provides the income to run the household. Should the husband get to keep any savings accrued in this period and not share them with the wife, given their respective contributions to domestic life have not changed at all since they separated? Fairness would suggest a sharing of those savings, in this scenario.

'Risk laden' assets versus 'copper-bottomed' assets:

54. The courts have consistently identified that there is a significant difference in the real-life 'value' of what are termed 'copper-bottomed' assets (eg: cash and property) as opposed to more illiquid or risk-laden assets (eg: shares in a private limited company or investments in EIS or SEIS schemes). Therefore, the court often adjusts away from equal sharing in cases where one party will be retaining all or most of the 'copper-bottomed' wealth and the other party will be retaining the risky/illiquid wealth. To do otherwise would be unfair to the party who is taking on the more illiquid and riskier assets.

55. For example: The parties own a house with net equity of £600,000 (which they agree must be sold), a 100% shareholding in a small business worth £400,000 and cash savings of £200,000. It is all matrimonial in character. It is agreed that the husband will retain the business because he runs it and it provides his only source of income. The 'copper-bottomed' assets are thus £800,000 and the risk-laden/illiquid assets are £400,000, making a total of £1.2m. Absent any 'needs' issues, it could be unfair to award the wife £600,000 comprising of only cash, thus leaving the husband with just £200,000 in cash and £400,000 in illiquid/risky shareholding. An adjustment would be made. Sometimes the courts discount the notional value of the shareholding in the overall mathematics, but very often they adjust the overall % division between the parties to account for the different qualities of the assets that each of them will be retaining.

Relationship-generated disadvantage:

56. This could also be known as 'compensation' and we note the proposal to include this as a s.25 factor (or a factor in any new statute with different numbering). Where relationship-generated disadvantage has been shown, and the court wishes to mitigate any further disparity caused by the disadvantage into the future, one of the options for the court is to apply an unequal sharing of wealth to meet the justice of the case.

57. For example: The parties trained as accountants together and both worked at the same firm for 12 years. They both make partner aged 35 and are each earning good incomes. Their career paths are identical. The wife falls pregnant and they agree that she will leave her career to be primary career for the children. Another 15 years passes and they separate. The parties are now both 50 years old. The husband been able to carry on with his career and now earns £1m a year. He has another 17 years left in his career, earning at that level, with the ability to accrue significant further capital during the remainder of his career. The wife has no income at all and it is now too late for her to return to her previous career. She remains primary carer to their three children, who are all aged 15 and under. Given the extent to which the husband will continue to accrue capital from his income – and the wife will not - as a result of the choices made in the marriage, is it fair to share their current assets equally and just meet the wife's needs, or should the wife have more than 50% of the matrimonial assets or provision that exceeds her needs in order to compensate her for the disadvantage she has suffered and the 'exit disparity' it has caused?

'Matrimonialisation':

58. This concept was addressed at length in *Standish*. However, what was not fully addressed in *Standish* is the proportions in which an asset that has been 'matrimonialised' might be shared, or whether the process of matrimonialisation is 'all of nothing', in which such assets are either equally shared or not shared at all. In the Court of Appeal in *Standish*, Moylan LJ was clear that matrimonialisation is not binary. An asset can be 'matrimonialised' to a degree, but the process of matrimonialisation does not always make the entire asset fully matrimonial in character and thus equally shareable in every case. The Supreme Court in *Standish* did not appear to demur from this. It is similar to the way that matrimonial homes always fall into the 'matrimonial' category, but are not necessarily always shared equally.

Conclusion

59. The FLBA shares the view of the courts, developed over decades of thoughtful jurisprudence, that there are cases in which an automatic equal sharing of matrimonial wealth does not result in a fair outcome in the case, and that adjustments therefore need to be made if the case demands it. We take no issue with any codified statute setting out the general 'headline' principles that (subject always to meeting needs) matrimonial wealth is normally shared equally and non-matrimonial wealth is normally not shared at all. This would provide parties with a high degree of certainty as to what approach is going to be taken to their assets, absent any reason to the contrary. But equally it will provide the parties with comfort that, if there are particular features of their case which mean that an application of those headline principles will lead to manifest unfairness, the courts will not slavishly or robotically apply them.

60. Therefore, we strongly caution against the use of categorical language which might be perceived to place the courts in a straitjacket which would lead to unfairness. We also caution against any assumption that the identification of, or delineation between, matrimonial and non-matrimonial property will always be a simple process.

[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 in the text box.

61. We broadly agree with this, on the implied assumption that "equal sharing" here means "equal sharing of the *matrimionial* assets".

62. For the reasons expressed above we would caution against the use of the word 'equal' when describing each party's sharing entitlement.

63. The courts have said, in effect, that a litigant will receive whichever is the higher sum on an application of the 'needs' principle and of the 'sharing' principle. The only problem with approaching it in that way is that it tends to assume that there is only one litigant whose needs must be taken into account, and it is often a zero-sum-game. It does not work if, by meeting

one party's needs, the court is taking away from the other party's sharing entitlement to such an extent that they cannot meet their own needs.

64. A better way of expressing this is as follows:

a. **Stage 1** – An assessment of sharing entitlement: The word 'entitlement' is important because it means they are *entitled* to their fair share of the matrimonial assets (*often* equal, but see above). And they are entitled to that share even if those sums exceed their needs (hence 'entitlement'). To do otherwise would return to the pre-*White* days of 'reasonable requirements' and would likely discriminate between the roles each party played in a marriage.

b. **Stage 2** – A consideration of whether the parties can meet their relationship-generated needs from their assessed sharing entitlement. If they can, then the analysis can stop there. If either or both of them cannot, then consideration must be given to what extent they each may need more than their sharing entitlement to meet their needs.

c. **Stage 3** - To consider whether, in providing more than a party's sharing entitlement in order to meet their needs, the consequent effect is that the other party can no longer meet their own needs. If that is the case, the assessment of need must be adjusted so that needs are met on both sides, but likely at a lower level than previously assessed.

d. **Stage 4** - The court surveys the outcome which results from this process and is satisfied that the overall outcome remains fair in all the circumstances.

65. In low value cases, sometimes it is not possible to meet needs from any sharing of the wealth, even if shared 100% - 0% and even if non-matrimonial wealth is included in that. In those cases, where meeting needs simply cannot be done, fairness would suggest that the division of the wealth reverts to the outcome that results from sharing entitlement (Stage 1), unless there is another good reason (such as prioritisation of the victim of domestic abuse if the circumstances demand it).

[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 in the text box.

66. We only partially agree with this.

67. As we have expressed above, it will not be possible to express the distinctions between matrimonial and non-matrimonial property in a codified statute in a way which captures the nuances and complexities of every case. To attempt to do so would certainly lead to unfairness in many cases.

68. The Supreme Court in *Standish* wisely did not attempt to provide comprehensive guidance as to how to delineate between matrimonial and non-matrimonial wealth, nor did it attempt to

summarise the jurisprudence on the wide variety of assets in which delineation can be problematic and must be assessed in the context of the individual case. The focus was on the process of 'matrimonialisation', which is just one of the many features of cases (some referred to above) which might affect the distinction between these two classes of asset.

69. Therefore, we do not agree that *Standish* provides particularly comprehensive guidance as to the distinctions between matrimonial and non-matrimonial property, save in a high level and somewhat general way. It does not, for example, descend into any analysis of some of the complex issues referred to above. Broadly the case simply reinforces the following pre-existing principles:

    a. Assets which are deemed by the court to be the product of the parties' endeavours during a marriage are matrimonial assets;
    b. Assets which are treated by the parties over time in such a way as to suggest an intention to share them can also be deemed by the court to be matrimonial assets even if they are not the product of the parties' endeavours during a marriage. Whether this has occurred is not to be construed narrowly.
    c. The sharing principle applies to matrimonial assets, and the application of the sharing principle normally means equal sharing (absent reasons to the contrary);
    d. Assets which are not matrimonial assets because they do not derive from the parties' endeavours during the marriage, nor have they been treated in such a way as to suggest an intention to share the assets, are non-matrimonial assets.
    e. Save where required to meet needs, non-matrimonial assets should not be shared;
    f. Achieving a fair outcome overall, in the circumstances of the case, must remain the overarching principle which guides the courts' application of these concepts.

70. We take the view that *Standish* does not represent any kind of seismic shift in the way matrimonial law is applied but rather clarified and focussed the existing jurisprudence. It is a restatement of a number of principles that had already been settled law for number of years, and which had led to the law being considerably more predictable than it might have been in the years immediately following the 1973 statute. The Supreme Court thus could not have had the intention of prohibiting the judicial discretion conferred by the statute, especially if that led to outcomes that were manifestly unfair in the circumstances of any given case.

71. It is thus important to avoid categorical language, or unduly prescriptive principles that are to be followed without then surveying the wider circumstances of the case and the outcome to ensure overarching fairness.

[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 in the text box.

72. We agree with this.

73. The concept of 'matrimonialisation' has grown organically within the jurisprudence in the last 10-15 years, culminating in its approval in *Standish*, which also said that it was a concept that did not need to be narrowly construed.

74. The FLBA consider that the concept of 'matrimonialisation' has evolved in a direct reaction to the jurisprudence on non-matrimonial wealth gradually becoming more rigorous in the last 10-15 years. As the courts have increasingly held that non-matrimonial wealth is not to be shared (as opposed to just being a discretionary factor in a more holistic approach), the courts have also introduced the concept of 'matrimonialisation' to widen the class of assets that it would be fair to deem 'matrimonial' in the circumstances of the case.

75. We believe that this is a good example of the courts always ensuring that fairness lies at the heart of the process. If categories of asset are to be strictly delineated, as opposed to simply considered in a holistic discretionary balance, there needed to be a means by which the justice of the case could be met according to the particular circumstances.

[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 in the text box.

76. The FLBA strongly agrees with this, as is apparent from what has been said already.

77. The 1973 statute provides a checklist of factors in s.25 but these were drafted at a time when it was considered necessary to record in the statute that the court must look at things which we now probably take for granted as being necessary components of any analysis that seeks to achieve fairness: resources, income, earning capacity, needs, standard of living, duration of marriage, conduct, age, disability, contributions, loss of benefit.

78. The 1973 statute otherwise provides, *prima facie*, for the exercise of what might appear to be an almost untrammelled discretion.

79. In reality, the courts do not have an untrammelled discretion at all because 53 years of jurisprudence has stipulated and refined what the statute actually requires. But we accept that many of the fundamental concepts which now firmly trammel the exercise of the court's discretion are not codified in the statute itself, and can only be accessed by reading the case law that followed the statute. For example:

    a. The MCA 1973 does not refer to 'fairness' anywhere[2], even though it is accepted that it lies at the heart of the process;
    b. It does not mention 'sharing' or non-discrimination between spousal roles;
    c. It does not refer to the distinction between matrimonial and non-matrimonial property;
    d. It does not say that needs (save perhaps for the needs of children) must take precedence over sharing;

[2] Save for the reference to the 'fairness' of financial provision within s.10(3)(b) MCA 1973, which relates to proceedings prior to a final divorce order. There is no reference to fairness in ss.23-25.

e. There is no mention of relationship-generated disadvantage / compensation.

