The Thought Leader: ripe for reform – the Law Commission Scoping Report on financial remedies on divorce and dissolution

Simon Bruce, *Partner, Dawson Cornwell LLP*
Laura Couves, *Solicitor, Dawson Cornwell LLP*

If it ain't broke, don't fix it, as the saying goes.

This echoes what we have observed to be the general consensus since the publication of the Law Commission Scoping Report on Financial Remedies on divorce and dissolution.

We respectfully disagree.

The Matrimonial Causes Act 1973 as a dead parrot

We contend that the statutory regime that has remained substantively unchanged for over 50 years requires fundamental reform, and we will explore why that is our view below. The memorable description of our Statute by a retired High Court judge as a 'dead parrot' is apt in our view.

The scoping report considers whether reform of this area of the law is required and outlines four possible models on which any future reform may be based. In our view, the report should be considered essential reading for any matrimonial practitioner. It is written in crystalline English accessible to the general reader, it is impeccably researched, and it is beautifully reasoned. It is an excellent investment of ten hours of your time.

Section 25 of the Matrimonial Causes Act 1973 ('MCA') is the bread and butter of our financial remedy work, requiring the court to have regard to all the circumstances of the case, after giving first consideration to the welfare of any minor child. All of the s 25(2), MCA factors are to be taken into account.

This results in a hugely discretionary system, with divorcing couples rolling the dice unless they reach agreements. If the matter winds up in court, those factors in s 25(2), MCA will be applied, with the intention of achieving a 'fair' outcome. Fairness has been articulated as requiring consideration of potentially needs, sharing and compensation.

However, there is limited consensus on the content and scope of each of these concepts.

Remarkably, it remains the case that there is no express purpose or objective set out in the legislation!

The simile of courts being like bus drivers who have instructions on how to drive the bus but are not told where to drive it is very telling.

Needs and fairness are not defined in the statute. Supreme Court judges disagree about the definition of needs: Lord Nicholls in *Miller v Miller; McFarlane v* McFarlane [2006] UKHL 24, [2006] 1 FLR 1186 provides a generous interpretation including, for example, needs arising from age and disability. Whereas Lady Hale says that need should be relationship-generated. If those at the top of the tree cannot agree, how can it be said that there is any certainty in the concept?

The result of our current regime is that the court is required to interpret the statute.

And then to apply individual discretion. We have judge-made law as a product of its interpretations. As practitioners, we can gain an understanding of how the statute is being interpreted by reference to developing case law over time.

We also know that a great deal of reported cases relate to high net worth individuals, which is not reflective of the financial reality of most divorcing couples. It is obviously wrong that the big money cases set the dial.

A system that allows for such a range of outcomes, which will inevitably vary depending on the identity of the allocated judge, cannot be said to offer parties any reassurance when entering into court proceedings.

It is not possible for an individual going through divorce to understand, by reading the legislation, how their case will be decided. The law lacks certainty and accessibility to an extent that it could be argued to be inconsistent with the rule of law. That is a damning indictment and must give anyone involved in the system, and most of all our government, serious pause for serious thought.

Obtaining legal advice is a luxury

Consulting a lawyer when divorcing is a luxury. We know this. We often have to give pro bono advice when legal advice is unaffordable.

Statistics reveal that only approximately one-third of divorcing spouses use some form of legal support for financial arrangements. The majority of divorcing couples (60% in 2023) do not make an application to the court for financial relief, and far fewer pursue the court process to final hearing.

The law is out of reach for most people.

The level of uncertainty and discretion in our current system means that disagreements over the final outcome will be more prevalent, which (for couples who can afford the luxury of legal advice), will increase costs. Whilst that may keep lawyers busy in our jobs, we would argue that for such a system to remain unchanged is doing our clients (and, indeed, those who cannot or do not access our advice) a huge disservice.

Suitable reform should result in increased certainty, thus reducing legal fees, time engaged in proceedings and, hopefully, as a result, the emotional toll of the same. That will be a massive positive.

Two-track justice

It is not just ability to access legal advice which results in inequality. For example, relatively few couples can afford to choose a private financial dispute resolution ('FDR') appointment. Private FDRs can inevitably be heard much quicker than a court-listed FDR (so parties using the private FDR route are likely to reach a financial conclusion quicker than those who have to wait for a court-listed FDR). Parties choosing the private FDR route also have the benefit of choice of tribunal, the luxury of the judge's undivided attention, and choice of date and location.

This is in stark contrast to parties who cannot afford such an option, who wait a multiple of months to be sandwiched in between a host of other cases in the court's busy list for that day.

Even fewer couples can afford the luxuries of instructing a shadow expert to scrutinize the evidence of an SJE; reserving private conference rooms at court; or engaging a live transcription service to assist legal teams throughout a busy trial week. All of the above builds a picture of two-track justice, which is fuelled by the need for parties to engage in proceedings as a result of the inaccessibility and uncertainty of our current regime.

The Scoping Report concludes that the current law requires reform. We whole-heartedly agree.

Protection for cohabitants

Surely it is clear that any reforming Statute will protect cohabitants as well as divorcees.

We would suggest qualifying entry points of two years of cohabitation, or having a child together.

