



The Law Reform Commission
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

REPORT

RIGHTS AND DUTIES OF COHABITANTS

(LRC 82-2006)

IRELAND

Law Reform Commission

35-39 Shelbourne Road, Ballsbridge, Dublin 4

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LAW REFORM COMMISSION

Background

The Law Reform Commission is an independent statutory body whose main aim is to keep the law under review and to make practical proposals for its reform. It was established on 20 October 1975, pursuant to section 3 of the *Law Reform Commission Act 1975*.

The Commission's Second Programme for Law Reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both Houses of the Oireachtas in December 2000. The Commission also works on matters which are referred to it on occasion by the Attorney General under the terms of the Act.

To date the Commission has published 80 Reports containing proposals for reform of the law; eleven Working Papers; 41 Consultation Papers; a number of specialised Papers for limited circulation; An Examination of the Law of Bail; and 27 Annual Reports in accordance with section 6 of the 1975 Act. A full list of its publications is contained on the Commission's website at www.lawreform.ie.

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*Secretary/Head of
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Research Staff

<i>Director of Research:</i>	Raymond Byrne BCL, LLM, Barrister-at-Law
<i>Legal Researchers:</i>	John P. Byrne BCL, LLM (NUI), Barrister-at-Law Áine Clancy BCL Philip Flaherty BCL, LLM (NUI) Caren Geoghegan BCL, LLM (Cantab), Barrister- at-Law Cliona Kelly BCL Joanne Lynch BCL, LLM (NUI) Margaret Maguire LLB Jane Mulcahy BCL, LLM (NUI) Tara Murphy BCL, LLM (Essex) Richard McNamara BCL, LLM (NUI) Catherine Ellen O’Keeffe LLB, LLM (NUI) Charles O’Mahony BA, LLB (NUI), LLM (Lond), LLM (NUI) David Prendergast LLB, Barrister-at-Law Sinéad Ring BCL, LLM (NUI) Keith Spencer BCL, LLM (Dub), BCL (Oxon), Barrister-at-Law Nicola White LLB, Attorney-at-Law (NY)

Administration Staff

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<i>Information Technology Officer:</i>	Liam Dargan
<i>Private Secretary to the President :</i>	Debbie Murray
<i>Clerical Officer</i>	Ann Browne

Principal Legal Researcher on this Report

Catherine-Ellen O’Keeffe LLB (Law and European Studies), LLM (NUI))

Contact Details

Further information can be obtained from:

Secretary/ Head of Administration

Law Reform Commission

35-39 Shelbourne Road Ballsbridge Dublin 4

T: +353 1 637 7600

F: +353 1 637 7601

E: info@lawreform.ie

W: www.lawreform.ie

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Hugh Cunniam, Solicitor, FLAC
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Mary Lloyd, Family Mediation Service
John Mee, Lecturer in Law, University College Cork
Una Woods, Lecturer in Law, University of Limerick
Paul McCarthy, Barrister-at-Law

Full responsibility for this publication, however, lies with the Commission.

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Civil Liability (Amendment) Act 1996	1996, No. 42	Irl
Civil Liability Act 1961	1961, No. 41	Irl
Civil Liability and Courts Act 2004	2004, No.31	Irl
Civil Partnership Act 2004	2001, c. 33	Eng
Cohabitees Act 2003	SFS, 2003:376	Sweden
Domestic Violence Act 1996	1996, No. 1	Irl
Equal Status Act 2000	2000, No. 8	Irl
Equality Act 2004	2004, No. 24	Irl
Estate Administration Act 1996	1996, c. 122	BrCol
European Convention on Human Rights Act 2003	2003, No. 20	Irl
Family Home Protection Act 1976	1976, No. 27	Irl
Family Law (Divorce) Act 1996	1996, No. 33	Irl
Family Law (Maintenance of Spouses and Children) Act 1976	1976, No. 11	Irl
Family Law (Scotland) Act 2006	2006, asp 2	Scot
Family Law Act 1995	1995, No. 26	Irl
Family Law Act 1996	1996, c. 27	Eng
Finance Act 2000	2000, No. 3	Irl
Freedom of Information Act 1997	1997, No. 13	Irl
Freedom of Information Act 2003	2003, No. 9	Irl
Human Rights Act 1998	1998, c. 42	Eng
Inheritance (Provision for Family and Dependents) Act 1975	1975, c. 63	Eng
Intestate Succession Act 1990	1990, c. 185	Man
Intestate Succession Act 1996	1996, c. I-13.1	Sask
Intestate Succession Act 2000	2000, c. I-10	Alb
Judicial Separation and Family Law Reform Act 1989	1989, No 6	Irl
Law Reform (Succession) Act 1995	1995, c. 41	Eng
Law Reform (Succession) Act 1995	1995, c. 41	Eng
Matrimonial Homes (Family Protection) (Scotland) Act 1981	1981, c. 59	Scot
Parental Leave Act 1998	1998, No. 30	Irl

Pensions Act 1990	1990, No. 25	Irl
Powers of Attorney Act 1996	1996, No. 12	Irl
Property (Relationships) Act 1976	1976, No. 166	NZ
Property (Relationships) Act 1984	1984, No. 147	NSW
Registration of Deeds and Title Act 2006	2006, No. 12	Irl
Registration of Title Act 1964	1964, No. 16	Irl
Rent Act 1977	1977, c. 42	Eng
Residential Tenancies Act 2004	2004, No. 27	Irl
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Danning v The Netherlands	Comm. No. 180/1984	HRC
EH v JM	High Court 4 April 2000	Irl
Ennis v Butterly	[1996] 1 IR 426	Irl
F v Switzerland	(1987) 10 EHRR 411	ECtHR
Fitzpatrick v Sterling Housing Association	[2001] 1 AC 27	Eng
Ghaidan v Godin-Mendoza	[2004] UKHL 30	Eng
Hoofdman v The Netherlands	Comm. No. 602/1994	HRC
James v UK	(1986) 8 EHRR 123	ECtHr
Johnston v Ireland	(1986) 9 EHRR 203	Irl
Karner v Austria	[2003] 2 FLR 623	Aus
Keegan v Ireland	(1994) 18 EHRR 342	Irl
Mata Estevez v Spain	Appl. No. 56501/00 (10 May 2001)	ECtHR
OH v O'H	[1990] 2 IR 558	Irl
Saucedo Gomez v Spain	Appl. No. 37784/97 (26 Jan 1998)	ECtHR
Shackell v United Kingdom	Appl. No. 45851/99 (27 April 2000)	ECtHR
Sprenger v The Netherlands	Comm. No. 395/1990	HRC
T v T	[2003] 1 ILRM 321	Irl
The State (Nicholau) v An Bord Uchtala	[1966] IR 567	Irl
Wroth v Tyler	[1974] 2 WLR 1217	Eng
X, Y and Z v United Kingdom	(1997) 24 EHRR 143	ECtHR

INTRODUCTION

A Background

1. Along with changes in patterns of intimate relationships and increasing societal recognition of diverse family forms, there has been a growth in cohabitation in recent years. It can be said, however, that its significance as a family form is varied. In some jurisdictions, it has become a majority practice as a prelude to marriage; in other jurisdictions, it has become a family form analogous to marriage. For this reason, there is a danger in drawing parallel conclusions as to future trends or to predict its effect on family life in Ireland.¹ However, it can be said that cohabitation increased by 125% between 1996 and 2002 and is likely to continue to increase at some level.² The current legal framework does not reflect this social reality.

B Objectives of Reform

2. Following the analysis in the Consultation Paper *Rights and Duties of Cohabitees*,³ any successful legal regime for determining rights and duties between cohabiting couples must meet a range of objectives. On the one hand, there is the notion of respect for autonomy and the right of individuals in cohabiting relationships to non-state involvement in their affairs. On the other hand, there is the concept of favouring substance over form. The Commission must consider how the law should protect vulnerable family members and whether state involvement is justified in order to achieve this aim. From a social policy perspective, there is the objective of how best to promote lifelong relationships and to ensure stability and continuity in family life.

3. In attempting to achieve such objectives, it is important to acknowledge the broad spectrum of functional characteristics in the varying types of cohabitation and the reasons why people cohabit. There is a danger in applying a blanket assumption about the intentions of the parties and the

¹ There has been little quantitative sociological analysis on cohabitation in the Irish context.

² See *Census 2002 Principal Demographic Results* (Central Statistics Office 2003) available at www.cso.ie/census/Census2002Results.htm.

