

LAW COMMISSION CONSULTATION PAPER NO. 208 (2012)
MATRIMONIAL PROPERTY, NEEDS AND AGREEMENTS

RESPONSE OF THE CENTRE FOR CHILD AND FAMILY LAW REFORM

PRINCIPLED REFORM

7.2 Do consultees agree with our central argument that the current law requires reform to ensure that the payment of spousal support is founded on a principled basis that explains what has to be paid by way of spousal support, and for how long?

Supplementary Consultation Paper, Part 4, paragraph 4.113

Yes. The current law requires reform as it is too uncertain and lacks focus. A variety of outcomes are possible on the same set of facts, which added to a system struggling to cope with reduced resources and an increase in self-represented people causes serious problems. A lack of stated principle leads, for example, to a lack of equality in that joint lives maintenance orders are common for women, particularly within the M25 (as highlighted in paragraph 7 of the Executive Summary and paragraph 25 of the Overview for Lawyers), but rare for men. CCFLR welcomes and shares the values set out in paragraph 41 of the Overview for Lawyers, to which it would add:

- National uniformity: removing regional variations in the types of orders made, best illustrated by the joint lives maintenance order example above.
- Realism: in addition to the stated values, a need to take account of cultural issues and the social context, such as the level of child care, when comparing foreign systems or law to our own.

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7.3 Should spousal support:

- (1) be restricted to the compensation of loss caused by the relationship; or**
- (2) seek to unravel the “merger over time” by redressing the disparity in lifestyle caused by the divorce or dissolution?**

Supplementary Consultation Paper, Part 4, paragraph 4.114

As the Law Commission has made clear during the consultation process it wishes a choice to be made between these two options, CCFLR prefers option (2). Option (1) is unattractive as it is ‘backward looking’. Compensation also has a conceptual link to

conduct, which is rightly otherwise rarely relevant to a financial outcome and, should current plans come to fruition, soon be removed as a fact justifying divorce.

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7.4 In answering the question at paragraph 7.3 above it would be helpful to hear consultees' views on the relevance or otherwise of:

- (1) the length of the marriage;**
- (2) the marital standard of living;**
- (3) the way that joint responsibilities (for example, provision of childcare or care for an elderly parent) have been shared during the marriage and will be shared after its ending; and**
- (4) the occupation of the former matrimonial home following divorce.**

Supplementary Consultation Paper, Part 4, paragraph 4.115

All are relevant and as regards each points that CCFLR would stress are:

(1)(a) “short marriages” should be expressly defined as suggested by the 2009 Centre for Social Justice “Every Family Matters” report mentioned at paragraph 91(3) of the Overview for Lawyers, with the objective also as recommended.

(b) The current uncertainty and inconsistency in the court’s taking into account of pre-marriage cohabitation should end. “Cohabitation” is not defined and if couples choose to marry this should not result in actions when they were not married being used as if they had been married at the time.

(2) In the minority of cases where needs are adequately covered, ‘marital standard of living’ should be more strictly defined as to its impact. For example, achieving a degree of parity between the houses of each party, particularly where there are children, is to be encouraged whereas facilitating first class air travel when that had been the practice in the past is not.

(3)(a) “Double counting” needs to be guarded against here (as regards the position during the marriage) as, for example, a spouse’s lack of earning capacity due to child care in the past will already be a factor. While ‘compensation’ for loss of career prospects was highlighted in McFarlane that has not attracted support subsequently and it is considered that is right as if it increases the award this would be a good example of ‘double counting’ in practice.

(b) In contrast, it is right to take account of the ongoing impact of child care after the ending of the marriage. This is being carried out to the mutual benefit of the parties and they should share the cost if they can rather than burden the State.

(c) Other than child care, ‘joint responsibilities’ after the end of the marriage should be limited. For example, care for an elderly parent should be the responsibility of the

spouse who is the child. The impact on their financial position would be relevant but not because the responsibility is a shared one with the other spouse to his or her former parent-in-law.

(4) If there are children, the preferred option should be retention of the home during their minority but this must depend on financial realities. In that respect, separated couples should not be immune to the current social context when house ownership as opposed to renting is increasingly hard to achieve. Accordingly, both parties may have to rent following a sale of the former matrimonial home. In the minority of cases where another house can be afforded to be purchased, the objection should be parity, in terms of bedrooms to quote an example.