80. It is therefore sensible that a new statute records these high-level and fundamental principles in the body of the statute itself. This would at least give statutory force to the guiding jurisprudential concepts - which already have such a strong influence on the court's discretion that that they might as well be statutory.

81. Perhaps most importantly, the statute must record that it is the *overarching* duty of the court to achieve a fair result. It is surprising that the 1973 statute says nothing about fairness, although we imagine it was considered implicit. In this field, 'fairness' probably equates to 'justice'. But what was considered 'fair' in 1973 is not what we would consider 'fair' in 2026.

82. This will have two benefits:

a. Firstly, it will reinforce the fact that any high-level principles which are codified within the statute (eg: that matrimonial wealth must be shared, or that needs must be met) are codified because they are, implicitly, fair;
b. Secondly, it will provide the court with the ability to have final oversight as to any application of those principles to ensure that they have been applied in such a way as to produce a fair outcome, and if adjustment is required to ensure this, it will provide the court with the ability to do so without considering that its ability to do so is restricted by a dogmatic application of any of those codified principles.

83. It is important to note that one of the attractive features of the 1973 statute and the way it was drafted is that it has allowed the concept of 'fairness' to develop and evolve over time. By not stipulating categorically or prescriptively what 'fairness' means, it has enabled the jurisprudence to adapt to the way that marriages, relationships, child-caring and spousal financial arrangements have changed over time.

[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 in the text box.

84. We only partially agree with this.

85. The transition to independence should be 'an' objective, rather than 'the' objective for meeting needs. It cannot be the *only* objective because there are cases in which too great a focus (or exclusive focus) on the transition to independence would result in an unfair outcome, and may lead to needs not being fairly met.

86. A party might be disadvantaged as a result of 'compensation' elements in the case, or as a result of the conduct of the other party. Undue focus on a transition to independence might cause those two features (for example) be overlooked.

87. There are cases where the needs which are generated by the marriage could never be properly met by a party on their own, even if they make every effort to become self-sufficient. If the

'needs' assessment is driven only by an objective to achieve independence, it might influence the court to overlook the actual needs generated by the marriage, bearing in mind the standard of living, and to apply an analysis that is measured by an unfair, objective, standard.

88. The FLBA is concerned that any codified principles which refer only to the transition to independence might not fit well with the government's view that a three-stage test ought to be applied to the 'needs' assessment, in particular the second and third stage of the hierarchical approach. If discretionary spending is to form part of any needs assessment (whether as a separate 'third' stage or just as part of a wider assessment), it is not clear to what extent that discretionary element of the needs assessment will feature in the assessment of whether (and when) independence might be achieved. There might be a temptation to overlook or dismiss discretionary spending in order to achieve independence unduly quickly or in cases where it arguably it could never be achieved.

89. There is a further difficulty with the concept of '*independence, as far as resources allow'*. If a party has lived during a long marriage at a very high standard of living, the resources required to achieve 'independence' in that context will be greater than they might be in a case where the standard of living was markedly different. Therefore, the concept of independence itself, in the context of each case, becomes difficult to define.

90. Another difficulty with making the transition to independence 'the' objective (and not 'an' objective) of the needs assessment is that it is not possible to codify any timescale for it. There are many cases where the transition might take a very long time, and others where it might be reliably achieved within short order. Although periodical payments without a term are now increasingly rare, it remains very common for term orders to be made, but with no bar to later applying to extend the term if the prevailing circumstances justify it.

91. The jurisprudence currently introduces the concept of transitioning to independence without it causing 'undue hardship'. That hardship (and whether it is 'undue') must necessarily be set against the standard of living during the marriage because it forms part of the 'needs' assessment more generally, which also must be assessed in the context of marital standard of living. What might be 'undue hardship' for one litigant might be a very comfortable lifestyle for another. Any attempt to apply an objective or standardised threshold for this assessment risks unfairness overall: either by failing to meet a party's relationship-generated needs and causing them undue hardship in their context of their case, or by providing a party with a surfeit of resources over needs, at the expense of the other party.

92. The presence of children is also a factor which must feature in any analysis of the extent to which a spouse ought to be expected to transition to independence, and the timescales of that.

93. We would thus caution against referring only to "*as far as resources allow*" as being the only (stated) factor to consider in any expectation of a transition to independence. Financial resources are just one of *many* factors that will affect the ability of a party to transition to independence.

94. However, we agree that a later transition to independence ought to be codified as one of many factors to consider when making the needs assessment.

[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 in the text box.

95. We do not agree with this.

96. Meeting the needs of children is already within the existing statute as a 'first consideration' of the court and this is sensible.

97. However, children also might be said to have hierarchical needs. They too have their elemental need for food, clothing, accommodation, health needs and so on. But children also have what might be described as 'discretionary' needs, for example: toys, online gaming subscriptions, nannies, tutors, expensive technology and equipment, extra-curricular sports clubs, activities and hobbies, designer/fashionable clothing and jewellery, pocket money, and so on. It remains unclear to us whether private education would be classed as a basic need or a discretionary need, and we suppose this might depend on the education history of the child and the circumstances of the case.

98. Beyond that, we are also concerned that making a distinction between 'basic' needs and 'discretionary' needs will lead to frequent arguments that a party should be restricted only or primarily to their basic needs. Even the word 'discretionary' suggests that an item of expenditure is not a 'need' at all, but is instead something of a luxury because - if need be - it could be dispensed with or heavily economised. As we highlighted during the round table consultation discussions, in simple terms it could be said that 'a need is a need'.

99. It will be all too easy, for courts dealing with needs cases in which there are limited resources, to dismiss altogether the discretionary needs pleaded by one party, being mindful that meeting needs will invariably come at the expense of the other party. This would reduce the assessment of needs to an objective test, rather than a test that is measured against the marital standard of living. This would lead to unfair outcomes, particularly in cases where there is no qualifying nuptial agreement which expressly curtails needs.

100. The FLBA are also concerned about how 'discretionary' needs could ever be defined. It is something that would change from case to case and we suspect would be the focus of much argument between the parties, which could only ever be resolved after the hearing of evidence at trial and a line-by-line analysis of the claimed discretionary needs. It will make non-court dispute resolution more difficult, because it would introduce an additional contested factual element to many cases.

101. We are troubled by the reference in the consultation document to discretionary needs being "*luxuries*" such as "*expensive cars or designer items*". This assumes there is some objective standard by which needs are measured and where certain items might always be seen as luxury / discretionary. This simply is not the case. As we say in our preface above, no two marriages are alike.

102. Moreover, any attempt to alight on an objective standard for needs will have the effect of discriminating in favour of breadwinners and against homemakers – something which for almost three decades has been viewed as antediluvian and unfair. By restricting parties to an illusory objective standard of 'needs', it will greatly exacerbate the disparity that is likely to result from the breadwinner continuing to earn at a high level after separation (and able to spend freely) and the homemaker being unable to do so.

103. We are also unclear on how, and where, the line should be drawn. We do not see how it could be possible to codify which expenditure falls within the 'discretionary' category, because it will always be referable to the marital standard of living, as well as other factors like the duration of the marriage. A need which might be seen as a 'basic' need after a 30 year marriage because it has been a feature of the marriage for a very long time might be viewed as a 'discretionary' need after a 3 year marriage because it has not been a feature of lifestyle for very long. It would have to be left up to the judge dealing with the case to consider the circumstances of the case.

104. In the context of capital needs (usually housing), this issue may be exacerbated further. The 'basic' need for housing would be a sufficient number of bedrooms and possibly a commutable distance from school or employment. The 'discretionary' needs are likely to be: precise location, size, internal reception spaces, local amenities, decoration, 'kerb appeal', garden size, detached, not overlooked, driveway, number of bathrooms and so on. Again, if it could be argued that anything other than the most elemental housing requirements fall at the bottom of a hierarchy and are seen as 'discretionary' (ie: dispensable) needs, it will encourage disproportionate enquiry and litigation.

105. This is particularly likely to be a problem when the court is conducting the analysis suggested in Question 2 above, namely to apply the sharing principle and then only depart from that if needs require it. Parties will be encouraged to argue that there should be no departure from sharing ('Stage 1') to meet capital / housing needs which are merely discretionary.

[8] Do you agree that the stages should be focused on the following:

1. First consideration 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

106. We do not agree with this.

107. We refer to our response to the previous question. We agree with (1) and with the way it is drafted, such that the welfare of children of the family is given hierarchical prominence. We do not agree with the separation of (2) and (3) for all the reasons already given, and we assume that they are separated in this way to form a further hierarchy.

108. We suggest simply dispensing with (3) altogether. 'Discretionary' needs will then fall within the ambit of 'capital and income needs' and will be assessed in keeping with the standard of living during the marriage and the other circumstances of the case.

109. We do not consider it necessary to qualify any of this with the phrase "*where resources allow*". The assessment of all needs necessarily requires that it must be "*where resources allow*" because the court cannot make a needs-based award which exceeds the available resources, whether it be for 'basic' needs or for 'discretionary' needs (however identified).

110. Indeed, another problem with (3) is that it implies that *only* the discretionary needs are to be assessed in accordance with the available resources. This might lead to significant misunderstanding, because it implies that the needs described in (2) do not have to be assessed in the context of the available resources. This surely is wrong.

111. We think the use of the word 'pension' in (2) is too restrictive. Retirement needs are met in a variety of ways, including capital savings, workplace annuity schemes, property rental income and shareholding dividends. We would replace it with "*retirement provision*".

112. The use of the phrase "*in keeping with the standard of living during the marriage*" is also too restrictive. It is just one factor to consider in the assessment of need and yet appears to be denoted here as the *only* factor. There are other circumstances of a case (and s.25 factors) which are relevant to the assessment of need, such as:

a. The duration of the marriage;
b. The ages of the parties and their stage of life (it being accepted that needs tend to reduce in retirement);
c. The resources of the parties, both now and likely in the future (including future inheritance);
d. The existence of children in their minority;
e. Any particular health needs of disability;
f. The deployment of the other party's non-matrimonial wealth to meet needs;
g. The existence of a qualifying nuptial agreement;
h. The cohabitation of a party with a new partner;
i. Any element of relationship-generated disadvantage.

[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 in the text box.

113. We broadly agree with this.

114. The existing s.25 factors were drafted in 1973 in the context of statute that, as we have said, appears *prima facie* to give the court an almost unfettered discretion, and so it was deemed necessary to ensure that the court considered resources, needs and contributions. If these factors are being codified elsewhere in a statute under the auspices of 'sharing' and 'needs', largely in

line with jurisprudence since *White v White* [2000] UKHL 54, we wonder if they need to be included in any subordinate checklist of factors. The checklist of factors can be restricted to other matters to which the court must have regard when considering the analyses of 'sharing' and 'needs'.