³ (LRC CP 32-2004).

level of commitment involved. In this way, the precise parameters of recognition and in particular the type of rights and duties it creates for cohabitants could be said to be contingent on the circumstances of the particular relationship. Reform should be coherent, but not necessarily uniform.

C Outline of the Report

4. Chapter 1 discusses the policy considerations that underlie its approach to the development of a legal framework concerning cohabitants. It examines the demographic pattern concerning cohabitation both in Ireland and in other jurisdictions. Against this background, the concept of family life as interpreted under the Irish Constitution and the European Convention on Human Rights is examined. In Ireland, recognition of cohabitation has been taking place in specific areas. However, the rationale for recognition is not always clear. The Commission discusses its underlying principles for reform and the varying models that can be relied on, such as the status model/ registration, contract model/ private arrangements and redress model/safety-net system. The Commission considers it appropriate to have a ‘tiered approach’ in which each of these models can play a part. The Minister for Justice, Equality and Law Reform is due to publish an options paper on *Domestic Partnerships* outlining possible types of registration systems that could address the present inequalities between opposite-sex and same-sex couples. The Commission believes that the redress model and contract model could form part of this wider reform process, which, rather than being mutually exclusive, would co-exist with, and yet would operate separately from marriage and any form of registration introduced. The redress and contract models seek to address those couples who have not opted-in for any form of public registration.

5. Chapter 2 defines a cohabitant for the purposes of reform. Following its discussion in the Consultation Paper, the Commission has reviewed the use of the term ‘marriage-like’.⁴ When determining who should be eligible under the redress model, it is necessary to define the category of persons we wish to address. The Consultation Paper defined cohabitants as persons in a ‘marriage-like’ relationship. Such terminology implies that a marriage analogy with cohabitation is being employed. The partial resemblance between spouses and cohabitants does not signify that equal rights as marital couples are being suggested in the reform process. Such an inference should not be drawn from the term ‘marriage-like’. In order to avoid such a misunderstanding, the Commission describes cohabitants as couples living together in an intimate relationship, whether they are of the same-sex or opposite-sex.

⁴ (LRC CP 32-2004) “The Commission defines ‘cohabitees’ as persons who, although they are not married, live together in a ‘marriage like’ relationship,” at 3.

6. In the Consultation Paper, the Commission highlighted in general terms the need to separate issues such as domestic violence and health care, from others, such as property-based entitlements. In preparation of the Report, the Commission has had the additional benefit of submissions and advice received from various parties. In this respect, Chapter 2 suggests that, in framing a legislative scheme, it may not be possible to have a single eligibility criterion that would apply across all these diverse areas. There is a need to make explicit the basis on which certain aspects are self-executing, while others are dependent on satisfying certain qualifying criteria. For example, in terms of protection from physical harm, orders to prevent domestic violence should not depend on a minimum three-year cohabitation period. In essence, the existence of the relationship can be sufficient to attract legal protection. For others, the granting of, for example, an application for a property adjustment order, should be contingent on certain requirements such as a minimum cohabitation period and proof of economic dependency. Such relationships could be said to merit access to a particular remedy through an application to the courts. However, no automatic entitlement to relief exists and not all cohabitants warrant legal redress. The objective of reform in the particular context of ancillary relief on breakdown of the relationship is to provide a default scheme of redress that would ensure relationships, in respect of which economic dependency existed and have resulted in some form of vulnerability on termination of the relationship, are protected.

7. Chapter 2 also sets out the eligibility criteria to be established before an application will be heard under the redress model. Following its discussion in the Consultation Paper, the Commission suggests a ‘qualified cohabitant’ is a cohabitant who has been living with his or her partner for 3 years, or 2 years where there is a child of the relationship. In conjunction with a number of factors, the concept of household and co-residence is discussed as a means of establishing cohabitation. In the Consultation Paper, the Commission stated an application could not be heard where one or both of the parties are still married to another person. On further analysis, the Commission believes the constitutional reasoning for debarring an application on this basis is not justified. Rather than creating a parallel institution to marriage, the redress model aims to act as a safety-net system for cohabitants who are in a vulnerable position on termination of the relationship. The existence of a marriage may affect an applicant in establishing the existence of cohabitation and the marriage will be a factor taken into consideration by the court. However, the Commission considers it should not preclude an application from being made.

8. Chapter 3 discusses the contract model and its role within the reform process. Under this model, the parties choose the terms of a contract, directly by cohabitation agreements and indirectly, by making co-ownership

agreements and wills. The contract model aims to recognise and respect people's right to arrange their financial affairs without court intervention. The enforceability of cohabitation agreements and the relevance of the decision in *Ennis v Butterly*⁵ are discussed. The Commission believes safeguards are needed to ensure parties are fully informed and are aware of the consequences of entering cohabitation agreements. For this reason, specific formalities are required.

9. Chapter 3 also examines the use of co-ownership agreements as a means of arranging a couples' property affairs. The Commission believes the area of taxation indirectly relates to the making of agreements under the contract model and impacts on the difficulties that arise for cohabitants in the transfer of property. Save in a few contexts,⁶ the law treats cohabitants as strangers for the purposes of the taxation code. For this reason, the Commission discusses possible relief for cohabitants under Capital Acquisitions Tax and Stamp Duty who meet certain requirements.

10. In recent years, general recognition has been extended to cohabitants. The use of the term 'husband and wife' in legislation has limited its recognition to opposite-sex cohabitants. In addition, restrictive criteria exist, for example in domestic violence legislation, before a cohabitant will be granted protection. Moreover, its recognition is restricted to a few contexts. Chapter 4 examines areas where general recognition should be extended to cohabitants, such as, in social welfare, tenancies, domestic violence and health care.

11. Chapter 5 examines the position of a cohabitant on death of a partner. The absence of inheritance rights can cause serious hardship for cohabitants. In addition, the fact that a couple have not married and have not made a will cannot be taken as evidence that they do not wish to grant each other inheritance rights; it may simply be that they have not addressed the issue. Where inadequate or no provision is made by a will for a surviving cohabitant, or where there is no will, the redress model will operate as a safety net and extend a limited discretionary remedy to cohabitants.

12. Chapter 6 examines the position of cohabitants on breakdown of the relationship before an application will be heard by the court. The Commission proposes that a cohabitant who has been living with his or her partner for 3 years, or 2 years where there is a child of the relationship (a 'qualified cohabitant') must prove the existence of 'economic dependency' on making an application for an order of ancillary relief. Such orders include property adjustment orders, maintenance orders and pension adjustment orders and pension splitting orders. The Commission discusses the wide

⁵ [1996] 1 IR 426.

⁶ See for example *Finance Act 2000*.

range of factors to be considered by the court on hearing an application. No automatic right to relief exists and an award will depend on the circumstances of the particular case.

13. Chapter 7 examines some practical and procedural issues relating to reform in this area. The Commission points to the positive aspects of mediation for cohabitants on breakdown of their relationship. It also discusses the time limits within which a qualified cohabitant must make an application to the court for financial relief on termination of the relationship. The issue of retrospectivity and its impact on legislative reform in this area is examined. Extension of the *in camera* rule to hearings involving cohabitants is discussed.

CHAPTER 1 COHABITATION AND MODELS OF REFORM

A Introduction

1.01 In this Chapter, the Commission discusses the policy considerations that underlie its approach to the development of a legal framework concerning cohabitants. In Part B, the Commission states that its reform proposals in this area are limited to non-marital same-sex and opposite-sex couples in intimate relationships, and not to any wider cohabitation setting such as between siblings or friends. In Part C, the Commission examines the demographic pattern concerning cohabitation both in Ireland and in other jurisdictions. In Part D, the Commission examines the concept of the family as recognised under the Irish Constitution and the European Convention on Human Rights. It discusses the policy implications in giving legal recognition to cohabiting couples. Part E considers models of reform in addressing the rights and duties of couples in intimate relationships. Having noted registration-type proposals are being considered at present by the Department of Justice, Equality and Law Reform, the Commission recommends the adoption of a redress model or safety-net system in which certain rights and duties would apply to ‘qualified cohabitants’ on termination of their relationship. A contract model is also employed in the reform process. The Commission believes cohabiting couples should be encouraged to regulate their financial and property affairs through agreements. The Commission also points to particular contexts where general recognition should be extended to cohabitants.