Models for future reform

Turning to potential models for future reform, we provide a brief summary below:

1. **Codification:** this model would result in minimal change to the existing law contain in s 25 MCA. The court would retain a wide discretion. The current law, as developed through judge made law, would be codified. We say this is not the way, for the reasons explained above.
2. **Codification-plus:** under this model, the current law would be codified. There would be additional reform to deal with specific areas of uncertainty which are ripe for reform. The court would retain discretion, but limitations may be introduced on these areas of uncertainty. We explore this below.
3. **Guided discretion:** this would see the introduction of a set of underpinning principles and objectives, which would guide the court's discretion. The reform would go beyond changes to the existing law, as set out in s 25, MCA.
4. **Default regime:** under this model, there would be the creation of a matrimonial property regime. Couples would know when marrying how property will be divided on divorce. The result would be a high level of certainty and limited discretion would be afforded to the courts.

And couples would be able to contract out of the default system via a marital agreement.

The Scoping Report surveys Continental Europe and the Nordic countries. Many of these countries adopt community of assets; that is, equal sharing, generally of what has been acquired during the marriage (and does not include cohabitation). A minority of countries operate separation of assets ie you keep your own.

All of these countries have separate pillars of entitlement and how you deal with property is just one of those. Also considered include maintenance, occupation of the property, child maintenance and division of pensions.

A default system would bring certainty, and the other pillars of protection would provide fairness.

A harmonisation of our law with most other countries of comity sounds like an excellent idea which merits careful exploration.

This is our favoured model.

The codification-plus model would involve additional reform to specific areas of the law. We agree that is necessary and that the current system disadvantages wives.

Marital agreements

We know that since *Radmacher (Formerly Granatino) v Granatino* [2010] UKSC 42, [2010] 2 FLR 1900, such agreements should be upheld, provided they are fair and freely entered into. We support the introduction of qualifying nuptial agreements ('QNAs'), on the proviso that certain legal safeguards are met (including independent legal advice, financial disclosure and absence of pressure). The concept of autonomy is modern, gender-blind and important and should be respected. We agree that QNAs should not allow parties to contract out of providing for financial needs. These safeguards are important to ensure that the party with less financial awareness (often the woman), is protected.

Maintenance

Women are more likely than men to receive spousal maintenance. That said, whole life maintenance orders are now very rare. Statute moves divorcing parents towards independence.

Research highlights the risks of having a time limit on spousal maintenance such as the Scottish/Baroness Deech guided-discretion models; and suggests that

such a limit may have a detrimental effect on vulnerable spouses. We agree.

Child maintenance should also be considered as an area for reform. The effect of the MCA is that financial support for children generally ceases when they reach 18 years old. Increasingly (and immensely so since 1973), parents are still providing financial support for children beyond the age of 18.

The financial burden for supporting such child(ren) will often fall on the parent with whom they are living. Research shows that, more often than not, this parent will be the mother.

Conduct/behaviour

Victim-survivors of abuse (predominantly women) suffer poor financial outcomes following divorce. Whether domestic abuse, including coercive and controlling behaviour and economic abuse, should more readily be considered as conduct is a matter which has attracted discussion. Resolution have recently produced a valuable and well-researched shot in the arm for this idea.

Others suggest that domestic abuse is considered under the 'needs' factor under s 25, MCA, and so does not need to be treated as conduct.

The Scoping Report concludes that it would be beneficial for the law to state clearly what behaviour will be considered conduct, the impact of that conduct on a claim for financial remedies, and the process to be adopted when raising allegations of conduct. We agree.

Pensions

Almost a quarter of divorcing spouses did not know if their partner had a pension. Women are less likely to know if their spouse has a pension than men. This concern is underscored by the fact that pension assets are the most valuable for many divorcing couples. Research shows that only 11% of divorcing couples had pension sharing arrangements in place.

Many couples opt to 'offset' their pensions by way of rough and ready and unschooled comparison between the value of pensions and the value of liquid assets. But there is a risk that this results in unfairness, particularly for women whose longer-term financial wellbeing is ignored in favour of the practicalities of their current financial needs.

Women's pension pots are likely to be smaller than men's as a result of taking time out of the workplace or working part-time, often so that they can focus on caring responsibilities. We know that, since White, the court will treat the different roles that may have been played by each spouse during the marriage as equal, so why should this concept fall away when it comes to considering pensions?

Unpredictability in the system and examples of discretion in recent cases

In our partner Jess Reid's recent case of *ST and AR* [2025] EWHC 4 the Deputy High Court judge added a cushion of an additional amount of capital to the wife's need award. I last heard of those awards about thirty years ago. Purely discretionary and unforeseeable.

And back to the subject of equality, we noted that Cusworth J, in our partner Sarah Jane Lenihan's very recent case of *Vince*, treated the husband's work in a company post-separation as an 'unmatched contribution' compared to the wife's continuing care of the family. Another 'interesting' example of an individual judge's discretion.

Conclusion

It is evident to us that the current law requires reform. Lawyers should press and agitate for change; we should not be complicit in retention of an unfair system. At present, the system does not provide sufficient certainty. That disadvantages all divorcing spouses, and to a larger extent, those who cannot afford legal advice.

We pay thanks to the remarkable work of the team who have produced the Scoping Report.

It is to be hoped that the government acknowledges the endeavours of the Law Commission when considering reform in the months to come. The government's formal response to the Law Commission is due by 17 June 2025.

We are counting the days.