115. Indeed simply retaining 'contributions' as a factor might be confusing if the reformed law is going to codify, elsewhere, the effect of the parties' contributions (eg: broad definitions of matrimonial / non-matrimonial wealth and the application, or not, of the sharing principle to them). One of the difficulties with the broad umbrella term of 'contributions' being a factor in the 1973 statute was that it might be construed as requiring the court to '*rummage around in the attic'* of a marriage and assess the parties' respective contributions in all their forms over the course of the whole marriage – the very approach held in *White* to risk discrimination, and in any event hugely impractical in terms of judicial time.

116. Any checklist must still include many of the existing s.25 factors however, such as the age of the parties, the duration of the marriage, their health or disability, the conduct of the parties, and their continuing contributions to the welfare of children of the family. As discussed below, we agree that relationship-generated disadvantage (or 'compensation') should be included in this list of factors, being something to consider in both the sharing and the needs analyses.

[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 in the text box.

117. We agree with this.

118. The strand of 'compensation' has already been treated jurisprudentially as being more akin to a s.25 factor, as opposed to a headline strand alongside 'needs' and 'sharing'. The FLBA endorses this approach. Indeed, if there is a compensation / disadvantage element to a case it can only properly be reflected in either the sharing or the needs outcomes. It does not exist very easily as a standalone concept because it can only be given effect within the other two strands.

119. Including relationship-generated disadvantage as a factor to consider will breathe new life into this concept in circumstances where, possibly as a result of it being described as a strand that sits alongside 'needs' and 'sharing', the courts have, to date, imbued it with a very high threshold before it can be deployed.

120. Relationship-generated disadvantage is, for many litigants, a key issue in any assessment of overarching fairness. In modern times, it is very common for both a husband and wife to be on career paths when they marry. Where one party (often the wife) relinquishes her career in order to have, and then care for, children of the family, it creates significant disparity between the parties.

121. While the sharing principle ameliorates that disparity in relation to wealth accrued during the marriage, it does not ameliorate it after the marriage has ended. The parties exit the marriage in very different positions. The breadwinner is advantaged by their retained career and can

continue to meet their needs and accrue capital beyond the end of the marriage. The homemaker cannot, and any provision he/she may receive from the breadwinner's future income is restricted only to his/her *needs*, without the disparity being fully ameliorated. In many cases this very quickly leads to disparity between the parties soon after the marriage ends. Many litigants would consider this to be an unfair end to any relationship which has been, for many years, a partnership of equals.

122. The FLBA does not consider disadvantage to be an 'all or nothing' concept. It might have been treated this way because it was (perhaps incorrectly) said to be a headline strand and not a s.25 factor for consideration. If treated like any other s.25 factor, the extent to which weight is placed on it will depend on the circumstances of the case and the weight attached to other factors.

123. If disadvantage is a circumstantial factor to be considered along with others, then the courts will be able to place such weight on it as best suits the circumstances of the case. There will be some cases in which the disadvantage is modest, meaning that the factor might only weigh in the balance to a small degree in the finely balanced aspects of the assessment of need (discretionary or otherwise). In other cases, the disadvantage will be obvious and very significant, and the court may make adjustments to remedy the disadvantage and ameliorate future disparity by making awards that go beyond the meeting of need or by adjusting the sharing outcome to ensure that the outcome of the case is fair overall.

[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 in the text box.

124. The members of this FLBA sub-committee do not all share the same view on this, and it is not possible for us to reflect with precision the views of all c.2200 members of our Association.

125. Many practitioners *agree* that domestic abuse should more readily be taken into account in the distribution of assets in financial remedy and cohabitation proceedings because:

a. The prevalence of domestic abuse and the long-term impact it has on victims;
b. The potential for domestic abuse to be continued post-separation through economic or litigation abuse;
c. The bar is currently set too high;
d. A significant proportion of our profession supports change.

126. Some *disagree* that domestic abuse should more readily be taken into account in the distribution of assets in financial remedy and cohabitation proceedings because:

a. Lowering the bar will encourage allegations of abuse to be made (and in particular pursued) within financial remedy proceedings far more frequently, and sometimes cynically;

b. If litigants are more routinely able to ventilate allegations of domestic abuse as part of financial remedy proceedings, their legal costs are likely to be higher, and there will be insurmountable practical issues and impact on court sitting time;
c. There might be a tension regarding the purpose of the Financial Remedies Court, and the extent to which it ought to be used to reflect marital behaviour. The Financial Remedies Court is tasked to share assets fairly on divorce and to meet needs. The criminal courts exist to punish and deter abusive behaviour and the family courts already safeguard children from abusive behaviour pursuant to the Children Act 1989 and the Family Law Act 1996.

127. There is, however, a significant proportion of the profession who consider that there ought to be a substantive change to the law in this regard. If any changes are to be made to the current threshold and practice, it should be subject to:

a. The court retaining discretion as to how to reflect the incidence of domestic abuse in the final outcome to fit the particular circumstances of the case,
b. Appropriate resources being made available to deal with a likely increase in the number of cases where findings are required to be made.

128. Allegations of domestic abuse are common in financial remedy cases. Emma Hitchings and Caroline Bryson's report: Dividing property and finances on divorce: what happens in cases involving domestic abuse? published by the Nuffield Foundation, analysed a subset of the data used for the Fair Shares *Sorting out money and property on divorce* Report. About one third of financial remedy litigants cited domestic abuse as a reason for their marriage breakdown.

129. This reflects the research as to the extent of domestic abuse in society. Domestic abuse is endemic. The personal and societal cost of dealing with domestic abuse – especially the impact of that abuse on children - is such that it must be fought on all fronts including the Family Court which incorporates the Financial Remedies Court.

130. Section 25(2)(g) Matrimonial Causes Act 1973 already permits the courts to take domestic abuse into account as conduct when determining financial remedy claims. However, as the law stands at present, even if abuse is proved or admitted, the following (jurisprudential, statutory and discretionary) criteria have to be met before the abuse will lead to an adjusted award:

- it has to be to be "gross and obvious" (often called a "gasp" factor)
- it must be inequitable not to take it into account,
- it has to have a proven financial consequence.

131. We consider that a significant proportion of FLBA members (but not all) consider that the bar is set too high. Those members of the FLBA believe that, whilst it is right that the conduct must be such that it would be unfair not to take it into account, there is a disconnect between the prevalence of domestic abuse and the requirement for such conduct to be 'obvious and gross' or that the abuse should have a 'gasp factor' (ie: a high threshold of seriousness). Further, it has been recognised that a negative financial consequence may be difficult to establish (LP v MP [2025] EWFC 473 at §43). Maintenance of the current situation, with such a high threshold, does not sit easily with the Government's VAWG manifesto commitment.

132. There is support from practitioners for change: the *Resolution* report on domestic abuse in financial remedy proceedings found that 80% of practitioners who responded to their survey believed domestic abuse, and specifically the long term impact of economic abuse, is not sufficiently taken into account in the outcome of financial remedy proceedings. That figure rose to 90% for unmarried families.

133. For the reasons set out above, there are many members of the FLBA who would support further consideration of a mandatory steer to consider domestic abuse, its impact on the family and the needs arising therefrom (albeit not limited to financial needs). This would ensure that domestic abuse is more readily taken into account without the current 'conduct' limitations.

134. However, there are also some members of the FLBA who have concerns about this opening the 'floodgates' to allegations of abuse in all its forms (including emotional and economic) becoming a routine part of financial remedies litigation, and the practical and evidential problems that will come with ventilating allegations that might stem back over many years or decades of a marriage.

135. In cohabitation cases, the way in which misconduct might sound in the final award will depend on the regime adopted for resolving those cases. If the regime is primarily needs-based, a background of domestic abuse will provide the relevant context in which those needs are to be assessed.

136. However, in relation to financial remedy cases involving domestic abuse, the FLBA takes the view (unanimously) that the court should retain the discretion to distribute assets in a way which is fair. The FLBA believes strongly that a significant strength in the Matrimonial Causes Act 1973 is the discretion it affords the Court to determine an award which is fair to each case and the myriad of circumstances which arise on the breakdown of relationships. This discretion is fundamental to the provision of justice.

137. It should also be recognised that domestic abuse allegations are very often disputed. Unless there are admissions or findings in another set of proceedings such as injunction proceedings, Children Act proceedings or a criminal conviction, in cases where domestic abuse is alleged, the Financial Remedies Court is likely to have to determine, as an issue of fact, whether it has taken place. If the current test is amended and a greater number of allegations permitted to fall into the category which will impact on the order made by the court, there must be sufficient resources in place to enable those hearings to take place and to take place fairly, firstly to enable the court to appropriately reflect it in the outcome and secondly to ensure other court users are not prejudiced. This may have implications vis a vis legal aid and QLR provision, particularly in circumstances where there are already very real difficulties for litigants who are eligible for legal aid in financial remedy cases to find a solicitor willing and able to take such a case on at current legal aid rates.

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

• It should only be considered in exceptional circumstances

• It should be considered where it has had a clear financial impact

• It should generally be considered where domestic abuse has occurred

• It should not be considered in financial remedy or cohabitation proceedings

• Other (please explain)

138. There are many members of the FLBA who believe that, where domestic abuse is established as having occurred, it should generally be considered and should influence the court's decision making in financial remedy and cohabitation proceedings. However, there are some members who favour the existing high threshold (or a newly codified threshold that remains a high bar), as well as the requirement for a resulting financial consequence, so that the Financial Remedies Court remains focussed on dealing fairly with finances, and does not become a secondary court of punishment and deterrence in parallel with the criminal court. We note that the framework for considering disputed allegations of domestic abuse in Children Act proceedings is one of necessity and proportionality: where disputed allegations are likely to bear upon the appropriate outcome, it will be necessary to determine them, but where such allegations are unlikely to impact the evaluative exercise, and the appropriate outcome the exercise will be unnecessary and disproportionate (see *Re H-N and Others (Children) (Domestic Abuse: Finding of Fact Hearings)* [2021] EWCA Civ 448 and K v K [2022] EWCA Civ 468). A similar approach would seem appropriate in financial remedy cases.

139. See above with regard to cohabitation cases.

140. In financial remedy cases, it is the FLBA's view that in cases where domestic abuse is clearly established, it is important not to fetter the court's ability to meet fairness, taking into account the fact of the abuse, and in particular the consequences of the abuse and how the family now presents. Where the threshold for this ought to be set is a vexed question, for the reasons we have already expressed.

141. The ways in which domestic abuse will affect families will differ from case to case. Many cases of coercive and controlling behaviour involve a pattern of behaviours which taken individually may not be viewed as serious but this underestimates the impact of the repeated or prolonged behaviour. Some parties, maybe already vulnerable, can react severely to what might be considered to be 'low level' abuse, but in a way which leaves them with enduring needs. Some cases may also require an outcome which does not necessarily result in the victim survivor receiving a greater share of the assets. For example, a fair award may transfer a particular property to a victim survivor, for reasons of recovery and stability. It may, as discussed above, affect the distribution of 'risk laden' and 'copper bottomed' assets between the parties.