B Scope of Reform

1.02 In its widest sense, the term ‘cohabitation’ can include the following situations where people share a home together: parents and children, siblings, friends, carers, and couples in an intimate relationship. The Commission is aware of such relationships, and the need for legal protection of some kind.¹ It would be difficult, however, to devise a scheme

¹ Relationships between two or more people, for example between siblings or between elderly persons living together, can constitute social mutual support relationships. As the Minister for Justice, Equality and Law Reform argued “we need also to consider the position of people whose relationship has no sexual element and who may need legal protection and recognition for what is *de facto* a relationship based on a community of property or income, which flows from a caring relationship between

that would apply to all these relationships. It would assume that a single rationale could be uniformly applied to such diverse situations. Such a scheme has the potential to fail to address the underlying vulnerabilities and difficulties faced by those in an intimate relationship. The potential for failure can be seen in the Law Commission for England and Wales Discussion Paper, *Sharing Homes*, which sought to reform the common intention constructive trust as it relates to home sharers.² The Report ultimately concluded that it was not possible to recommend ‘across the board’ reform.³ The Law Commission has since acknowledged the need for a new approach to the remedies available to those living together in relationships “bearing the hallmarks of intimacy and exclusivity”, but who are not married to each other. Recently, it published a Consultation Paper on the financial consequences of relationship breakdown, limiting its scope to ‘couples’ only.⁴

1.03 The Commission recognises there is a need to examine aspects of the law affecting parents and children, for example in areas such as adoption and surrogacy. The rights and duties *between* a couple, of the same-sex or opposite-sex are, however, quite distinct and separate from what kind of reform is needed to address parental and children’s rights. The Commission believes that children’s rights are paramount and are distinct in themselves from the rights and duties that might accrue between a couple, whether they are married or unmarried.

1.04 *For this reason, the Commission recommends the scope of reform in this area be limited to cohabitants, either opposite-sex or same-sex, who live together in an intimate relationship, but who are not married to each other.*

C Demographic Background

(1) Growth in Cohabitation

1.05 The family based on marriage is the most common form of family unit in Ireland. It represents over 90% of the total family units of about 1.25 million. It can be said that the majority of people in Ireland still marry, and while the marriage rate declined during the 1980’s and early 1990’s, there

them.” Seanad Debates Second Stage Debate on the *Civil Partnership Bill 2004* Wednesday 16th February 2005.

² The Law Commission for England and Wales *Sharing Homes: A Discussion Paper* (No 278-2002). Available at: www.lawcom.gov.uk .

³ *Ibid* at para. 1.31(2). The need for a new approach to the remedies available for cohabiting couples was highlighted in Part 5 of the Discussion Paper.

⁴ Law Commission for England and Wales *Cohabitation: The Financial Consequences of Relationship Breakdown* (CP 179- 2006). Available at: www.lawcom.gov.uk .

has been an upsurge in marriage since 1997.⁵ However, along with changes in patterns of intimate relationships and increasing societal recognition of diverse family forms,⁶ there has been a growth in cohabitation.⁷ Recent data reveals that cohabitation increased by 250% between 1994 and 2002. According to the 2002 Census, there were 77,600 family units consisting of cohabiting couples, representing an increase of 125% between 1996 and 2002.⁸ The 2002 Census shows the number of same-sex couples increased from 150 in 1996 to almost 1,300 in 2002.⁹ Halpin and O'Donoghue estimate that about 6% of Irish people cohabit;¹⁰ that they may have children, but are less likely to have more than one; and that over 40% of new marriages are preceded by cohabitation. They note that 70% of cohabiting relationships last for at least 2 years and that just over 50% may last for 3 years. They calculate the average duration of cohabitation is a little over 2 years, with 25% cohabiting for 6 years or more. While cohabitation, in

⁵ See *Census 2002 Principal Demographic Results* (Central Statistics Office 2003) available at www.cso.ie/census/Census2002Results.htm; *Tenth Progress Report: The Family* All-Party Oireachtas Committee Report on the Constitution (Government Publications 2006); Fahey, Hayes & Sinnott *Conflict and Consensus: A study of values and attitudes in the Republic of Ireland and Northern Ireland* (Institute of Public Administration 2005). Data between 1997 and 2000 show that the number of marriages increased dramatically, from 15,631 in 1997 to 19,168 in 2000, with the marriage rate increasing correspondingly from 4.5 to 5.1. CSO data shows that the marriage rate has been maintained, averaging 5.1 between 2000 and 2005.

⁶ For a recent discussion of family life and diversity in Irish society, see Brown *Family Matters Ten Years On* (Comhairle Social Policy Report 2005) and Daly *Families and Family Life in Ireland: Challenges for the Future* (Report of Public Consultation Fora 2004).

⁷ Cohabitation outside marriage is not, however, a modern phenomenon. See Harrison *The Law of Athens: The Family and Property* (Clarendon Press 1968) at 13 and Treggiari *Roman Marriage: Iusti Coniuges from the Time of Cicero to the Time of Ulpian* (Clarendon Press 1994) at 51.

⁸ *Census 2002 Principal Demographic Results* (Central Statistics Office 2003) at 20. It must be stated however that there has been little quantitative sociological analysis on cohabitation in Ireland.

⁹ Census figures may be an underestimate of the actual numbers of couples. See Manus *Sexual Orientation Research Phase 1: A Review of Methodological Approaches* (Scottish Executive 2003). For example, same-sex couples may be concerned about disclosing their sexuality in official census. Furthermore, the means of recording sexual orientation is through stated relationship with other members of the household. It is thus not possible to record relationships with persons not living in the household or to record sexual orientation regardless of relationship status.

¹⁰ Halpin & O'Donoghue *Cohabitation in Ireland: Evidence from Survey Data* (University of Limerick Working Paper 2004-01). Halpin and O'Donoghue used large-scale surveys, such as the Labour Force Survey/Quarterly National Household Survey and the European Common Household Panel Survey, to characterise the extent and nature of cohabitation in Ireland.

relative terms, may not be rejecting or replacing marriage as an alternative social unit in Irish society, they conclude that cohabitation is functioning increasingly as a common route into marriage.

1.06 Throughout the 1990's, the rate of cohabitation increased significantly in a number of foreign jurisdictions. For example, Mee notes that it was estimated in the USA in 1996 that there were seven times as many unmarried opposite sex couples as there were in 1970, and that the rate of cohabitation in both Australia and Canada increased by just over 25% between 1991 and 1996.¹¹ The increase in New Zealand was even acute, with numbers rising by more than 50% between 1991 and 1996 and by more than 100% between 1986 and 1996.¹² In a recent analysis of trends across Western Europe, Kiernan notes that cohabitation is most common in Denmark, Sweden, Finland and France.¹³ There is an intermediate level of cohabitation in the Benelux countries, the UK, Germany and Austria, while there is a comparatively low incidence of cohabitation in Southern Europe and Ireland. In 2004, 24% of unmarried men and 25% of unmarried women aged 16-59 years in Great Britain were cohabiting. In the same year, the Scottish Social Attitudes Survey noted that cohabitation in Scotland trebled from 9% to 29% between 1976 and 1998.¹⁴

1.07 Cohabitation has been increasing at a different pace and timing in each jurisdiction. Moreover, its significance as a family form is varied. In some jurisdictions, it has become a majority practice as a prelude to marriage; in other jurisdictions, it has become a family form analogous to marriage. For this reason, there is a danger in drawing parallel conclusions as to future trends or to predict its effect on family life in Ireland.¹⁵ It is likely, however, that cohabitation will continue at some level.¹⁶ Though the

¹¹ Quoted in Mee *The Property Rights of Cohabitants* (Hart 1999) at 7.

¹² *Ibid.*

¹³ Kiernan *Cohabitation and Divorce Across Nations and Generations* (Centre for Analysis of Social Exclusion Discussion Paper 65 March 2003) at 3-4 and Kiernan "The Rise of Cohabitation and Childrearing Outside Marriage in Western Europe" (2001) 15 *International Journal of Law, Policy and the Family* 1.

¹⁴ For a discussion of family issues in Scotland, see *Scottish Social Attitudes Survey 2004* (Scottish Centre for Social Research 2005). Available at: <http://www.scotland.gov.uk/publications/2005/08/02131208/12092>. Part of the survey canvassed public views and knowledge on a range of family-related issues including marriage, cohabitation and parenting.

¹⁵ There has been little quantitative sociological analysis on cohabitation in the Irish context.

