Institute
and Faculty
of Actuaries

14 August 2026

IFOA RESPONSE TO MOJ CONSULTATION
A FAIRER END TO RELATIONSHIPS

The Institute and Faculty of Actuaries (IFoA) is a royal chartered, not-for-profit, professional body. We represent and regulate over 34,000 actuaries worldwide, and oversee their education at all stages of qualification and development throughout their careers. Actuaries are big-picture thinkers who use mathematical and risk analysis, behavioural insight and business acumen to draw insight from complexity. Our rigorous approach and expertise help the organisations, communities and governments we work with to make better-informed decisions. In an increasingly uncertain world, it allows them to act in a way that makes sense of the present and plans for the future.

The Institute and Faculty of Actuaries (IFoA) welcomes the opportunity to respond to the Ministry of Justice's consultation on reforming financial remedies on divorce and strengthening protections for cohabitants at the end of their relationship. This response is prepared by the IFoA Pensions on Divorce Working Party and focuses on questions 19 and 37 which cover our specialist area, although we also make a number of wider comments. It is written in the public interest.

- The IFoA recommends that the opportunity is not missed to make substantive improvements to the position on pensions. We support specific consideration of pensions but believe this does not go far enough. We propose that pensions sharing should be a starting point. Our response discusses relevant considerations for implementing this.

- Requirements to use, or not use, a Pensions on Divorce Expert (PODE) should be codified (albeit not through primary legislation). This should be accompanied by a system of enhanced regulation for PODEs.

- Within defined benefit (DB) pension schemes, internal sharing will often produce significantly better outcomes for ex-spouses than external shares. However, internal sharing is often not an option in private sector DB schemes. Government should require or encourage this to be more widely available. Where it is available, it may be appropriate to establish that good practice is to provide an internal implementation quotation alongside Cash Equivalent Values for divorce.

- We agree, in principle, that pension sharing should be available as a remedy on the breakdown of cohabiting relationships, but urge the Government to recognise that significant technical, legislative and tax issues will need to be resolved before enactment of any new law.

- We would be pleased to engage with the Government on any of these matters. The IFoA working party on this subject includes PODE and non-PODE actuaries, solicitors and a barrister, including members of the Pensions Advisory Group.

Question 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?

Many Pensions on Divorce Experts (PODEs) are actuaries, and in particular, IFoA members. The need for a PODE often arises on divorce because simply splitting the Cash Equivalent Value (CEV) provided by schemes may not produce a fair outcome. This is because the CEV represents the scheme's estimate of the funds it needs to hold in order to provide the benefit it has promised within the scheme. This figure is appropriate for that purpose, but in DB schemes it often differs significantly from the cost to an individual of securing similar benefits privately. Without expert advice, an ex-spouse may receive a significantly lower income despite receiving an equal share of the CEV, which may also be an inappropriate figure for offsetting purposes. Our response is informed by these considerations, discussed in detail in PAG2[1], and by the IFoA membership's wider expertise in pensions and financial uncertainty.

The IFoA supports the principle underlying the question but considers the proposed framing (that courts should 'give consideration' to pensions) to be insufficiently clear, particularly for litigants in person. Research[2] demonstrates that pensions are routinely overlooked or inadequately addressed in financial settlements, often because parties treat pension assets as belonging solely to the accruing spouse. Legislative language needs to be stronger and clearer to drive the necessary cultural shift.

Furthermore, the reference to the court only being required to 'give consideration' to pensions accrued during the marriage (a) is misleading as case law is clear that the start date for 'marital accrual' (marital being a misnomer in this context) is the start of settled cohabitation[3] and (b) undermines the clear guidance (from both caselaw, and PAG2) that arguments as to apportionment of pensions as to 'marital pensions and non-marital pensions' are inappropriate in cases which are needs cases for pension purposes, which will be the vast majority of cases.