142. As set out above, there are difficulties with the current test of establishing an adverse financial consequence and a financial impact may be unquantifiable at the time of the court hearing, particularly for any children. The research demonstrates that domestic abuse generally leads to poorer outcomes for the victim survivors over a longer period: decreased opportunities in terms of employment, career advancement, socialisation for example. These lead to needs which may not be immediately financially measurable but should nevertheless be taken into account by the court when considering how the abuse should sound in the final outcome.

143. For all of these reasons, it is the FLBA's view that domestic abuse, if established, should influence the court's decision making, but *how* that decision making should be influenced should be left to the court to be dealt with in a way which is fair in the circumstances of the case. It should be considered the 'lens' through which the other principles pertaining to distribution are considered. In some cases, this may lead to an enhanced needs award. Many members of the FLBA believe that in other cases it ought to lead to the victim survivor receiving a greater share of the assets (see below), but there are contrary views on this.

144. Some of our members continue to favour a higher threshold before the court's decision can be influenced by such conduct in order to avoid the opening of floodgates to much more complex and costly litigation in many more cases. Moreover, some of our members also believe that the court's decision should only be influenced in relation to needs caused by the abuse or conduct, as opposed to an unequal sharing of wealth that goes beyond needs, and thus becomes a form of financial penalty against the perpetrator.

[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?

145. The FLBA supports the idea that the abuse and its impact on all family members should be specifically considered as a standalone factor. However, the FLBA believes the strength of the current system is its flexibility to produce outcomes which are fair. We have already said that careful thought needs to be given to the threshold beyond which this can occur, and our members do not hold a unified view on this.

146. The Matrimonial Causes Act 1973 was applied very differently when it came into effect. Aside from no fault divorce enacted by The Divorce, Dissolution and Separation Act 2020, it has not been revisited in any meaningful way in over 50 years. Its longevity reflects the discretion and flexibility afforded to the judiciary to meet fairness and what are seen as needs through times of changing social mores. It is the FLBA's view that that flexibility must be allowed to continue.

147. For that reason, it is the FLBA's view that finer points of practice beyond broad basic principle should be dealt with by way of practice direction or case law which can react to change far more quickly than legislation.

148. The FLBA considers there may be unintended consequences if the court is mandated to adjust an award in a particular or prescribed way in the event findings of domestic abuse are made. For example:

- It may produce outcomes which are unfair in ways which are yet unforeseen;
- Victim survivors will require their abuse allegations to be determined in every case, otherwise they will be unfairly penalised and shut out from possible financial advantage;
- In (often parallel) children proceedings, parties will not readily admit their abuse or take steps to remedy their behaviour if they are aware it may have a negative impact upon them in the financial proceedings.

149. It is acknowledged that in general terms, consideration of domestic abuse as a standalone factor is likely to result in the victim survivor receiving a greater share of the assets, be that on a needs or on an (adjusted) sharing basis. That is currently what happens in cases where domestic abuse is considered relevant, albeit set against the currently high threshold for making such adjustments. The Court already has the discretion to make a larger or different financial award to meet needs and/or fairness. Family situations can be endlessly complex. There may be competing needs - aside from the effects of domestic abuse - which also require adjustment to the distribution of the assets. The Court should retain its discretion on how to ensure those needs can be met, otherwise the ability to meet the fairness of each individual situation will be compromised.

150. The FLBA would not oppose legislation which makes it clear that an abuser should not profit from their abuse in a final award, or that an award should be structured in such a way as to avoid or minimise the potential for economic abuse or coercion to continue. However, the FLBA would caution against legislation which mandates a punitive element against an abuser in every case. That said, the FLBA recognises that there are some cases in which it is fair to adjust a sharing claim to take the abuse into account e.g LP v MP [2025] EWFC 473, DP v EP [2023] EWFC 6 and Gohil v Gohil & Ors [2025] EWHC 3646 (Fam).

151. As set out above, the FLBA is in favour of the impact of domestic abuse being considered in ways which are not purely financial. The Court already has the power to make a bespoke award even if there is no measurable financial impact to the abuse. The court can for example transfer a property or a car to a victim survivor, or share pension provision / capitalise periodical payments if a victim survivor has a reduced or more unstable earning capacity, or avoid arrangements which perpetuate financial dependence on a perpetrator who may use those arrangements to exert control. The Court should retain that power.

152. Further, the FLBA takes the view that there are many procedural and enforcement issues that could be improved as a result of the review of the current law and practice in this area, such as:

- there should be automatic disclosure of prior findings/admissions and the evidence of abuse between proceedings (including from financial remedy proceedings into children proceedings between the same parties)[3];

[3] Currently a party has to make an application for any documents filed in a financial case to be released into a children case, or injunction case. Abusers often try to argue different things in the different proceedings. The disclosure process itself involves unnecessary time and costs

- interim financial support: abusers will often cut off or cut down financial support to put a victim survivor under pressure. The process should be simplified and interim hearings should take place sooner;
- Legal Services Payment Orders: similarly, abusers will often cut off or cut down financial support so a victim survivor cannot afford lawyers;
- payment rates for providers and barristers should be materially increased to ensure that sufficient expert advice and representation is available to those who qualify for legal aid;
- there should be a recognition that one party may be in control of marital assets and both parties should be permitted greater access to them at an interim stage: abusers may refuse to agree interim sale / transfers of property / distribution of assets. These can presently only be ordered in very limited circumstances, even when it is clear that provision will be made from those assets in the final analysis;
- enforcement/compliance with court directions: abusers often increase another party's costs by refusing to agree anything, claiming sickness or creating distractions to undermine progress, so extending the proceedings. Abusers can use the system to perpetuate their abuse, often flouting court orders for disclosure, or payment or failing to engage in some or all of the proceedings;
- abusers can put monies and assets out of reach, transferring them to third parties or spending them in circumstances where courts cannot list an emergency hearing to prevent this behaviour for many months and in any event the Court can only prevent or overturn a disposition of the monies which the applicant might recover at final hearing.

153. The FLBA would welcome Judges having greater resources and interim powers to deal with these issues and in particular:

- whilst a Legal Services Payment Order is clearly available in Schedule 1 Children Act 1989 claims, it is not set out within the statute and should be clarified;
- arguably, Legal Services Payment Orders are not available for applications to appeal or set aside where an income clean break has come into effect (CC v UU [2025] EWFC 214 §§46/ 49). They should be made available;
- there should be speedier listing of LSPOs and maintenance pending suit applications in cases where domestic abuse is alleged (this will require additional judicial resources);
- there should be a clearer regime for the enforcement of orders to include a clear steer in favour of a financial penalty for non-compliance beyond the current costs awards;
- there should be a clearer system for the provision of financial disclosure from third parties where parties do not provide full and frank disclosure;
- a power to order interim sale or transfer of an asset could be helpful as both part of interim enforcement provisions but also to preserve assets. For example, in a case where a house is always going to be sold due to a punitive mortgage rate or to avoid pending repossession, but one party refuses knowing the effect repossession will have on the other party's mortgage capacity in the future;
- the court should be empowered to distribute assets prior to a final hearing where those are necessary to meet interim needs / costs, especially in circumstances where they are marital assets to which both parties have competing claims.

[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)?

154. We consider that primarily it is likely that findings of fact will be required (not normally at a separate hearing but as part of the final hearing itself) which will require additional resources (in terms of court sitting time) and will also come at additional cost to the parties. However, that is a necessary consequence of reflecting domestic abuse in finance outcomes. A significant proportion of our members are confident that it may not result in more final hearings overall but some of our members do have that concern.

155. The system will struggle to better meet the needs of victim survivors without additional resources being put in place. Sometimes an abuse case is easy to identify. Much of the time it is disputed, and the Court must receive written evidence, contemporaneous disclosure (e.g. police and/or local authority records) and hear live evidence from the parties in order to make findings. This is often compounded by the fact it is well documented that abusers will often allege that a victim is themselves controlling and/or abusing the children by means of alienating behaviours. The Court is then very often faced with competing allegations of abuse.

156. It is likely, as we have said, that most fact finding will take place at a final hearing. However, in order to enable the Court to impose interim remedies or to ensure a Financial Dispute Resolution hearing is conducted in light of all the relevant facts, it may be necessary to consider whether fact finding hearings should be made at an earlier stage of the proceedings (for instance at a discrete fact finding hearing). Those members of the FLBA who do not support a fundamental change to the current threshold have concerns that this would both encourage contested litigation (a fact-finding hearing) and would also create significant and unavoidable costs towards the start of a case.

157. One suggestion is that a case in which domestic abuse is alleged could be allocated a 60 minute (rather than a 45 minute) First Appointment (albeit an additional 15 minutes would be insufficient to deal with all matters such as applications for Legal Services Payment Orders, disclosure and enforcement of disclosure orders and these may require a further hearing). The Court could determine at the First Appointment whether to have a discrete fact-finding hearing.

158. We consider that just because this issue may require additional resources does not mean it should be ignored or sidelined. The impact upon families of not dealing with the issue of abuse, and not meeting needs, sounds in many ways which impact upon state resources, be that within the health, schooling, employment or welfare sectors. The required additional resources are a necessary consequence of taking domestic abuse into account. Those additional resources cannot be taken from other already overstretched areas of the family justice system (ie courts resolving private and public law children proceedings). The legal and emotional costs to parties from persistent lack of engagement and limited powers of enforcement will often be greater than a discrete abuse hearing. The costs to the parties of another hearing can be managed between them by costs orders.

159. Many FLBA members also believe that any new regime in which domestic abuse is more readily taken into account as a stand-alone factor is unlikely to lead to more final hearings once a new regime has bedded in. Once parties are aware that misconduct will sound in the final award and that there will be costs consequences of alleging/defending claims inappropriately, this will become the regime in which parties will negotiate and reach outcomes without the need for court hearings.

160. Other members of this sub-committee foresee a far greater number of cases in which allegations are made, and then pursued in litigation, with all the additional cost and impact on court time that will entail. They also have concerns that if litigants became aware that allegations of domestic abuse might result in a better financial outcome, such allegations – even if untrue - would be routinely made, even if just to apply tactical pressure. The nature of such allegations is that they can easily be made and often carry very little objective or independent evidence to support them. The concern of some members of this sub-committee is that a culture might develop in which almost every litigant will begin the litigation making allegations, either as a 'sword' or as a 'shield' against allegations that they suspect will come their way. The allegations on both sides would have to be taken equally seriously.

[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 in the text box.

161. The members of this sub-committee are generally agreed that the so-called 'gasp factor', and 'obvious and gross' tests are linguistically imprecise and somewhat subjective. See above and in particular the response to question 11.

162. There has been a significant change in private law proceedings in terms of our understanding of the impact domestic abuse on children and victim survivors. The case of Re H-N [2021] EWCA 448 was seminal to our understanding of the issue. It is notable that the same practitioners appearing in front of the same judges see the issue being dealt with differently within the children and financial remedy arenas. Many of our members take the view that this needs to change so that they are aligned, but some take the view that the test within financial remedy proceedings ought to be different (ie: more stringent) because the court is not concerned with safeguarding or punishment; it is tasked only with distributing marital wealth and meeting needs in a fair way.