¹⁶ Prior to divorce, couples in a new relationship could not legally terminate their marital relationship. This option is available to them now, which may have an impact on the level of cohabitation.

situation is changing in some contexts, the current legal framework does not reflect this social reality.¹⁷ In general, cohabitants are left to a patchwork of common law and legislative remedies, which lack coherency and certainty.¹⁸ For example, though some capital acquisitions tax relief may be available to cohabitants in certain contexts,¹⁹ they cannot claim stamp duty and income tax benefits, which are available to spouses. Though some private pension schemes make provision for a cohabitant or a dependent partner, state pensions do not make provision for cohabitants. Cohabitants have no right to succeed to tenancies and have no right to make decisions concerning the health of their partner. Cohabitants do not have succession rights, nor do they have a right to claim maintenance during or after the relationship. This is regardless of the duration of the relationship and nature of commitment involved. Though an application for ownership on the basis of a resulting trust may be available to cohabitants,²⁰ the courts have no jurisdiction to make an order for ancillary relief on termination of the relationship.

D Policy Issues

(I) Concept of the 'Family'

1.08 The institution of marriage retains a central role in family life in Ireland. Article 41 of the Constitution recognises the family based on marriage as “the natural primary and fundamental unit group of society”.²¹ In

¹⁷ The law does not, contrary to popular belief, recognise a ‘common law marriage’. The common law marriage myth, itself, is not a grounds for reform in this area. In fact, there is no evidence to suggest that it exists in Ireland. However, it is interesting to note that in the UK, over half of all respondents (56%) in a study believed that cohabitants and married couples are treated equally in law. Barlow et al *Cohabitation, Marriage and the Law: Social Change and Legal Reform in the 21st Century* (Hart 2005) at Chapter 3 “The Common Law Marriage Myth and ‘Lived Law’: An Analysis of Beliefs”. In the *Scottish Social Attitudes Survey* (Scottish Centre for Social Research 2004), 50% of the public thought that the concept of common law marriage was established simply by virtue of a couple living together over a period of time with no awareness of the test for marriage by cohabitation, with habit and repute. 30% of those asked believed that where a couple had been together for 10 years, (with no children) and those separated, the woman would have the same rights to financial support as a married woman.

¹⁸ Probert “Cohabitation in Twentieth Century England and Wales: Law and Policy” (2004) 26 *Law and Policy* 13.

¹⁹ See *Finance Act 2000*.

²⁰ An established concept developed by the courts of equity.

²¹ Article 41.3.1. of the Constitution provides that “The State pledges itself to guard with special care the institution of marriage, on which the family is founded, and to protect it against attack.” The constitutional definition of the family has also been interpreted by the courts as the family based on marriage. See judgment of Walsh J in *The State (Nicholau) v An Bord Uchtala* [1966] IR 567.

1996, the Constitution Review Group favoured the retention of the pledge by the State to protect the family based on marriage but also recommended that, “the Oireachtas should provide protection for the benefit of family units based on a relationship other than marriage”.²² In 2006, the All-Party Oireachtas Committee on the Constitution also recommended that legislation be enacted for cohabiting couples.²³

1.09 Subject to the Constitution, the Irish courts must have regard to the European Convention on Human Rights (ECHR). A number of articles deal with and relate to family life. For example, Article 12 of the Convention states that men and women of marriageable age have the right to marry and found a family; Article 8 states that everyone has the right to respect for his private and family life, and Article 14 prohibits discrimination on a number of grounds including sexual orientation.

1.10 The European Court on Human Rights (ECtHR) does not require adherence to a uniform position on matrimony, and has indicated that Contracting States will have a wide discretion in this area. They are not required to treat spouses and cohabiting couples in the same manner.²⁴ The Court has stated that it is an area “closely bound up with the cultural and historical traditions of each society and its deep-rooted ideas about the family unit”.²⁵ The ECtHR has also decided that married and cohabiting couples may be regarded as being in an analogous position for the purposes of an Article 14 assessment, and so any difference in treatment must at least be justified on objective grounds. However, the margin of appreciation afforded to States is very wide in this context. The case *Saucedo Gomez v. Spain*²⁶ dealt with national provisions on the allocation of the family home

²² *Report of the Constitution Review Group* (Government Publications 1996) at 336.

²³ *Tenth Progress Report: The Family* All-Party Oireachtas Committee Report on the Constitution (Government Publications 2006). In light of the demographic, social and cultural changes since the adoption of the Constitution, the CRG argued the continued recognition of the family as the basic unit group of society, and a restatement of the State’s commitment to protecting the institution of marriage. It also stated, however, that this did not prevent the Oireachtas from legislating in the interests of non-traditional relationships, and the inclusion of an individual’s right to respect for one’s family life.

²⁴ International instruments such as the UN Human Rights Committee (HRC) have adopted a similar approach. For example, in *Danning v The Netherlands* Communication No.180/1984 (9 April 1997), *Sprenger v The Netherlands* Communication No.395/1990 (8 April 1992) and *Hoofdman v The Netherlands* Communication No.602/1994 (25 November 1998), the HRC found that differential treatment of marital couples and *de facto* couples was justified on the basis that marital couples assumed certain benefits when they chose to enter into the marital contract.

²⁵ *F v Switzerland* (1987) 10 EHRR 411 at paragraph 33.

²⁶ Application No. 37784/97 (26 January 1999).

and maintenance payments. The applicant had cohabited with her partner for approximately 18 years. Following the breakdown of their relationship, she sought a court order granting use of the family home and financial support. The claim was dismissed by the national court on the basis that the relevant legislation did not apply to ‘*de facto* relationships’. While the ECtHR accepted that the facts disclosed the existence of family life as defined in the Convention,²⁷ the differential treatment of spouses and cohabitants pursued a legitimate aim—the protection of the traditional family. The means used to advance that aim were reasonable and objective as required under the Convention.²⁸ The ECtHR stated that:

“social reality shows the existence of stable unions between men and women [outside marriage]..It is not however for the Court to dictate, nor even to indicate, the measures to be taken in relation to such unions, the question being one within the margin of appreciation of the respondent government, which has the free choice of the means to be employed, as long as they are consistent with the obligation to respect family life protected by the Convention.”²⁹

In short, regulation of the legal status of married and unmarried couples fell within the Member State’s margin of appreciation.³⁰

1.11 The ECtHR has, however, recognised that ‘family life’, protected under Article 8 of the ECHR, encompasses other *de facto* family forms, including those of unmarried cohabiting couples.³¹ In *Keegan v. Ireland*³²,

²⁷ Article 8 of the European Convention on Human Rights.

²⁸ Article 14 of the European Convention on Human Rights.

²⁹ Information Note No.2 on the Case Law of the Court (January 1999). The ECtHR applied the same reasoning in *Shackell v UK* Application No. 45851/99 (27 April 2000), holding that the surviving partner of a 17-year old *de facto* relationship was not entitled to the same benefits afforded to widows. See also *Mata Estevez v Spain* Application No. 56501/00 10 May 2001, which concerned pension rights, where the Court held that reservation of eligibility for pension benefits to spouses pursued the legitimate aim of the protection of the marital family.

³⁰ The decisions of the ECtHR on Article 1 of Protocol No.1 to the ECHR, which deals with property rights, have also afforded a generous margin of appreciation to states in matters of social and economic policy. See for example *James v UK* (1986) 8 EHRR 123 where the ECtHR upheld legislation allowing tenants to acquire the freehold estate.

³¹ *Johnston v Ireland* (1986) 9 EHRR 203. The Court held that family life within the meaning of Article 8 existed between a heterosexual couple that had cohabited for approximately 15 years.

³² (1994) 18 EHRR 342. The Court found that where people are living outside of marriage, a child born of such a relationship is as a matter of law part of that family unit from the moment of the birth and by the very fact of it.

the ECtHR looked at the concept of the family and how it relates to non-marital fathers. It noted:

“The Court recalls that the notion of the ‘family’ in [Article 8] is not confined solely to marriage-based relationships and may encompass other de facto ‘family’ ties where the parties are living together outside of marriage.”³³

In *X, Y and Z v United Kingdom*, which involved a relationship between children born by AID to a mother whose partner and the children’s ‘social father’ was a female to male transsexual, the ECtHR held that whether a relationship amounting to ‘family life’ protected by Article 8 of the ECHR existed was a question of fact.³⁴ Moreover, in *Johnston v Ireland*³⁵ and *Saucedo Gomez v Spain*,³⁶ the relationship between long-term opposite-sex cohabitants may also amount to ‘family life’ where the couple do not have children. Relevant factors to consider include whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means.