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7.5 If consultees favour a principled reform of spousal support, should it take the form of:

- (1) a reformed discretionary approach; or**
- (2) a formulaic calculation?**

Supplementary Consultation Paper, Part 4, paragraph 4.116

A formula would assist to reduce uncertainty but purely as a starting point. The Child Support Agency experience demonstrates pure formula does not work. The Canadian approach set out at paragraph 63 of the Overview for Lawyers giving a range of possible outcomes is attractive. By way of qualification of a strict formula, account should be taken of; in particular of the need to avoid hardship, defined as being forced to rely on State benefits, when that was not the case previously. While this could be long term reform, an immediate short term improvement would be to spell out the guideline, favoured in practice, of using one third of income as a starting point in cases where income exceeds needs.

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7.6 To what extent do consultees think that either a reformed discretionary basis or a formula should embody incentives towards independence by placing limits on the extent of support that might be given?

Supplementary Consultation Paper, Part 4, paragraph 4.117

CCFLR supports this principle. In practice, this should include:

- (a) Stating the principle in a preamble to each financial order.

- (b) A term order without a bar on subsequent extension being the presumption, echoing paragraph 91(l) of the Overview for Lawyers.
- (c) Triggers for a reduction in income support being considered in every case such as retirement, to allow time for retraining, children leaving school or automatic percentage reduction at stated intervals.
- (d) The payer only being able to rely on the term if he or she reminds the recipient six months prior to the end of the term payments are then due to stop.
- (e) Judges to be more robust in promoting independence and take account of the disadvantages of future applications, financially and otherwise, rather than using nominal orders to leave options open and indicating a reluctance to ‘crystal ball gaze’.

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7.7 What preliminary work would be needed to research and pilot a new approach? In particular:

- (1) who should do that work;**
- (2) what methodology should be adopted;**
- (3) what sort of timescale and investment would be required?**

Supplementary Consultation Paper, Part 4, paragraph 4.118

Research should be carried out to confirm current issues, such as the variation in orders within the M25 as compared to the rest of country mentioned in 7.2 above, and international experience. As regards other jurisdictions, the Scottish experience given the limited income orders and the same welfare benefits available may be particularly instructive. Similarly, Australia with its similar culture but no joint lives income orders. The detail of the research is best left to others although academics specialising in family law with adequate funding would be preferred.

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IMPROVING THE CURRENT LAW RELATING TO NEEDS

7.8 Consultees are asked to give us their views about the following possibilities for statutory and non-statutory reform.

- (1) Statutory provision to the effect that the courts, in making provision for spousal need, must aim to ensure that a payee spouse is enabled to become independent within a reasonable period, while bearing in mind also that independence is unlikely to be practicable until the children of the marriage or civil partnership finish their education.**

- (2) An authoritative source of guidance for the courts and for members of the public about:**
- (a) the considerations involved in an assessment of need (see Supplementary Consultation Paper, Part 5, paragraphs 5.43 to 5.48);**
 - (b) the priority to be afforded to different elements of need (see Supplementary Consultation Paper, Part 5, paragraphs 5.49 to 5.50).**
- (3) Provision about the following either by way of statutory amendment or in the form of authoritative guidance:**
- (a) the time within which independence is to be expected (see Supplementary Consultation Paper, Part 5, paragraphs 5.33 to 5.39);**
 - (b) the normal form of orders for periodical payments (term orders or joint lives) (see Supplementary Consultation Paper, Part 5, paragraph 5.33); and**
 - (c) the financial arrangements to be made after short childless marriages (see Supplementary Consultation Paper, Part 5, paragraphs 5.38 to 5.39).**
- (4) Who should provide that guidance? Would it be appropriate for it to be produced by the Family Justice Council in the form of Practice Guidance?**
- (5) Publication of that guidance on the information hub to be provided in response to the Family Justice Review.**

Supplementary Consultation Paper, Part 5, paragraph 5.62

Reference should be made to the comments above. The response in summary to the specific questions posed is:

- (1) Agreed.
- (2) Agreed with provision of the information given to those giving notice of intention to enter into marriage or civil partnership. CCFLR supports the approach suggested in paragraphs 96 and 97 of the Overview for Lawyers but not in paragraph 98 of the same documents as any case study is bound to be fact specific.
- (3) See above.
- (4) Yes, as part of a concerted approach involving interested bodies such as the Law Society, Family Law Bar Association, Resolution and the Family Procedure Rules Committee. Incorporation into the approach expected by courts in the past of the Law Society Protocol and the Resolution Code of Conduct provide a template. It would also be vital that the senior judiciary agree with the guidance and promulgate it robustly in their decisions and comments.
- (5) Agreed.