We recommend:

1 A statutory starting point of pension sharing (rather than just pensions being taken into account). The IFoA Pensions on Divorce Working Party discussed whether or not there should be a default of pension sharing but consider that a default would put the bar too high. A 'starting point' instead emphasises that pension sharing will not be appropriate in all cases (i.e. short relationships, young parties, modest pensions, needs-based outcomes requiring offsetting instead). This is consistent with the existing needs, sharing and compensation principles.

2 Clear statutory guidance as to:

  2.1 the fact that arguments as to apportionment of pensions as 'marital' or 'non marital' will not be appropriate in the vast majority of cases (in line with PAG2);

  2.2 the fact that where pension apportionment is appropriate, the relevant 'marital pensions' should (in fact) be those accrued from the start of settled cohabitation to the point of separation save, perhaps, where there is a significant ongoing contribution by the other party, e.g. to childcare responsibilities which impacts on their ability to accrue a pension post separation;

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[1] Pension Advisory Group Guide to the Treatment of Pensions on Divorce, 2nd edition (PAG2)

[2] Pension inequality a major issue when couples divorce, research finds and Fair shares? Sorting out money and property on divorce - Nuffield Foundation

[3] See also paragraph 4.6 of the Pension Advisory Group Guide to the Treatment of Pensions on Divorce, 2nd edition (PAG2)

2.3 the fact that the aim of pension sharing should be to achieve equal sharing; hence, a starting point of pension sharing is a starting point of equal sharing;

2.4 what ‘equal sharing’ means. Equal sharing by reference to Cash Equivalent Values (CEVs) alone often leads to unequal outcomes in terms of income or even other measures of capital value, particularly in DB cases[4]. The guidance in PAG2, Part 6 should - to the extent possible - be codified so far as it relates to (a) when a pensions on divorce expert (PODE) will be required (and, conversely, when equalisation by reference to CEVs alone will be appropriate) and (b) whether equalisation should be by reference to equalising incomes or equalising capital (other than by reference to CEVs). Codifying the former will help ensure proportionality and manage costs (particularly for lower value cases); codifying the latter will provide much needed clarity to litigants, particularly those without the benefit of representation.

2.4.1 For ‘equal sharing’ to be codified as a starting point, it may be necessary to give a specific definition of that starting point. For example, this could be ‘equal incomes from State Pension Age for life’. It will be essential to allow flexibility to depart from any starting point based on the circumstances of the case.

2.4.2 Codification as described in 2.4(a) should not be through primary legislation, rather through a mechanism that allows for regular review, such as the Family Procedure Rules or Practice Directions, because, for example, the figure for de minimis pensions may need to be adjusted from time to time. Any requirements for when a PODE is necessary may need to include a definition of a PODE and be supported by accreditation of PODEs. This would help to promote high professional standards, support confidence in expert evidence provided to the courts, and reduce the risk of inequitable pension-sharing outcomes. Any PODE definition must include suitably experienced actuaries since actuaries are recognised as providing some of the highest quality PODE reports. The IFoA would be happy to liaise regarding design and implementation of a suitable definition and accreditation. In particular, our Pensions on Divorce Working Party has proposed mechanisms for enhanced accreditation.

2.4.3 The choice between equality of capital and equality of income is a fundamental question of the underlying aim of equality. Case specifics will not normally affect the answer to this question[5] . Therefore, it would be helpful for this choice to be settled on a consistent basis through codification.

2.4.4 It may be possible to further streamline the treatment of simple cases to improve speed and minimise cost. The codification discussed at 2.4(a) would provide, for example, that simple defined contribution cases where the parties are similar ages can be settled using the Cash Equivalent Values without the need for a PODE. The suggestions at 2.4.1 and 2.4.3 would further support streamlining and simplification, especially in DC cases.

3 the speed and quality of information provision for divorce is addressed. The requirement to consider pensions must be supported by timely and accurate information. The IFoA Pensions on Divorce Working Party has been working with the Pensions Administration Standards Association (PASA) to look at standardisation of divorce data provided by administrators of private sector defined benefit pension schemes. We would be happy to discuss this.

[4] We appreciate that in bigger money cases equal sharing by reference to CEVs may be appropriate - see *CMX v EJX (French Marriage Contract)* [2022] EWFC 136.