1.12 It can be said that the ECtHR, while acknowledging that it is legitimate to support and to strengthen the traditional family,³⁷ adopts a view wide enough to encompass all types of relationships, including various effective ties among people who mutually support and care for each other from an economic, educational and emotional point of view. The concept of the family has indeed expanded and is continuing to expand to embrace an ever-wider range of relationships.³⁸ On this basis, the Commission has concluded that any reform in this area should reflect changes in the form of family units, to include cohabitation between couples in intimate relationships whether opposite-sex or same-sex.³⁹ Some recent reforms, for example, in parental leave legislation, have recognised the reality of changes in family patterns to confer some rights on cohabitants. In addition, equal

³³ *Ibid* at 44.

³⁴ (1997) 24 EHRR 143.

³⁵ *Johnston v Ireland* (1986) 9 EHRR 203.

³⁶ *Saucedo Gomez v Spain* Application No.37784/97, 26 January 1999.

³⁷ *Ibid*.

³⁸ In the EU, recognition of other family forms is becoming a pressing issue. During his November 2004 nomination hearings, European Union Justice Commissioner Franco Frattini said that states are obliged to recognise the family life of couples in non-marital relationships under the provisions regarding free movement of people from one state to another in the *EU Charter of Fundamental Rights*.

³⁹ The terminology can vary from jurisdiction to jurisdiction: cohabitants, de facto partners, domestic partnerships, significant relationships and putative spouses.

status legislation has had some impact, by prohibiting discrimination in many areas on grounds of family status and sexual orientation. Sentiments expressed by Justice L’Heureux Dubé of the Supreme Court in Canada are noteworthy in this context: “it is possible to be pro-family without rejecting less traditional family forms”.⁴⁰

1.13 While the ECtHR has yet to find that same-sex relationships amount to ‘family life’ for the purposes of the Convention, the Court established in *Karner v Austria*⁴¹ that less favourable treatment of a same-sex partner, as compared with a partner in an opposite-sex relationship violated the right to a home protected under Article 8. The UK House of Lords in *Ghaidan v. Godin-Mendoza*⁴² has concluded that discrimination between opposite-sex and same-sex cohabiting couples infringes Article 14 of the Convention when read in conjunction with Article 8.⁴³

(2) *Objectives of Reform*

1.14 Deciding whether legislative change is needed to address the legal position of cohabiting couples and, if so, what form it should take, raises many difficult questions.⁴⁴ Following the analysis in the Consultation Paper, it can be claimed that any successful legal regime for determining entitlements between unmarried cohabitants must meet a range of diverse objectives. On the one hand, there is the notion of respect for autonomy⁴⁵ and the right of individuals in cohabiting relationships to opt-out of state regulation of their affairs.⁴⁶ On the other hand, there is the concept of

⁴⁰ *Canada (Attorney-General) v Mossop* [1993] 1 SCR 554 at 634.

⁴¹ [2003] 2 FLR 623.

⁴² [2004] UKHL 30.

⁴³ Ryan “Casenote: *Ghaidan v. Godin-Mendoza*” (2005) 27 *Journal of Social Welfare and Family Law* 3 at 355. Following the decision in *Ghaidan v Godin- Mendoza* [2004] UKHL 30, the England and Wales *Civil Partnership Act 2004* expressly amended statutes applying to cohabiting couples so that they now cover both opposite-sex cohabitants who have not married and same-sex cohabitants who have not registered a civil partnership.

⁴⁴ For example, how should individual choices about family relationships, and state regulation of the consequences of such choices, be connected, if at all, in the 21st century.

⁴⁵ The Commission is of the view that the State should respect the choice people make in relation to their own private lives. The objective of reform in this area does not necessitate far-reaching rights on cohabitants.

⁴⁶ While this option is currently available to heterosexual couples, same-sex couples do not have this option. In March 2006, the Minister for Justice, Equality and Law Reform established a Working Group on Domestic Partnerships in order to consider the categories of partnerships and relationships outside of marriage, including that of civil partnership and gay marriage.

favouring substance over form. Against this background, the Commission must consider how the law should protect vulnerable family members, such as economically dependent cohabitants, and whether state intervention is justified in order to achieve this aim. From a social policy perspective, there is also the issue of how best to promote lifelong relationships and to ensure stability and continuity in family life. In attempting to achieve such objectives, it is imperative to acknowledge the variety of reasons as to why people are in a cohabiting relationship.

1.15 The precise parameters of recognition of a relationship, and in particular the type of rights and duties it makes, is contingent on the circumstances. This becomes more significant when one recognises the nature of cohabitation itself. The types of cohabitation can range from, at one end of the spectrum, a relationship “which has all the characteristics of a marital relationship save the blessing of the law”, to at the other end “a relationship which is no more than that of two persons...who, finding each other sexually attractive, decide, for the convenience of their primary interest in each other, to occupy the same dwelling, neither intending the relationship to have the quality of permanence”.⁴⁷ The broad spectrum of functional characteristics in intimate relationships is further complicated when it is acknowledged that people’s attitudes towards the relationship may change over time.⁴⁸ Mee highlights this as follows:

“Consider the case of a couple who move in together at an early stage in their relationship, seeing their cohabitation as a trial period before possible marriage. If, for some reason (probably the reluctance of one partner) they never actually marry, they will not necessarily separate. Many of the cases in this area involve relationships, which drift on for many years, even after it has become apparent that the originally envisaged marriage will never take place. Such a relationship begins as a ‘trial marriage’ and ends, in effect, as an alternative to marriage.”

1.16 Such subjective and transitory elements within a private relationship highlight the danger in applying a blanket assumption about the level of commitment and the intentions of the parties involved.⁴⁹ In this way,

⁴⁷ See Consultation Paper on *Rights and Duties of Cohabitees* (LRC CP 32-2004) at 2.06-2.21. Wills “Protecting the Rights of Cohabitees- Recommendations for Reform” (2002) 3 *IJFL* 8 at 13 argues that cohabitation covers such a wide range of relationships with different and even conflicting priorities. This makes it complicated when addressing the need for their recognition.

⁴⁸ Mee *The Property Rights of Cohabitees* (Hart 1999) at 11.

⁴⁹ Indeed several commentators note the different forms of cohabitation including first-time cohabitation, pre-marital cohabitation, cohabitation as an alternative to marriage, and post-marital cohabitation. A *Scottish Social Attitude Survey* (Scottish Centre for Research 2004) examined why people cohabit. The reasons included: they were not

reform should be coherent, but not necessarily uniform. For example, the question of eligibility may depend on the policy requirements of each legal context and the nature of the remedy involved. The scheme adopted to protect the rights and duties of cohabitants on termination of the relationship should warrant consideration of a wide range of factors so that the outcome can be tailored to meet the justice of the particular case. In the Commission's view, this is not a situation where one solution fits all, and different contexts may involve different solutions.

E Models of Reform

Different jurisdictions have used various conceptual models of reform to regulate intimate personal relationships. The models can be classified as: status/registration system, redress/safety-net system and contract/private agreements.⁵⁰

(I) Status Model: Registration

1.17 Under the status model, the law provides a public registration system, involving a package deal into which the parties can choose to enter but which is largely non-negotiable once they have done so. The law rather than the parties chooses what the terms will be. The law can also change the terms while the relationship is going on. The relationship has legal consequences not only for the parties but also for their wider families and the world at large. The law may also try to protect and encourage this privileged status by discouraging or ignoring other personal relationships outside it.

(a) Marriage as a Status

1.18 Marriage is our current status model of public registration. The Commission considers it appropriate that this should continue to be the case. The law, reflected at its highest level in Article 41 of the Constitution, gives marriage a privileged status. Marriage is a 'rite of passage',⁵¹ a status-

legally able to marry; there was an unexpected pregnancy arising from their relationship; cohabitation was considered to be a trial marriage; there had been a previous marriage; one or more held ideological objections to marriage; parties had a desire to avoid the legal commitments of marriage; and cohabitation was convenient. Available at <http://www.scotland.gov.uk/Publications/2005/08/02121208/12092>.

⁵⁰ For further discussion on the various models of reform in this area see Baroness Hale *The Mating Game: Coupling and Uncoupling in the Modern World* (F.A. Mann Lecture London 11th November 2005).