163. Many (probably most) victim survivors and many practitioners consider the financial remedy regime sidelines abuse: it is so rarely determined and so rarely does it lead to any change in the distribution of assets. The high bar for personal conduct - the "obvious and gross" test - often leaves victim survivors feeling their experiences are minimised or trivialised.

164. The only arguable counterpoint to this issue is the practical concern regarding the possibility of additional fact-finding in many more cases and also the concern that it will lead to an increase in cynical or fabricated allegations, if there is a tangible financial award made more likely by the making of allegations.

165. Even without any change in how assets are distributed, we should be better at how domestic abuse is described, considered and weighed in a financial remedy case. Making consideration of domestic abuse mandatory as a stand alone factor will assist with this.

[16] What forms of behaviour do you think should be considered as "misconduct"? You may wish to give reasons in the text box.

166. The FLBA believe that there needs to be uniformity. Use of the definitions in FPR 2010 PD 12J and the Domestic Abuse Act 2021 ss 1-3 should be adopted throughout.

167. Additionally, there may be scope for specifying conduct which is unique to financial remedy cases such as litigation misconduct as a means of abuse. This would include the matters referred to above including *inter alia*:

- Non-compliance with orders (including for disclosure / substantive orders),
- failure to give full and frank disclosure,
- manipulation of an asset base to include dissipation of assets with an intent to impact the other party's claim such as in DP v EP [2023] EWFC 6**,**
- intentionally reducing a source of income by stopping work or manipulating a business
- creation of false liabilities to third parties or businesses,
- litigation misconduct.

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

168. The FLBA believes that the court should retain discretion as to how the misconduct sounds in the final outcome, and subject to the appropriate threshold for this happening (on which we do not have a unified view).

169. As set out above, whilst the Courts should be encouraged to integrate findings/ admissions of abuse more centrally into their analysis of fairness, as well as to address litigation misconduct, they should not be limited in how the assets are adjusted to meet needs and fairness. The more interference there is in the exercise of the discretion, the more potential there is for unfairness because of the myriad of different situations.

170. The FLBA is not in favour of a punitive element to an award *per se* for the reasons set out above. However, as set out elsewhere in this response, there are cases in which a victim survivor may need more financial support (greater assets or income) to meet needs. There are cases in which victim survivors will require a different *structure* to meet needs. Then there are those cases in which a fair outcome can only be achieved by an adjustment to sharing, where it is right for an abuser to receive less or for the victim survivor to receive more as a result of the abuse.

171. Each case will turn on its own facts, and much will depend on where the threshold lies.

[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?

172. We believe this will depend on the circumstances of the case, although it seems likely that financial consequences (including enhanced needs) will usually be a necessary component, otherwise the family court will be in the position of making orders for no other reason than punishment of behaviour, and thus potentially encroaching into the territory of the criminal courts.

173. As set out above, the FLBA's view is that the court should not be limited in how it exercises its discretion in this area: the Court already has the power to adjust to meet financial and non-financial needs.

174. One problem is that, as already identified in the case law, financial consequences may not be immediately apparent at the time of the final hearing or, even if identifiable, may not be easily measurable.

175. For that reason and as set out above, it would be unwise to *categorically* link the outcome with adverse financial consequences which may not be readily apparent, but it should be denoted as a key component in the consideration.

176. The corollary of this is that, in some cases, it might be argued that should be some way to mark proven domestic abuse in the outcome even where it falls short of an identifiable/easily measurable adverse financial consequence.

177. Whilst, as set out above, the FLBA would not be in favour of an overt 'abuse penalty' being imposed, there are many members of the FLBA who believe that the domestic abuse must be marked in some way. In needs cases, this would be by prioritising the needs of the victim survivor over those of the abuser (whilst ensuring the needs of the children take priority in any event). In sharing cases, this might mean an adjustment to the share of the assets each party is awarded to ensure a result that is fair in <u>all</u> the circumstances.

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

178. The FLBA broadly agree with this, but with some comments.

Pensions accrued during the marriage

179. It is important that pensions are, in the first instance at least, viewed separately to other claims to meet more immediate income and capital needs.

180. In principle, we see no reason why any specific 'consideration' should be limited to pensions accrued during the marriage. The vast majority of cases are determined by an application of the 'needs' principle. In such cases, the timing and source of the asset is unlikely to carry much relevance. Narrowing or limiting the focus of the court's 'consideration' to pensions accrued during the marriage will, in a large number of cases, lead to unfair outcomes.

181. We also highlight that to make specific reference to pensions (or any other asset) acquired during the marriage only may lead to an implied presumption that sharing matrimonial pension assets, and not more, is invariably the fairest outcome. Any such implication would be wrong, and inconsistent with the guidance in the second report of the Pension Advisory Group.

182. That said, we recognise there may be benefits to focusing, but not limiting, the court's enquiry to pensions accrued during the marriage to better protect pensions that have been accrued outside the marital partnership. We expand on that below.

Needs on retirement

183. We endorse a specific focus on a party's needs on retirement, recognising that s.25(2)(b) of the Matrimonial Causes Act 1973 does not make clear what is meant by 'needs', and that the breadth of the needs principle is unlikely to be apparent to unrepresented litigants.

184. We note the observations made by Professor Sharon Thompson[4] that:

> *"[a] failure to pension share is directly connected to women's poverty. The economic gulf created by caregiving 'choices' is in part because putting one's career on hold also means compromising one's pension in retirement. Priorities on divorce are gendered too, with women's most urgent concern often being to 'keep a roof over the family's head'."*

185. It is important that litigants are encouraged to look to the future and how they will meet their needs on retirement before compromising their financial remedies claim. It is foreseeable that the lack of specific reference to pension assets, or needs on retirement, may lead unrepresented litigants to settle their claims without due regard to pension assets or needs on retirement. This is especially important if the law is to protect caregivers, as Professor Thompson observes, the majority of whom are women.

186. We emphasise that the focus of the court's enquiry must be on whether the needs have been generated by decisions made during the marriage. The causal relationship between decisions made during a marriage and needs which must fairly be met on divorce is a 'cardinal' feature of the needs principle (*Miller v Miller; McFarlane v McFarlan*e [2006] UKHL 24 at [137][5]).

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[4] S Thompson, 'The Road To Equal Partnership' (BUP 2026) 51.

[5] But see also, *Rossi v Rossi* [2006] EWHC 1482 (Fam); *Vince v Wyatt* [2015] UKSC 14. See also: *C v C* (Financial Relief – Short Marriage) [1997] 2 FLR 26; *Sharp v Sharp* [2017] EWCA Civ 408; *XW v XH* [2019] EWCA Civ 2262; *E v L* [2021] EWFC 60.

In our experience, this cardinal principle can be neglected when considering the fair sharing of pension assets in cases which fall under the umbrella of 'needs cases', resulting in all pension assets being shared, regardless of their source

187. Focusing the court's enquiry on pension assets generated during the marriage, as alluded to above, may tackle this issue by encouraging courts to reflect on whether needs can be met from an equal share of matrimonial pension assets in the first instance before moving to consider whether there is a need for further financial provision from the other spouse's non-matrimonial pension.

[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 in the text box.

188. The FLBA broadly supports the proposed safeguards, which are closely aligned with the recommendations of the Law Commission in Matrimonial Property, Needs and Agreements (2014). The proposed requirements of contractual validity, execution as a deed, a minimum 28-day period before the wedding or civil partnership ceremony, full material financial disclosure, and independent legal advice for each party provide an appropriate framework for ensuring that parties understand the nature and consequences of a qualifying nuptial agreement. They also promote certainty and autonomy, allowing parties to make informed and binding arrangements regarding the financial consequences of relationship breakdown.

189. The FLBA considers it particularly important that it should not be possible for either party to contract out of the obligation to provide full and frank disclosure of assets, income, liabilities and financial resources.

190. The effectiveness and legitimacy of any qualifying nuptial agreement depends upon both parties making decisions on the basis of accurate and complete information.

191. Any attempt to waive disclosure (1) risks undermining informed consent and could result in significant injustice, particularly where there is a material imbalance in financial knowledge or bargaining power (2) makes a QNA much more likely to be open to unmeritorious challenge

192. The FLBA strongly supports the requirement for independent legal advice for each party. This should be regarded as a fundamental safeguard rather than a procedural formality. Independent advice assists parties in understanding the legal consequences of the agreement, the rights they are or may be relinquishing, the practical effect of the terms proposed, and the alternative outcomes that might arise in the absence of an agreement. The FLBA therefore agrees that parties should not be permitted to waive independent legal advice and considers that this requirement is central to ensuring that any agreement is entered into freely, knowingly and on a properly informed basis.

193. However, the FLBA considers that additional procedural safeguards may be desirable. In particular, consideration should be given to requiring the execution of a qualifying nuptial

agreement in the presence of independent witnesses, who would attest to the fact that the agreement was signed voluntarily and without any apparent pressure or duress. While such a requirement would not in itself prevent undue influence or coercion, it may provide an additional evidential safeguard and encourage careful scrutiny of the process by which the agreement is entered into

194. The FLBA is also concerned that the proposed safeguards may not, in all cases, provide sufficient protection for individuals who are subject to coercive or controlling behaviour, including economic abuse. As recognised throughout the consultation, coercive control can be subtle, persistent and difficult to identify. A party may appear to have received legal advice and provided informed consent whilst nevertheless acting under significant psychological, emotional or financial pressure. The existence of independent legal advice should not be treated as conclusive evidence that such pressure was absent.

195. The FLBA therefore considers that any scheme for qualifying nuptial agreements should ensure that the court retains an effective ability to scrutinise allegations of coercion, controlling behaviour, undue influence or economic abuse when the validity of an agreement is challenged. Particular care will be required in cases where there is evidence of a significant imbalance of power between the parties or a history of domestic abuse. The objective of increasing certainty through binding agreements is an important one, but it should not come at the expense of adequate protection for vulnerable parties.

196. Subject to those observations, the FLBA considers that the proposed safeguards represent a sound and proportionate foundation for the introduction of qualifying nuptial agreements and are consistent with the Law Commission's objective of balancing certainty, autonomy and fairness.

[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 in the text box.

197. The FLBA agrees with the Government's view that, when considering whether a qualifying nuptial agreement makes adequate provision for needs, the concept of needs should exclude discretionary needs and be assessed on a narrower basis than in financial remedy proceedings generally. This approach is consistent with the underlying purpose of qualifying nuptial agreements, namely to promote certainty and respect for party autonomy whilst preserving the court's ability to intervene where essential needs have not been met.

198. The FLBA takes the view that any three-stage or hierarchical approach to needs fits more appropriately within the assessment of need within the context of a qualifying nuptial agreement, namely:

a. First consideration should be given to the welfare and needs of any children of the family;

b. The court should then consider the parties' capital and income needs, including housing needs and retirement provision, assessed by reference to the standard of living enjoyed during the marriage;

c. Where resources permit, the court may consider additional / discretionary needs, assessed by reference to the standard of living enjoyed during the marriage.