[5] Save it is recognised that in high-value cases, or where ages are similar, the difference between the share needed to equalise incomes and that needed to equalise capital may either be de minimis in the context of the case, or de minimis in absolute terms

4 The opportunity is taken to look at what ancillary legislative or procedural rules reform and / or public education steps can be taken to improve this area of law, namely:

4.1 The Government should take this opportunity to consider whether all DB pension schemes should be required to offer internal pension sharing to an ex-spouse, rather than requiring external transfers. Currently, many private sector DB schemes do not offer this option. Internal sharing can produce better outcomes for couples on divorce and should be more widely available. We acknowledge that this would, however, require careful consideration, given the administrative burden to private sector schemes and the costs of implementation (which schemes may seek to pass on to the divorcing couple).

4.2 The Government should take this opportunity to establish that as a matter of good practice any private sector DB schemes that do offer internal pension sharing (if indeed all schemes are not mandated to do so) should provide internal implementation quotes as standard when providing Cash Equivalent Values (showing the estimated pension payable to the pension credit member from their normal pension age from a notional 50% pension share, say, based on either the specified pension credit member age or a table by age). This will be particularly relevant if internal sharing by private sector defined benefit schemes were to be more widely available. Such a statement would also need to specify how the estimated pension would increase in payment.

4.2.1 Unlike in most private sector schemes, PODEs are able to use published information to estimate what the ex-spouse may receive from public service schemes without the scheme providing an internal implementation quote. Therefore, one point of view is that it is better for public service pension schemes not to make implementation quotes easily available. Instead, it is argued that members should pay a PODE to produce these figures so that they can be put into context and any risk of them being misapplied can be minimised. However, an alternative point of view is that:

(i) In the context of a public service pension scheme pension share, the CEV is no more than a technical calculation device. It is strange for schemes to provide a CEV for the purpose of divorce – which is essentially meaningless to the parties – but not to tell the parties what they would actually receive if a share were implemented.

(ii) It should be relatively cost-effective and efficient for schemes to produce this information. It should not be a large addition to producing CEVs.

(iii) There is a threshold below which it is not proportionate to commission a PODE report. Providing implementation quotes will be better than providing only CEVs.

(iv) An explicit requirement to consider pensions makes it even more important that parties have access to information about what the share would provide, especially if sharing were to be a starting point.

4.3 Any change in primary legislation could and should also be accompanied by a public education piece to ensure that divorcing parties and their legal advisers appreciate the value of pensions (otherwise often overlooked on divorce) and have better understanding of pensions in the divorce context. The information is already available (i.e. PAG2, the Advice Now Guide[6]) but better signposting would be helpful.

[6] Pensions and divorce | Advicenow

4.3.1 We suggest that the Government should offer a voucher scheme, similar perhaps to that available in respect of mediation, to enable people to access financial advice on divorce. This will enable divorcing couples to better understand and appreciate the value of their pensions and enable those people, particularly the non-accruing spouse, to make properly informed settlement choices on divorce. Alternatively, an expansion of PensionWise or MoneyHelper to provide specific support on divorce may be appropriate.

4.3.2 In our recent submission to the Second Pensions Commission[7], we recommended removing tax obstacles to paying for expert (financial) advice at the point of decumulation (retirement). Divorce is another pivotal life event and the same applies here. Divorcing parties should be able to pay for a PODE report or financial advice from either party's pension savings. Payment for advice for both parties should be possible even where only one party has pensions.

4.4 The working party is also aware of various other issues in this area which go beyond the remit of their group but which we believe should be considered by the Government as part of this consultation, namely:

4.4.1 addressing problems with pension disclosure: for example, providing a route where a spouse (whether via court order or otherwise) could search the pensions dashboard (once launched) for details of a non-disclosing spouse's pensions;

4.4.2 the suggestions set down in Appendix V of PAG2, including introducing a new jurisdictional basis (namely a pension being situated in England and Wales) for applications under the Matrimonial and Family Proceedings Act 1984 (MFPA 1984) to address the issues couples encounter where they have pensions in this jurisdiction but no ongoing connection to enable them to secure a pension sharing order (whether by consent, or otherwise);

4.4.3 requiring pension schemes to accept payment of implementation charges via deductions from the retained pension/ pension credit, rather than requiring payment up front, and where a party is not paying their share of fees, allowing the schemes to unilaterally deduct their share of charges in that manner;

4.4.4 addressing the situation where the recipient of a pension share fails to nominate an arrangement to accept their pension credit, i.e. requiring schemes to have a default option and not allowing schemes to defer commencement of the implementation period in that situation.