⁵¹ A rite of passage can be defined as a ritual that marks a change in a person's status. It is often marked by a ceremony surrounding the event, such as childbirth, marriage and death.

changing event.⁵² As an institution, it retains a central role in family life in Ireland. The majority of people in Ireland still marry.⁵³ In fact, there has been an upsurge in marriage in recent years. Though the ECtHR recognises familial relationships not based on marriage, the Court has stated that member states enjoy a wide margin of appreciation in their differential treatment of those who are married and of those who are not. It has stated that there is a legitimate aim in giving protection to the marital family.

(b) Same-Sex Couples

1.19 When dealing with reform options, the position of same-sex couples is an issue for concern.⁵⁴ While it may be assumed that some cohabitants have opted not to marry, the same cannot be said of same-sex cohabitants. It is not possible to equate opposite-sex and same-sex cohabitants based on autonomous choice. The assumed community of interest between same-sex cohabitants and opposite-sex cohabitants breaks down at this point.⁵⁵ The Commission acknowledges such a legal distinction

⁵² As per Murray J in *T v T* [2003] 1 ILRM 321 “The moment a man and woman marry, their bond acquires a legal status. The relationship once formed, the law steps in and holds the parties to certain obligations and liabilities”.

⁵³ Fahey, Hayes & Sinnott, *Conflict and Consensus: A study of values and attitudes in the Republic of Ireland and Northern Ireland* (Institute of Public Administration 2005).

⁵⁴ Calls for equality for same-sex partners is evident from a number of national reports. See for further discussion: *Report of the Equality Authority Implementing Equality for Lesbians, Gays and Bisexuals*. The Report recommends the introduction of a formal registration scheme for same-sex couples, including civil marriage and partnership registration schemes (The Equality Authority 2002). Available at www.equality.ie ;

National Economic and Social Forum Report No.27 *Equality Policies for Lesbians, Gay and Transsexual People: Implementation Issues* (NESF 2003). The Report stated that the absence of formal recognition for same-sex relationships is a significant barrier to the advancement of equality for the Lesbian, Gay and Bisexual Community. Available at http://www.nesf.ie/dynamic/docs/nesf_27.pdf .

In its Report, *Equality for All Families* (Irish Council for Civil Liberties 2006) the ICCL is critical of the current treatment of non-traditional relationships. The Report argues in favour of the introduction of a scheme for registered partnerships, and for a presumptive scheme with respect to certain types of relationships, both of which should confer most of the rights and obligations associated with marriage on relevant parties. The Report also recommends an amendment to the Constitution to give a general right to private and family life, and a non-gender specific right to marry and found a family.

⁵⁵ Scherpe claims that “the core problem of this approach is that it puts two groups together who are fundamentally different: couples that cannot marry and couples that do not want to marry or just did not marry. Same-sex couples who cannot marry and cohabiting couples who do not want to marry or just have not married do not necessarily have the same interests and problems. Some same-sex couples- just like opposite-sex couples- might wish for a more intense legal regime, while others do not”. Scherpe “The Legal Status of Cohabitants- Requirements for Legal

and is aware of the danger in assuming that there is a single problem which can be addressed by a single legislative solution.

1.20 The Minister for Justice, Equality and Law Reform established a Working Group on Domestic Partnerships with the intention of preparing an options paper addressing the inequalities that exist between same-sex couples and opposite-sex couples.⁵⁶ The options paper, though not yet published, appears to signal the introduction of a form of registration system, or ‘Civil Partnership’, for same-sex couples only. Such an opt-in system, would extend many of the rights and duties that accrue to marital couples would be extended to same-sex couples once the couple has registered their relationship. The Commission also notes that the High Court has reserved judgment in a case in which a lesbian couple, who married in British Columbia, are seeking to have their marriage recognised in Irish law.⁵⁷ The Commission does not intend to make proposals in this respect, but considers that a registration model and redress model could logically co-exist together. The result may be a registration or opt-in system in place for both opposite-sex (marriage) and same-sex couples (‘Civil Partnership’), while a redress model would operate as a safety-net or default system to those couples who have not opted in to either regime.

1.21 A number of jurisdictions have introduced some form of registration, open to same-sex couples only or open to both opposite-sex and

Recognition” in Boele-Woelki (ed) *Common Core and Better Law in European Family Law* (Intersentia 2005).

⁵⁶ See speech by An Taoiseach, Bertie Ahern T.D. at the official opening of the Gay and Lesbian Equality Network (GLEN) (April 2006). He stated: “All citizens, regardless of their sexual orientation, stand equal in the eyes of the law. Sexual orientation cannot, and must not, be the basis of a second-class citizenship. Our laws have changed, and will continue to change to reflect this principle”. Address by Minister for Justice, Equality and Law Reform, Mr. McDowell, at the opening of the 13th Dublin Lesbian and Gay Film Festival on 28th July 2005: “The Government is unequivocally in favour of treating gay people as fully equal citizens in our society...Sexual orientation cannot be the basis of a second class citizenship.” In 2006, he established a Working Group on Domestic Partnerships. Moreover, Senator David Norris, having proposed a Private Members Bill in 2004, to allow same-sex and heterosexual cohabiting couples a bundle of legal privileges matching but not exceeding those of married couples, has recently stated that he would be re-activating his Bill with modifications. See further the discussion in the Seanad Debates, *Second Stage Debate on Civil Partnership Bill 2004* Wednesday 16th February 2005. The Equality Authority has claimed that there is a legal requirement on the Irish Government under the Good Friday Agreement to provide the same level of human rights as in Northern Ireland, where Civil Partnership has been available since December 2005.

⁵⁷ *Zappone and Gilligan v The Revenue Commissioners, Ireland and the Attorney General* High Court No 2004/19616P.

same-sex couples.⁵⁸ The introduction of a semi-marriage or half-way house option extends on registration some of the automatic rights and duties of marriage to the couple. The Commission considers that adding another layer of family law rules, in which marriage and civil partnership are on one level and a semi-marriage option for both opposite-sex and same-sex couples would exist on another level. The Commission considers not only may there be constitutional issues with such a registration style system, but it is also unlikely to benefit vulnerable couples since they are the least likely to formalise their relationship.⁵⁹ In attempting to address the needs of cohabiting couples, the Commission questions whether couples who decide not to get married or enter a civil partnership should be left without legal redress. In order for the law to be effective and inclusive of those cohabitants in need of protection and support, a formal ‘opt-in’ method may not provide adequate solutions. For this reason, other modes of protection are required.

(2) *Contract Model: Private Arrangements*

1.22 Under the contract model, the cohabiting parties are free to choose what they wish to agree. Sometimes they are able to do this directly by a cohabitation agreement. Sometimes they can only do it indirectly, by making co-ownership agreements, property settlements and wills for the benefit of themselves and their children. The main feature of the contract model is that the terms agreed to at the outset will largely determine what is to happen when the relationship comes to an end.

1.23 A cohabitation agreement should be seen as an option for couples who wish to arrange their affairs. The Commission is of the view that the decision in *Ennis v Butterly*⁶⁰ does not operate as a bar to the enforceability of a cohabitation agreement. Such contracts are enforceable provided they do not attempt to replicate the marriage contract, but restrict themselves to regulating the financial and property affairs of the couple. In relation to co-ownership agreements, the Commission believes that current practice to advise cohabitants to draw up such agreements should be encouraged.

⁵⁸ A system of registration is available in the United Kingdom, Spain, Belgium, Germany, France, Denmark, Norway, Sweden, Iceland, Greenland, the Netherlands, the United States (Vermont, District of Columbia), Switzerland (the canton of Geneva). The extent of the legal protection depends upon entering the relationship in a public register.

⁵⁹ Scherpe “The Legal Status of Cohabitants-Requirements for Legal Recognition” in Boele-Woelki (ed) *Common Core and Better Law in European Family Law* (Intersentia 2005). Scherpe claims that “the problem with registration is the formal requirement that establishes it, as some couples, either by choice or by ignorance, might not conclude the formal act and thus will fall outside the scope of the legislation,” at 288.

⁶⁰ [1996] 1 IR 426.