7.9 Consultees are asked to tell us about any other reform measures that would make the law relating to needs more consistent and accessible, short of the fundamental and principled reform envisaged in Part 4.

Supplementary Consultation Paper, Part 5, paragraph 5.63

Nothing to add to earlier comments.

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7.10 We invite consultees' views as to whether, as well as stating that it shall not be possible to contract out of provision for needs by means of a qualifying nuptial agreement, statute should also specify the level of needs for that purpose.

Supplementary Consultation Paper, Part 5, paragraph 5.70

Qualifying Nuptial Agreements (QNA) should play a key part in reducing the current uncertainty that causes the issues outlined at 7.2 above. Accordingly, as long as parties are shown to have been fully aware of the implications of entering into a QNA and there is no evidence of duress, their autonomy should be respected and they should be able to contract one of provision for needs just as in Australia, where such agreements are binding even if needs are not met. In the alternative, if this is not the case then the level of needs required should be the same as in matters when there is no QNA.

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NON-MATRIMONIAL PROPERTY

7.11 We provisionally propose that non-matrimonial property, defined as property held in the sole name of one party to the marriage or civil partnership and:

- (1)** received as a gift or inheritance; or
 - (2)** acquired before the marriage or civil partnership took place
- should no longer be subject to the sharing principle on divorce or dissolution, save where it is required to meet the other party's needs.

Do consultees agree?

Supplementary Consultation Paper, Part 6, paragraph 6.41

Yes.

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7.12 We ask for consultees' views on whether the family home should be excluded from the definition of non-matrimonial property proposed above.

Supplementary Consultation Paper, Part 6, paragraph 6.50

In principle, the family home should be excluded as it is integral to the marital relationship. In practice, there should be a qualifying period within which it would not be excluded, say three years. Also guidance is required as to the definition of the term to seek to avoid the issues which arise as in, for example, *Lawrence v Gallagher*.

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7.13 We ask for consultees' views on whether property acquired by one party during cohabitation with the other party should be excluded from the definition proposed above.

Supplementary Consultation Paper, Part 6, paragraph 6.50

To follow the logic in our response at 7.4 (1) (b), it should not be excluded unless it satisfied the qualifying period under 7.12 above. This would also have the effect of avoiding potential unfairness on cohabiting single sex parties who began cohabitation before the Civil Partnership Act 2004 came into force enabling them to become civil partners.

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7.14 We provisionally propose that non-matrimonial property should not lose its status as such merely by virtue of having been used by the family.

Do consultees agree?

Supplementary Consultation Paper, Part 6, paragraph 6.77

Yes, unless it is used to acquire the family home and the qualifying period under 7.12 above is satisfied.

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7.15 We provisionally propose that where non-matrimonial property has been sold and substitute property bought, that property should be matrimonial property if it has been bought for use by the family, save where the substitute property is of the same kind as the property sold.

Do consultees agree?

Supplementary Consultation Paper, Part 6, paragraph 6.87

No, consistent with our view as to non-matrimonial property retaining its status as stated at 7.14 above.

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7.16 We provisionally propose that where non-matrimonial property has been sold and the proceeds invested in matrimonial property, the property (following that investment) should be matrimonial property.

Do consultees agree?

Supplementary Consultation Paper, Part 6, paragraph 6.88

Yes, given the deliberate decision to invest it in matrimonial property rather than it acquiring that status by default as anticipated under 7.15 above.

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7.17 We ask consultees to tell us whether they think that it is possible to devise rules - or a guided discretion -for the treatment of cases where non-matrimonial property has grown due to the investment of one or both the spouses? What values should be expressed in those rules?

Supplementary Consultation Paper, Part 6, paragraph 6.100

It would be possible but, in our view, inadvisable given the capacity for uncertainty that would arise when the thrust of any reform should be more certainty. If, in the alternative, this approach was to be proposed it would be important to limit it to traceable financial investment.