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

We limit our response to the question of pension sharing being made available to cohabitants on relationship breakdown.

We agree, in principle, that pension sharing should be available as a remedy on the breakdown of cohabiting relationships, but urge the Government to recognise that significant technical, legislative and tax issues will need to be resolved before enactment of any new law.

[7] Response of the Institute and Faculty of Actuaries to the Second Pensions Commission: Interim Report, 14 July 2026, paragraphs 5.25 to 5.27

We agree that there is no principled reason to exclude pension sharing from the range of remedies: pensions are often a significant (sometimes the most significant) asset a couple may have, and excluding them from the range of possible remedies could produce unfair outcomes (with either one party not receiving sufficient provision, or the creation of significant 'cash flow' issues where pension needs in retirement are having to be addressed instead by non-pension capital).

We also note that, as the proposed remedy will be 'needs' not 'sharing' based, there will be constraints around the extent of pension sharing and it will certainly not apply in all cases.

We consider the following issues will need to be resolved:

1 When a pension sharing order would take effect, given that it is assumed there will not be an equivalent formal dissolution process akin to a final order on divorce or dissolution of a civil partnership. Legislation will need to specify when the effective date is (one would assume simply 'four weeks after the date of the financial order' but this will need to be explicit in the legislation).

2 Tax treatment - This applies more widely than just to pensions, but the Government will need to be clear as to the tax treatment of transfers of pensions between cohabitants on relationship breakdown (given the 'no gain/ no loss' principle does not apply). Will pension sharing orders attract tax charges on the pension member? Aligned to this, is there the potential that pension sharing on relationship breakdown could then be used for tax planning purposes to transfer pensions between a couple (given that, unlike divorce, there is no formal dissolution process)?

3 Guidance as to approach - Given claims on breakdown of a cohabiting relationship will be needs based, further thought will be required as to how pension sharing will factor into that assessment. In the absence of guidance, it may be less clear than in divorce that a starting point of equality of pensions accrued during the cohabiting relationship is appropriate (as there is going to be no equivalent to 'sharing' claims). Therefore, guidelines will be required for cohabitants, and those advising them, to understand how pensions should be approached in a purely needs-based jurisdiction. Would it, for example, be assumed that in all bar 'big money' cases, needs would dictate that pensions should be shared, even if parties may be many years off retirement and their actual needs in retirement therefore difficult to quantify (i.e. akin to PAG2's suggestion in the divorce context that most pensions cases are needs cases)? When might a PODE report be required and/ or proportionate?

In our response to Question 19, we recommended a starting point of equal sharing for divorce. We propose that the same approach should apply to cohabitation as to divorce, on the grounds that the vast majority of cases are 'needs cases' anyway, so far as pension sharing is concerned. Therefore, a starting point of equal sharing (being likely required to address needs in retirement) would remain appropriate on the understanding that, where needs can be met without recourse to pension sharing (or equal pension sharing), that starting point can be departed from.

4 In consultation responses regarding the development of policy to include unused pensions in the deceased's estate for inheritance tax purposes, the IFoA has repeatedly highlighted[8] the lack of any special protection for non-spouse dependants in the context of the extension of inheritance tax to pension assets. Any review of cohabitants' intestacy rights should look again at the lack of special provision for them under the inheritance tax regime.

[8] See, in particular, [Reforming inheritance tax: unused pension funds and death benefits: IFoA Response]

Should you wish to discuss any of these points further, please contact Caroline Winchester in the first instance, caroline.winchester@actuaries.org.uk.