(3) *Redress Model: Safety Net System*

1.24 In seeking to devise an appropriate legal framework for cohabitants,⁶¹ the Consultation Paper proposed a form of redress model, which would not attempt to create a new status,⁶² parallel to that of marriage, but would operate as a default system for those who do not opt-in for formal registration, whether marriage or any proposed registration system.⁶³ In this way, it does not rely on the parties having entered into either a status or a contract. Such a proposal would have appropriate regard to the value of autonomy of private relations while providing a safety net to address the needs of particularly vulnerable persons. A redress model looks at what they have in fact done and asks whether their current situation, usually when the relationship comes to an end,⁶⁴ requires some remedy or redress. It is similar to the contract model in that the consequences tend only to affect the parties. It is similar to the status model in that the consequences are imposed when the occasion arises and do not depend upon what was agreed at the outset.

1.25 Rather than use the term presumptive scheme,⁶⁵ the Commission in this Report has chosen to employ the term ‘redress model’. Such a term indicates that the legislative reform being suggested would operate as a safety-net system for persons who, for whatever reason, have not registered their relationship. Such reform would apply in a wide range of areas

⁶¹ The All-Party Oireachtas Committee on the Constitution published its Tenth Progress Report in 2006, in which it focused on the constitutional provisions relating to the family. It recommended (i) the retention of the current constitutional definition of the family; (ii) legislative provision for heterosexual couples in the form of a presumptive scheme or registration scheme; (iii) legislative provision for same-sex couples.

⁶² Legislators suggesting reform in this area in other jurisdiction have expressed similar sentiments. For example, the Scottish Parliament was anxious to avoid the creation of any sort of new status for cohabitants which might be thought to detract from the institutions of marriage or civil partnership. Therefore, it is the parties rather the relationship which are given statutory definition as evident in section 25 of *The Family Law (Scotland) Act 2006*.

⁶³ Mee “Property rights and personal relationships: reflections on reform” (2004) 24 *Legal Studies* 3. He comments “[a different objection is that] the equation of marriage and cohabitation in this respect takes away the freedom of members of society to enter informal unions without the interference of the law. On this view, it could be argued that the ‘radical’ reform was actually conservative in nature, in that it would impose a traditional marriage model on informal relationships” at 434.

⁶⁴ For example, through breakdown of the relationship or death of one of the parties.

⁶⁵ This term was employed in the Consultation Paper *Rights and Duties of Cohabitees* (LRC CP 32-2004).

including property, succession, maintenance, social welfare, taxation, pensions, domestic violence and health care.⁶⁶

F Conclusion

(1) Models

1.26 The Commission considers it appropriate to have a ‘tiered approach’ in which each of the models can play a part.⁶⁷ The Minister for Justice, Equality and Law Reform is due to publish an options paper on *Domestic Partnerships* outlining possible types of registration systems that could address the present inequalities between opposite-sex and same-sex cohabitants. The Commission believes that the redress model and contract model could form part of this wider reform process, which, rather than being mutually exclusive, would co-exist with, and yet would operate separately from marriage and any other form of registration system introduced.

1.27 *The Commission recommends the scope of reform in this area be limited to cohabitants, either opposite-sex or same-sex, who live together in an intimate relationship, but who are not married to each other.*

1.28 *The Commission recommends the use of a contract model and redress model as the basis for reform in addressing the rights and duties of cohabitants.*

(2) Public Awareness

1.29 In some jurisdictions, governments have financed a public information campaign with the aim of highlighting the legal distinction between spouses and cohabitants. For example, the Department for Constitutional Affairs in England and Wales has stated that it is keen to dispel the myth of ‘common law marriage’ and has supported and funded two voluntary sector partners, Advice Services Alliance and One Plus One, to manage the ‘Living Together’ campaign.⁶⁸ The Commission believes that such a campaign should be introduced in Ireland, with its objective to inform the public of the vulnerable position of cohabitants, particularly of those who

⁶⁶ Presumptive schemes are in operation in jurisdictions such as Scotland, Austria, France, Hungary, the Netherlands, Portugal, Spain, Sweden, Australia, New Zealand, Canada and the United States.

⁶⁷ Ryan and Walsh *The Rights of De Facto Couples* (Irish Human Rights Commission 2006). The Irish Human Rights Commission argues in favour of an opt-in registration scheme, for both opposite-sex and same-sex couples, that would operate in conjunction with a presumptive scheme.

⁶⁸ The aim of its campaign is to make cohabitants more aware of their legal position and provide them with practical advice on how they can protect themselves and their families, should they wish to do so. See for further information www.advicenow.org.uk and www.oneplusone.org.uk/marriedornot.

do not marry or ‘self-regulate’ their property arrangements through an agreement. Although the impact or success of raising awareness and informing the public through such campaigns is difficult to evaluate, the Commission believes it is imperative that some efforts should be made by the legislature to make couples more aware of their legal position.⁶⁹ Such a campaign could for example, operate in conjunction with a number of organisations and agencies such as Comhairle, the Courts Service, the Law Society of Ireland, and Family Support Agency (FSA).

1.30 *The Commission recommends the undertaking by the Government of a public information campaign with the aim of highlighting the legal distinctions between spouses and cohabitants.*

⁶⁹ Mee, “Property rights and personal relationships: reflections on reform” (2004) 24 *Legal Studies* 3 at 426. Anne Barlow and Carole Burgoyne are currently undertaking an evaluation on the impact of the ‘Living Together’ awareness campaign in England and Wales. See: <http://www.advicenow.org.uk/go/livingtogether/index>.

CHAPTER 2 COHABITANTS AND ELIGIBILITY

A Introduction

2.01 In the Consultation Paper on *Rights and Duties of Cohabitees*,¹ the Commission highlighted in general terms the need to separate issues, such as domestic violence and health care, from others, such as property-based entitlements. In preparation of the Report, the Commission has had the additional benefit of submissions and advice received from various parties. In this respect, the Commission has concluded that, in framing a legislative scheme, it should make explicit the basis on which certain aspects are self-executing, while others are dependent on satisfying certain qualifying criteria. Thus, for some elements of the scheme, such as health care, being a cohabitant should be the sole criterion applied. For others, such as property-related orders, a cohabitant will not be considered for redress if they do not satisfy certain qualifying criteria. Once such criteria are satisfied, the cohabitant has the right to apply for an order, but no automatic entitlement to relief exists.

2.02 In this Chapter, the Commission discusses the meaning of the term ‘cohabitants’ and suggests that such a definition as “couples who live together in an intimate relationship, whether they are of the same-sex or opposite-sex” be used as a general definition in the reform process. Various factors, including the concept of household as a means of establishing cohabitation, are discussed.

2.03 Part C sets out the eligibility criteria to be established before an application by a cohabitant will be heard under the redress model. Following its discussion in the Consultation Paper, the Commission suggests that a ‘qualified cohabitant’ is a cohabitant who has been living with his or her partner for 3 years, or 2 years where there is a child of the relationship. In the Consultation Paper, the Commission stated that an application could not be heard where one or both of the parties are still married to another person. The Commission reviews its position on this issue. Furthermore, the Commission discusses situations where ‘serious injustice’ might otherwise arise if an application was not allowed due to non-satisfaction of the minimum cohabitation period.

¹ (LRC CP 32-2004).

B Eligibility

(I) *The Marriage Analogy and Cohabitants*

2.04 Ascribing remedies to the fact of cohabitation rather than the status of an opt-in registration system raises the difficulty of how the law defines cohabitation. Such a task is further complicated by the many possible forms cohabitation itself can take.² The use of the term ‘marriage-like’, when determining who should be eligible under the presumptive scheme, implies that a marriage analogy with cohabitation is being employed.³ The New South Wales Law Reform Commission has noted:

“The distinction drawn by the law accepts that *de facto* relationships resemble marriage to a certain extent, although not in all respects. It is this *partial resemblance*, which has prompted legislators and policy makers specifically to confer rights and impose obligations on *de facto* partners in certain situations. Other domestic relationships bear less resemblance with marriage.”⁴

This partial resemblance does not signify that equal rights as marital couples are being suggested in the reform process. Such an inference should not be drawn from the term ‘marriage-like’. In order to avoid such a misunderstanding, the Commission describes cohabitants as couples who live together in an intimate relationship, whether they are of the same-sex or opposite-sex.⁵

² The Law Commission for England and Wales *Cohabitation: The Financial Consequences of Relationship Breakdown* (CP 179-2006) at 238: “In the case of marriage and civil partnership, the existence and recognition of the relationship is conclusively established on production of a valid certificate.” A clear focus point in the form of a formal act, a clear date for when the legal rules are to be applied and also a clear ending point, namely the dissolution of the formal act, allows the state to decide whether it wants to attach legal consequences to the clear cut period of cohabitation. Requiring a formal act lowers the danger of abuse or fraud in order to obtain for example, social welfare benefits.