199. Strictly in the context of qualifying nuptial agreements, and given the proposed 3 stage structure, the FLBA agrees that only the first two stages should remain protected. The purpose of the jurisdiction in such cases should be to ensure that neither party, nor any child of the family, is left without appropriate provision for essential needs, albeit still assessed by reference to the marital standard of living. It should not operate so as to undermine the parties' freely made agreement by permitting broader claims based upon discretionary expenditure or lifestyle expectations.

200. The FLBA notes that the third category of needs is likely to be relevant only in a relatively small number of high-value cases where resources substantially exceed the parties' housing, income and pension requirements. In the majority of financial remedy cases, available resources are exhausted by meeting needs falling within stages one and two, such that discretionary needs do not arise in any meaningful sense. Excluding discretionary needs from the assessment of qualifying nuptial agreements is therefore unlikely to create significant hardship whilst providing greater certainty as to the enforceability and effect of the agreement.

201. Concerning needs-based claims: Under the proposed cohabitation framework, the court would consider only the equivalent of stages one and two of the needs analysis, namely the needs of any children and the parties' defined housing, income, capital and pension needs. There is no provision for discretionary needs within the proposed cohabitation scheme, and the consultation makes clear, consistent with the aim of supporting marriage, that cohabitants' needs are intended to be assessed more narrowly than those arising on divorce. Furthermore, the proposed framework seeks to ensure that cohabitants do not receive more favourable outcomes than spouses in comparable circumstances, although we have made some comments about the practicality of applying this test (see below).

202. Against that background, the FLBA considers it understandable that a similarly restricted approach has been proposed where parties have freely entered into a qualifying nuptial agreement intended to limit the court's discretionary jurisdiction. The adoption of a needs test limited to stages one and two promotes coherence across the proposed reforms and reinforces the principle that parties should generally be held to agreements freely made, subject always to the protection of children and the satisfaction of essential needs.

203. Overall, the FLBA considers that limiting the protected concept of needs within qualifying nuptial agreements to children's needs and essential housing, income, capital and pension needs strikes an appropriate balance between safeguarding vulnerable parties and respecting the autonomy of those who have chosen to make binding arrangements regarding the financial consequences of divorce.

[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 in the text box.

204. The FLBA agrees that housing, capital, income and retirement provision should form the core components of any assessment of needs within the context of qualifying nuptial agreements. These categories are consistent with the Government's proposed approach to needs generally and reflect the matters most commonly encountered in financial remedy proceedings.

205. The FLBA would, however, suggest that consideration be given to making explicit that certain additional matters may fall within the assessment of needs where appropriate. In particular:

- Health and disability-related needs, including the costs of treatment, care, adaptations to accommodation and ongoing support requirements.
- Needs arising from caring responsibilities, whether for children or dependent adults, where those responsibilities affect earning capacity or generate additional expenditure.
- Educational or retraining needs, where a party requires a period of education, training or professional requalification in order to achieve the transition to financial independence which underpins the Government's wider approach to needs.
- Costs associated with separation and transition, including, where appropriate, reasonable costs of re-establishing an independent household.
- Protection against financial hardship in later life, including pension provision and, where relevant, other retirement-related needs that may not be fully captured by a narrow focus on current income and housing.

206. The FLBA does not suggest that these matters should create a broader category of discretionary or lifestyle-based provision. Rather, they are examples of circumstances that may properly fall within the assessment of essential needs. The court should retain sufficient flexibility to ensure that needs are assessed realistically and fairly in light of the particular circumstances of the parties.

207. Conversely, the FLBA agrees that discretionary needs, luxury expenditure and claims founded solely upon the standard of living enjoyed during the marriage should remain generally excluded from the assessment of needs in relation to qualifying nuptial agreements. The purpose of the jurisdiction should be to ensure that parties' essential needs and the needs of any children are met, whilst giving proper effect to agreements that have been freely entered into with appropriate safeguards.

208. Accordingly, the FLBA considers that housing, capital, income and pension needs should remain the principal elements of the assessment, but that the legislation or accompanying guidance should make clear that the court may also take account of health-related needs, caring responsibilities, reasonable retraining requirements and other matters directly relevant to achieving financial independence and avoiding hardship. This would preserve the intended distinction between essential needs and discretionary provision (noting that we do not agree

that there should be a categorically defined distinction between the two) while allowing the court to respond appropriately to the realities of individual cases.

[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 in the text box.

209. We agree with this.

210. In modern society there are many relationships in which the parties cohabit for many years prior to marrying. They might even have children during this period and live a family life that is identical to a marriage in all respects. Wealth accrued during this period which is clearly the product of their shared endeavours must of course be shared between them if they later decide to marry.

211. Careful thought must be given to how this would play into any new statute as to the rights of cohabitants. If assets can be readily 'matrimonialised' during a period of cohabitation, or wealth accrued during the period of cohabitation is to be seen as something to be shared if there is an eventual marriage, cohabiting parties who do not marry might wonder why the same principles do not apply to wealth created or 'matrimonialised' during their own relationship, just because they did not marry at any point. We suppose the distinction lies in the fact that, at some point, the parties have taken the formal and legal step of getting married, which would have the added benefit of ensuring that marriage is treated differently to cohabitation in the eyes of the law.

[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 **TICK**

• Stability of the relationship **TICK (but see below)**

• Financial arrangements **TICK**

• Responsibility for children **TICK**

• Presence of a sexual relationship **TICK (but see below)**

• Public recognition of the relationship **TICK (but see below)**

212. Realistically, this part of any matrimonial law is going to have to align with any definition of 'cohabitation' within any new law as to the rights of cohabitants (see below). We address out concerns as to some of these factors in our responses below.

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?

213. We agree with this.

214. In its response to the 2021 call for evidence by the Women and Equalities Committee regarding the rights of cohabiting partners the FLBA considered that the definition ought to be focussed on people in emotionally committed and intimate relationships. In order to achieve this, it was then thought that the definition of "cohabitants" in the Family Law Act 1996, section 62: "two persons who are neither married to each other nor civil partners of each other but are living together as if they were a married couple or civil partners" and that "living together as if they were a married couple" ("LTAMC") in the context of social security legislation, was the appropriate definition. This is now 5 years ago and time has moved on.

215. The Scottish Law Commission Report November 2022 acknowledged that the previous definition of cohabitant in section 25 of the 2006 Act by reference to living together "as if husband and wife" has been widely criticised as being outdated and not reflective of modern-day relationships.[6] The Scottish Law Commission proposed that "cohabitant" should be defined as a member of a couple who are or were living together in an enduring family relationship.

216. This definition, or one in very similar terms, is one that the FLBA endorses. It is important that there is a clear definition so that couples know whether they come within it and also to minimise the potential for dispute.

[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 **TICK**

• Stability of the relationship **TICK (but see below)**

• Financial arrangements **TICK**

• Responsibility for children **TICK**

• Presence of a sexual relationship **TICK (but see below)**

• Public recognition of the relationship **TICK**

[6] Para 3.5

217. The FLBA considers that all of these factors are relevant when considering whether individuals are cohabitants. Some concerns have been raised in respect of a couple of the factors, as set out below. It is noted, however, that the proposal is that there should be a clear but flexible framework, and it is therefore anticipated that the flexibility would mean that the absence, or limited presence of one or two factors in a particular case would not be determinative.

218. *Stability of the relationship*: there is concern that this factor could be detrimental to the applicant where there has been an abusive relationship and/or the relationship has been volatile and "on-off". If the definition of cohabitant is "enduring" then this would appear to encapsulate "stability" in any event, thereby rendering the specific inclusion of "stability" nugatory.

219. *Presence of a sexual relationship*: We are not sure that '*presence of a sexual relationship'* is helpful. We can imagine cases where the existence of a sexual relationship is either denied, or where one party alleges that the sexual relationship withered away many years previously or was a minimal aspect of the relationship. We have concern about the courts descending into an evidential analysis of this, particularly where there has been an abusive relationship. Furthermore, the settled position under the 1975 Act case law is that the presence of absence of a sexual relationship is not a decisive factor: see response to question 44 below. Moreover, there are likely to be some relationships (for example late-in-life relationships) where sexual relations play no part in the relationship, but it is nevertheless a familial loving/intimate relationship. It would be helpful for the legislation to make it explicitly clear that the presence or absence is not a decisive factor.

[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?

220. We agree with this.

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

221. Whilst this is consistent with the current age of marriage, having regard to the "4 Ps" and particularly prioritising fair outcomes for children and protecting the vulnerable, the FLBA considers that those aged 16 and 17 should also qualify where there is a child of the relationship.

[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?

If you disagree with the three-year minimum duration period suggested above, what period would you propose having instead?

222. The FLBA agrees with a minimum period of three years.

223. The FLBA has considered arguments in favour of a two-year minimum requirement: this would be consistent with the approach taken under the Inheritance (Provision for Family and Dependants) Act 1975 and would be more likely to ensure that more vulnerable parties were protected as more couples would be captured by the legislation. On the other hand, there are arguments in favour of a longer requirement than three years: one particular concern is in respect of younger couples for whom it may be their first serious relationship and a pragmatic decision to save on the cost of housing but otherwise with no greater intention or commitment. It would be easy for this type of couple to be caught by a three-year requirement (or indeed two-year requirement).

224. The difference between the three-year minimum requirement and that on death (two-years) is considered justified on the basis that the situation where one partner dies is different to that where the relationship comes to an end. Death is a relationship cut short without any element of choice on the part of either partner, in contrast to the breakdown of a relationship.

225. Overall, the FLBA considers that three years does strike the correct balance. It is also acknowledged that to a significant extent this is a policy decision.

[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**
- **No, but the minimum duration should be lowered**
- **No, the minimum duration should not be altered as a result of children**
- **Undecided**

226. We agree with this.

227. The FLBA expressed concern in its response to the Women and Equalities Committee in 2021 that the children of unmarried couples are reliant upon the provisions of Schedule 1 of the Children Act 1989 ("Schedule 1"), under which capital provision has been largely limited by the courts to (outright) lump sums, and to settlements of property which revert to the paying parent after the end of the child's minority or tertiary education. Children whose parents'

relationship has been subject to divorce or dissolution still benefit further from the slipstream of the more generous outright capital provision available under the Matrimonial Causes Act 1973 or Sch 5 Civil Partnership Act 2004.[7]

228. In addition, Schedule 1 litigation (in the Family Court) often has to run alongside related trusts of land litigation (in the County Court), is costly and complicated, and is seldom a viable solution for families of ordinary means, or many families based outside the South East of the country. Anti-avoidance provisions are inferior to those available where the parents are married or have a civil partnership. Further, there are tax complexities in Sch 1 cases resulting from entry, periodic and exit charges relating to capital settled into trusts. These complicate cases, add costs (the need for specialist tax advice) and disincentivise potential claimants.

229. Removing the minimum duration requirement where there is a child of the family would ensure that claims can be made for the benefit of children, thus satisfying the aim of prioritising fair outcomes for children.

[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?

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

- **No Time Limit**
- **1 Year**
- **3 Years**
- **4 Years**
- **More than 5 Years**

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

230. The FLBA agrees with this.

231. The FLBA considers that a two-year time limit would be appropriate but that it should be extendable in the event of exceptional circumstance.

232. There is a need for certainty and finality. The rules and statutes as to limitation in other areas of the law have been worked out over centuries and vary depending on the litigant and subject matter of the litigation. The Limitation Act 1980 prescribes different time limits for different classes of action, with six years for claims in contract and tort and three years, usually, for personal injury claims. Claims under the Inheritance (Provision for Family and Dependants) Act 1975 should ordinarily be brought within six months of the grant of probate. There seems to be no time limit on bringing claims for financial remedies after divorce. The time limit for actions to recover land is twelve years. Section 21 of the Limitation Act provides that no period of limitation prescribed by the Act shall apply to an action by a beneficiary under a trust being

[7] Para 18 of the FLBA's response to the Women and Equalities Committee 2021.

an action to recover from the trustee trust property. There are similar exemptions in the case of fraud.[8]

233. There is a good argument for there being a three-year limitation period. It would be consistent with that in, for example, personal injury claims. It would also be consistent with the length of time necessary for a couple to have been in a cohabiting relationship.

234. However, there is considerable force in the time limit being two years. A two-year time limit would mean that former cohabiting couples are able to move on with their lives and form a new relationship without the on-going risk that their former partner might bring a claim against them.

235. On balance, the FLBA agrees that a two-year time limit is appropriate.

236. The FLBA also considers that there should be a limited discretion to extend the time limit in the event of exceptional circumstances. This would strike the correct balance between the need for certainty but ensuring that former cohabitants were adequately protected.

[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 in the text box.

237. We broadly agree with this, but with some qualifying remarks.

238. It is understood that the government has decided to adopt a "needs" model, rather than a "compensation" model, such as that in Scotland. On the basis that this decision has been made, being one of policy, the FLBA confines its submissions to whether needs should be the guiding principle.

239. The FLBA is supportive of the proposed approach insofar as it brings consistency with the proposed approach for married couples. It is anticipated that in practice the greater the consistency with the approach to married couples, or those in a civil partnership the better, as this will minimise the opportunities for dispute and argument.

240. There are a number of concerns, however. One principal concern is in respect of the proposal that cohabitants' needs are limited to basic needs, and discretionary needs are excluded. Whilst it is appreciated that this preserves a difference between cohabitants and married couples the following observations are made:

    a. It could be considered unfair: why should a partner in a lengthy cohabiting relationship not have his/her needs assessed in the same way as a partner who has married where there has been a relatively high standard of living? This concern is compounded when it is considered that statistically there is a greater level of domestic abuse in cohabiting relationships and that refusal to get married on the part of one partner may be a part of that abusive behaviour.

[8] FLBA response to Women and Equalities Committee 2021 paragraphs 2-3.

b. There may be an adverse impact on children, particularly where one partner is extremely wealthy and has access to the luxury items envisaged by the Consultation, such as expensive cars when the other partner does not.

c. Judging needs by reference to the standard of living means that needs will have to be assessed accordingly; where that standard of living has been high, the level of needs will also necessarily be high.

d. In practice it can be anticipated that there would be a significant amount of time taken up by arguments about what items are "basic" needs and what are "discretionary".

[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 in the text box.

241. We broadly agree with this, but with some qualifying remarks.

242. The FLBA considers it important that as consistent approach as possible is taken in respect of married couples and unmarried couples. In respect of married couples, the proposed test for meeting needs is *to enable both parties to transition to independence, as far as resources allow* and in respect of cohabitants it is *to do so in such a way as to enable termination of dependence and obligations as soon as is just and reasonable.* There is likely to be argument in practice about the difference between the two tests and it may be difficult for the Courts to identify with any degree of precision what that difference is. A consistent approach between the two would avoid such difficulties.

243. We also refer to our concerns expressed above (in the context of matrimonial law reform) regarding 'transition to independence' being framed as 'the' objective as opposed to 'an' objective.

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

244. We do not agree with this.

245. The FLBA considers that it would be difficult to distinguish basic needs from discretionary needs in practice. Reference is made to the response to question 32 above and our responses in relation to delineating between these different categories of needs within matrimonial law.

[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 in the text box.

246. The FLBA agrees with this.

247. The court should be able to take account of needs arising from wider circumstances that the relationship in exercising its discretion.

[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 in the text box.

248. The FLBA agrees with this.

249. However, any checklist of factors cannot be framed as an exhaustive or comprehensive list, in the same way that the existing s.25 factors are not an exhaustive list. They are drafted as matters to which the court must have particular regard, whilst surveying "*all the circumstances of the case*".

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

250. We agree with this approach.

251. The ability of the courts to award a wide range of remedies, rather than being limited to property claims or lump sums is welcome. It will enable the court to take a flexible approach to the requirements of each case, particularly where there are children of the relationship.

[38] In relation to maintenance in particular, do you agree with the follow statements. Please tick all that apply:

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

- Yes – although there would, however, be likely to be arguments about what "exceptional circumstances" means in practice which would take up time and cost. It is likely that the necessary bar for "exceptional circumstances" would be set relatively high, so that those whom the proposed legislation is intended to benefit may not do so. A more consistent approach with married couples/those in civil partnerships would be easier for the courts to implement in practice and ensure that vulnerable parties are sufficiently protected.

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

- Yes – although we caution against using categorical language. There may be rare cases in which a time-limited order is not appropriate, and there ought to be a means by which an exception can be made to this.

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

- Yes – although we caution against using categorical language. There may be rare cases in which a time-limited order is not appropriate, and there ought to be a means by which an exception can be made to this.

[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?

255. We do not agree with this.

256. Whilst it is understood that it is considered necessary for the difference between married couples and unmarried couples to be preserved for policy reasons, this provision seems unnecessary if the proposed distinction between basic and discretionary needs is maintained.

257. Moreover, to undertake that test properly the court would have to engage in a parallel 'what if' analysis in which the concurrent matrimonial law is applied to each case involving cohabitants.

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

If you disagree, please explain which safeguards you would either add or remove and e xplain why.

258. We agree with the proposed safeguards, as listed below.

Proposed Safeguards Required to Opt-Out of the Cohabitation Framework

- ***Contract validity:*** *the agreement must be a valid contract without, for example, undue influence or misrepresentation.*
- ***Execution as a deed:*** *the agreement must have been made by deed and must contain a statement signed by both individuals that they understand that the agreement is an opt-out agreement that will remove the ability of either party to make an application under the cohabitation framework.*
- ***Material financial disclosure:*** *each party to the agreement must have received, at the time of the making of it, disclosure of material information about the other party's financial situation.*
- ***Independent legal advice:*** *Independent legal advice for each party signing the opt-out, to ensure each understands the legal effect and consequences of the agreement.*

- It should not be possible for a party to waive their rights to disclosure and legal advice.
- Any variation of an agreement must meet the requirements listed above.

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

259. We agree with this.

[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?

260. This is not primarily an issue for us as a Specialist Bar Association. Others will be better placed to comment upon this. However, we believe that in addition to government statements which may be reported in the Press, a social media campaign is likely to be the most effective way, both in terms of cost and communication, of communicating these reforms.

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 in the text box.

261. The FLBA agrees with this, on balance.

262. Whilst the FLBA supports this proposition, we anticipate that this may be one of the more controversial aspects of the consultation, and we comment below on some of the countervailing considerations that the Government may wish to reflect on.

263. There are four main issues that the FLBA identifies as presenting practical, conceptual, and procedural challenges within the proposed succession framework:

(1) Reconciling competing priorities between surviving cohabitants and children in blended families

264. The first issue to consider is that of the rationale underlying intestate succession and how this balances the security of a surviving partner against the expectations of children, particularly in blended families.

265. If the rationale underlying intestate succession is to, in broad terms, reflect what the majority of people would want to happen to their estate, we consider it uncontroversial that most people

dying without a will in a cohabiting relationship without children would want their estate to pass to their cohabitee rather than to remoter relatives or the Crown *bona vacantia*.

266. We also consider that there would likely be a general expectation, even where the deceased is also survived by children, that the survivor of the cohabiting relationship should be permitted to continue to live in the home that the couple shared.

267. However, we consider it less certain that the majority of people would want their surviving partner to inherit in priority to their children. In particular, where a cohabiting relationship involves children from an earlier relationship, the risk of "sideways disinheritance" – where capital left to a surviving partner is ultimately diverted on the survivor's death to the survivor's new partner or children from another relationship – may be a common concern. Since stepchildren do not enjoy automatic intestacy rights, sideways disinheritance is a particularly acute problem where both parties die intestate.

268. This tension is borne out by empirical research. The NatCen study (*Inheritance and the Family: attitudes to will-making and intestacy*, 2010) on public attitudes to intestacy demonstrated that support for the partner inheriting the entire estate declines significantly when the deceased is survived by children, particularly those from a previous relationship.

269. Qualitative findings from the NatCen study highlighted "conduit theory" – the premise that a surviving partner is widely expected to act as a reliable conduit for passing wealth down the generations primarily when they are also the biological parent of the surviving children. Where the surviving partner is a step-parent or unmarried partner, public support for direct, automatic inheritance for the children is more pronounced, reflecting a widespread concern to preserve family assets for one's own children.

270. Whilst the spouse-equivalent proposals notionally preserve part of the estate for the children, the proposed statutory legacy will absorb the entire estate in many cases.

(2) Litigation consequences: Burden on minor children and evidentiary uncertainty around status

271. Granting the surviving cohabitant automatic spouse-equivalent rights, will result in the disinheritance of children for the reasons secured above. As recognised in the consultation, where that result fails to make reasonable financial provision for a child, the child would be required to bring a claim under the Inheritance (Provision for Family and Dependants) Act 1975.

272. Minor children may face substantial practical barriers in pursuing such litigation, as they depend on having a suitable adult who is willing and able to act as a litigation friend. This is a key procedural consequence that the Government will want to balance against its first guiding principle of prioritising fair outcomes for children.

273. Secondly, the reform is likely to generate uncertainty and disputes regarding relationship status. Proving that a relationship met the "marriage-equivalence" test and survived the proposed minimum duration requires a retrospective, fact-sensitive evaluation. This is inherently less

certain than a hard-edged legal status such as marriage or kinship provable by DNA testing and is bound to lead to contested estates.

(3) Conceptual distinctions between the lifetime separation framework and succession proposals

274. The Government has proposed that there should be a clear distinction between cohabitation and marriage, ensuring that legal protections for separating cohabitants remain different from and narrower than those available on divorce.

275. On death, however, this distinction is set aside in favour of a "marriage-equivalence" model on intestacy. There are distinct considerations that may justify different approaches in life, where the division of assets between living partners who have competing needs requires a discretionary exercise, versus the reallocation of assets away from the wider family on death, where certainty in estate administration may favour simplicity. Nonetheless, this remains a major conceptual distinction within the overall reform package that requires clear policy rationalisation.

(4) Public awareness and the transition from current intestacy expectations

276. A primary driver for cohabitation reform is to address the persistent "common law marriage myth," under which nearly half of the public mistakenly believes that cohabiting couples already enjoy automatic legal rights.

277. The introduction of automatic intestacy rights for cohabitants may inadvertently create a new problem of ignorance of the reforms. Unmarried parents with children from prior relationships may continue to assume that if they die without a will, their estate will automatically pass to their biological children in line with pre-reform law.

278. We consider that if the Government proceeds with the proposed reform, the reforms would be accompanied by a public education campaign with a view to mitigating this problem.

Conclusions on spouse-equivalent rights

279. Overall, the view of the FLBA is that automatic provision for surviving cohabitants on intestacy is preferable to leaving bereaved partners with no default rights, which under the current law forces them to bring costly, adversarial, and stressful discretionary claims under the 1975 Act.

280. In evaluating the counter arguments, it is relevant to bear in mind that not all cohabiting couples remain unmarried through mutual choice. In many cases, one partner may favour marriage or a civil partnership but the other is unwilling; the absence of formal status does not necessarily indicate that both parties have opted to avoid the legal consequences of formalising their relationship.

281. Furthermore, whilst the potential disinheritance of minor biological children is a concern in blended families, this represents a statistical minority of intestacies. The vast majority of individuals who die intestate do so in later life, when they are unlikely to have dependent minor

children, and their surviving offspring are more likely to be independent adults. In these typical circumstances, ensuring the immediate housing and financial security of the surviving partner is the primary practical necessity in the view of the FLBA.

282. Whilst there will inevitably be status disputes, and the issue of certainty in succession rights is a point to weigh in the balance, our courts are well acquainted and equipped to make decisions on relationship status, as they do under existing statutes including the 1975 Act, and we do not consider that this should be decisive.

283. We have also considered whether some alternative, lesser statutory provision for cohabitants would be preferable, such as a model akin to that in Austria, where cohabitants only inherit if there are no other statutory heirs, or a model restricting the cohabitant's entitlement to a life interest. We do not favour these options. An Austrian-style model would leave very large gaps in provision for cohabitants. Whilst a life interest in the family home might not be excessively expensive to administer, it does carry a degree of continuing administrative obligations and scope for family conflict. It was for similar reasons that the spousal legacy plus life interest structure on intestacy was reformed and simplified under the Inheritance and Trustees' Powers Act 2014.

284. The proposed reforms have the benefit of simplicity and align England and Wales with the majority of comparable jurisdictions that protect cohabitants on death by conferring spouse-equivalent rights.

285. Ultimately, the rules of intestacy are a default fallback; individuals who wish to distribute their estate differently or preserve their property for their children can do so by making a will.

[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?

286. We agree with this.

287. If a qualifying cohabitant is to inherit as a spouse or civil partner, they should have the same priority to apply for a grant. Otherwise, the reform would create an undesirable mismatch between beneficial entitlement and administrative control. Existing mechanisms – including the caveat procedure, section 116 Senior Courts Act 1981 and section 50 Administration of Justice Act 1985 – are sufficient to deal with cases where entitlement or suitability to administer is disputed.

[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? Please provide your answer in the box below.

288. The FLBA supports the proposal to adopt a definition of a cohabitant for intestacy rights that aligns with the established "marriage-equivalence" test under the Inheritance (Provision for Family and Dependants) Act 1975. Maintaining consistency across the statutory regimes governing succession law will promote coherence and achieve a higher degree of legal certainty, which is particularly important in the context of intestacy where the law operates to confer automatic inheritance rights.

289. In practical terms, however, the differing tests proposed for the lifetime separation framework ("enduring family relationship") and succession ("marriage-equivalence") may well prove to be a distinction without a difference. It is relatively unlikely that their separate application would lead to different practical outcomes in the vast majority of cases. Case law under the 1975 Act has consistently recognised that cohabitation, even on a marriage-equivalence test, is a flexible concept. As established in *Re Watson (Deceased)* [1999] 1 FLR 878, the court must consider whether, in the opinion of a reasonable person with normal perceptions, the couple were living together as spouses, taking into account the "multifarious nature of marital relationships". Since a marriage-equivalent test under this jurisprudence does not require a rigid adherence to a singular model of marital relationships, it is unlikely to require anything more than the "enduring family relationship" proposed for the lifetime separation scheme. Consequently, there may be argument for adopting a unified definition of cohabitation across both the lifetime separation and succession regimes to prevent unnecessary complexity.

290. To introduce greater certainty in the application of the test, it would be beneficial to include a non-exhaustive checklist of statutory factors to guide the court, mirroring the checklist proposed for the lifetime separation framework. In doing so, the legislation should make it explicitly clear that the presence or absence of a sexual relationship is not a decisive factor. This is already the settled position under the 1975 Act case law: see, for example, *Banfield v Campbell* [2018] EWHC 1943 (Ch), where the High Court confirmed that the cessation of a physical relationship and the fact that the couple slept separately for several years did not preclude a finding of cohabitation, where there remained an element of ongoing mutual support.

291. Conversely, the public recognition of the relationship is a factor that has consistently been treated as highly important under the 1975 Act marriage-equivalence test and should be explicitly reflected in any statutory checklist for intestacy reforms. As Ward LJ observed in *Gully v Dix* [2004] EWCA Civ 139, relationships of cohabitation are manifested by various elements including the "public and private acknowledgment of their mutual society". This public dimension is a critical safeguard in succession law, where one party is deceased and cannot give evidence. Emphasising public recognition would also serve to mitigate against attempted "predatory cohabitation" by unscrupulous individuals targeting vulnerable individuals with a view to acquiring inheritance rights. This risk of financial exploitation through relationship status links to the concept of "predatory marriage", recently considered by the Law Commission, in its Modernising Wills Law report (2025), to be a factor in favour of abolishing the automatic revocation of wills on marriage.

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

• Less than 5 years

• 5 years

• More than 5 years

• Undecided

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

292. The FLBA favours a period of 5 years.

293. The acquisition of spouse-equivalent rights will frequently disinherit children or other close relatives. In our view, such a significant displacement of default succession rights should be reserved for enduring, marriage-equivalent relationships where long-term mutual commitments have clearly arisen over time. A five-year qualifying period ensures that these automatic rights are only conferred when the relationship has demonstrated real permanence.

294. As to the "*potential unintended consequences of setting either a shorter or a longer minimum duration period*":

a. Because automatic intestacy rights require no judicial oversight, too short a qualifying period may increase the risk of "predatory cohabitation" arrangements, touched on above. Furthermore, a short timeframe may incentivise an abusive partner in a coercive or financially exploitative relationship to exercise control and make it actively difficult for the victim to end the relationship.

b. Conversely, setting too long a period risks excluding survivors of committed couples who are prematurely bereaved. It must be recognised that for later-life couples, even a five-year period can represent a very significant proportion of their remaining years together.

c. A five-year qualifying period strikes the most balanced and pragmatic middle ground between protecting other intestacy beneficiaries from abrupt disinheritance and safeguarding genuinely committed cohabitants against a sudden loss of financial support.

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

• No minimum period

• 2 years

• More than 2 years

• Undecided

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?

295. The FLBA favours a period of 2 years.

296. As to "*any specific risks or benefits*" regarding the minimum duration period for couples who have a child together:

a. Cohabitation is fluid and fact-sensitive, and, for the purposes of intestacy rights, should require some established baseline of shared living over an appreciable period.
b. Because intestacy operates automatically, conferring spouse-equivalent rights in shorter relationships immediately on a child's birth or pregnancy could create uncertainty. It could also prematurely reduce other intestacy entitlements, including those of the shared children.
c. This differs from the proposed framework on separation and the proposal to remove a minimum duration requirement under the 1975 Act, where there is a child. Such claims are discretionary and needs-based and do not automatically reduce or extinguish rights of others.
d. Whilst any minimum threshold inevitably carries a risk of harsh outcomes if a partner dies prematurely in a very new relationship, this is a necessary safeguard to preserve administrative and legal certainty in automatic estate distribution. The 1975 Act provides a flexible, needs-based safety net to mitigate hard cases.

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

297. The FLBA agrees with this.

298. We support the proposal to remove the two-year qualifying period for claims under the Inheritance (Provision for Family and Dependants) Act 1975 where cohabitants have shared children. This represents a modest reform that establishes consistency with the proposed lifetime separation framework, which similarly removes minimum duration requirements when a couple share a child.

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

299. In practical terms, this is a minor change that has limited wider impact, as many surviving parents in short-term cohabiting relationships would already have standing to bring a claim as dependants under section 1(1)(e) of the 1975 Act on the basis of being maintained by the deceased immediately before death. However, establishing standing under section 1(1)(e) requires proving that the deceased made a substantial contribution to the applicant's reasonable needs, which can be a complex and contentious factual hurdle. Granting direct cohabitant status in these circumstances removes an unnecessary barrier for bereaved parents.

300. Separately, the government should consider addressing two further issues which the FLBA considers warrant amendment of the Inheritance (Provision for Family and Dependants) Act 1975:

301. First, under the current 1975 Act framework, cohabitation status must be subsisting immediately before death for a surviving partner to have standing to bring a claim. Consequently, if a relationship breaks down and a partner dies shortly thereafter, the survivor has lost standing to claim as a cohabitant under the 1975 Act. Under the proposed reforms, a separated cohabitant would have a two-year limitation window to bring a claim for financial provision under the new lifetime separation framework.

    a. However, if one of the parties dies during this period, we must presume that the ability to pursue a claim under that separation framework will also expire with the death of one of the parties. This creates a critical "death gap" that would not apply if the couple simply separated and both remained alive. To prevent this unjust outcome, the government should consider introducing a new qualifying status of "former cohabitee" under the 1975 Act.
    b. This status should apply where death has occurred within the limitation window for bringing a cohabitation claim on separation or, if later, where lifetime cohabitation proceedings had been issued but not determined at the date of death. If the government adopts the FLBA's proposal that the limitation window for lifetime claims should be extendable, there would be a need to consider how this intersects with any former cohabitee status introduced to the 1975 Act.
    c. Arguably, in the interests of certainty in estate administration, any new former cohabitee status introduced to the 1975 Act should be limited to individuals who are still within the primary two-year window from separation and those with pending lifetime claims.

302. Second, the government should consider introducing a "cohabitation cross-check" under the 1975 Act, equivalent to the deemed divorce cross-check currently applied to spousal claims. A significant methodological tension exists between the proposed separation framework and the existing 1975 Act framework regarding how housing needs, in particular, are met.

    a. Under the 1975 Act, there is a clear steer in the case law – as noted by the Supreme Court in *Ilott v Mitson* [2017] UKSC 17 – towards providing capital for housing on a life interest basis only, rather than by way of outright capital.

b. Conversely, the proposed separation framework appears to envisage outright capital provision for housing. If left unaddressed, this means a cohabitant could potentially receive a less generous award on death than on separation.
c. Amending the 1975 Act to introduce a statutory requirement to consider the provision that would have been made under the cohabitation separation statute had the relationship ended by separation instead of death, akin to the "divorce cross-check" applied to spousal claims (s.3(2) of the 1975 Act), would smooth out these differing methodologies and ensure coherence across both statutory regimes.

The Family Law Bar Association ('FLBA')

(Money/Property Sub-Committee)

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