³ The marriage analogy is used in recent Scottish legislation introducing financial relief for cohabitants: section 25 of the *Family Law (Scotland) Act* and in other states such as the Northern Territory, South Australia and Western Australia in Australia. The study carried out by Halpin & O’Donoghue reveals that although cohabitation is increasing in Ireland, it does not appear to be chosen as an alternative parallel institution to marriage. Cross reference to stats in chapter one. Halpin & O’Donoghue *Cohabitation in Ireland: Evidence from Survey Data* (University of Limerick Working Paper 2004-01)

⁴ New South Wales Law Reform Commission *De Facto Relationships and Outline* (Report 36-1983) at 1.4.

⁵ The Consultation Paper on *Rights and Duties of Cohabitees* (LRC CP 32-2004) referred to cohabitants as persons who, although are not married, live together in a ‘marriage like’ relationship.

2.05 *The Commission recommends defining cohabitants as couples who live together in an intimate relationship, whether they are of the same-sex or opposite-sex.*

(2) *Establishing Cohabitation*

2.06 The concept of cohabitation ('live together') involves some degree of co-residence and a joint household.⁶ By way of example, the *Family Law (Scotland) Act 2006* directs a court determining the question of cohabitation to have regard to three factors: the length of time for which the parties are living together; nature of their relationship during that period; and the nature and extent of financial arrangements subsisting during that period. It must be acknowledged that the notion of a 'household' is different from a house. For example, a house may be shared, but the occupants might operate entirely separate households within it. For the purpose of the redress model, the relevance of cohabitation lies in the degree of domestic interaction between the parties.⁷ It is not enough to establish that the parties reside in the same house. It is necessary to establish they are living in the same household.⁸

2.07 In determining whether the parties live in the same household, the Social Welfare Inspector employs the following non-exhaustive list. It includes the following:

- co-residence: are the parties living together;
- the nature of the household relationship: whether and to what extent finances are shared; whether and to what extent household duties are shared;
- the stability of the relationship;
- the social aspects of the relationship, including whether the parties socialise together and whether they are regarded locally as a couple, and
- the sexual aspects of the relationship.

A shared household usually involves sharing a home, but for the purposes of employment, medical treatment or serving a prison sentence, a partner might be absent for definite or sometimes indefinite periods. The fact that one partner is absent from the home or maintains a second home elsewhere

⁶ Sections 26-29 of the *Family Law (Scotland) Act 2006*.

⁷ The Law Commission for England and Wales *Cohabitation: The Financial Consequences of Relationship Breakdown* (CP 179- 2006) at 244.

⁸ The two terms are not synonymous. For example, one could be a tenant, housemate, or a housekeeper.

should not of itself prevent a person from being a member of the household. However, the person will have to prove that he or she is otherwise sufficiently integrated into the household.⁹ Discussing the related concept of ‘living apart together’ and the grounds upon which a decree of judicial separation under the *Judicial Separation and Family Law Reform Act 1989*,¹⁰ the then Minister for Equality and Law Reform, stated in 1996:

“The crucial factor in the description is not so much whether people are living in one house but whether there are two separate households. This key provision will involve consideration of the nature of the ties which bind people and an examination of whether there is any community of life between the spouses in a specific case. It has been stated that the practical test applied in cases where the parties are still living under the same roof is usually whether one party continues to provide matrimonial services to the other and if there is any sharing of domestic life. Most cases will be clear, but some will require examination and determination by the Courts. It will vary from case to case.”¹¹

In establishing cohabitation, the concept of ‘household’ is certainly a factor to be considered. The Commission believes however that all the circumstances of the relationship should be taken into account, as may be relevant in the particular context. Such factors include:

- the duration of the relationship;
- the nature and extent of common residence;
- whether or not a sexual relationship exists;
- the degree of financial dependence or interdependence;
- any arrangements for financial support between the parties;
- the ownership and acquisition of property;
- the degree of mutual commitment to a shared life;

⁹ Mee “A Critique of the Law Reform Commission’s Proposals on the Rights and Duties of Cohabitees” (2004) 29 *Irish Jurist* 74-110.

¹⁰ Martin, Frank “‘To Live Apart or Note to Live Apart’: That is the Divorce Question” (2000) 2 *IJFL* at 4. Martin states that the house/ household distinction is at the core of the recognition or non-recognition of a ‘state of affairs’ in which spouses are seeking a divorce on the basis of ‘living apart’ but who operated in circumstances not involving total physical separateness.

¹¹ Seanad Debates 10th October 1996 at 1687. An effort was made to define “living apart” in section 2(3) of the *Judicial Separation and Family Law Reform Act 1989*. Section 2(3) deals with the various grounds for the granting of a decree of judicial separation, states that “spouses shall be treated as living apart from each other unless they are living with each other in the same household, and references to spouses living with each other shall be construed as references to their living with each other in the same household.”

- the care and support of children;
- the performance of household duties, and
- the reputation and public aspects of the relationship.¹²

2.08 *In establishing cohabitation, the Commission recommends use of the general term ‘living together’. All of the circumstances of the relationship should be taken into account, as may be relevant in the particular context. Such factors include:*

- *the duration of the relationship;*
- *the nature and extent of common residence;*
- *whether or not a sexual relationship exists;*
- *the degree of financial dependence or interdependence;*
- *any arrangements for financial support between the parties;*
- *the ownership and acquisition of property;*
- *the degree of mutual commitment to a shared life;*
- *the care and support of children;*
- *the performance of household duties, and*
- *the reputation and public aspects of the relationship.*

(3) *Remedy and Context*

2.09 It can be said that the question of recognition as a cohabitant depends on the policy requirements of each legal context and the nature of the remedy involved. The question of eligibility may depend on the context of the legislative scheme being proposed. The areas being addressed for legislative reform are different and varied and it may not be possible to have a single eligibility criterion that would apply across all these diverse areas. For example, in terms of protection from physical and emotional harm, it is difficult to argue that legally enforceable orders to prevent domestic violence should depend on a minimum three-year cohabitation period. Similarly, the question of whether a person is entitled to be present at their partner’s hospital bedside should not be preceded by the question: “have you been together for the qualifying period?” The existence of the relationship can be sufficient to attract legal protection, without needing additionally to show that it lasted a certain length of time. On the other hand, adjusting a person’s property affairs on termination of the relationship,¹³ should not be too readily undertaken by the courts, but should instead depend on the circumstances of

¹² See section 4 of *Property (Relationships) Act 1984* (New South Wales).

¹³ Whether by death or breakdown of the relationship.

the case. Not all cohabitants warrant legal redress. For this reason, certain minimum requirements may be sought before an application can be heard.

2.10 There is also a distinction to be drawn between issues that arise when a relationship is ongoing and the situation that arises on break up. When a relationship is ongoing, any recognition of the relationship can be described as the State, or public law, recognising the reality of the relationship the parties have chosen for themselves. It is, in a sense, giving effect to the intention of the parties and acknowledging the existence of an intimate relationship. When a party transfers property to his or her partner, the law insists on treating this as a transaction between strangers for the purposes of the taxation code.¹⁴ A similar example is the question of rights of notification in respect of medical treatment. In principle, the question is what recognition the State should provide for the relationship the parties themselves have chosen.

C The ‘Qualified Cohabitant’

(1) Consultation Paper Recommendation

2.11 For the purposes of the presumptive scheme proposed in the Consultation Paper, the Commission stated ‘cohabitants’ are persons who although are not married, live together in a ‘marriage like’ relationship for a continuous period of 3 years or where there is a child of the relationship for 2 years. The Commission recommended this would apply to both same-sex and opposite-sex couples.

(2) Discussion

2.12 Eligibility criteria under the redress model seek to ensure that only relationships in which interdependency existed, and the termination of which would result in some form of vulnerability, are protected. Such relationships could be said to merit access to a particular remedy through an application to the courts. The following is a discussion of the applicable eligibility requirements under the redress model as it applies in the context of succession, property, pensions and maintenance.

(a) Minimum Duration Period

2.13 It can be said that not all cohabiting relationships necessitate the imposition of extensive rights and duties.¹⁵ Casual, short-term relationships

¹⁴ Save in a few contexts, see *Finance Act 2000*.

¹⁵ Opposite-sex couples have this option, marriage. Where there is a formal act required to register the relationship, the State can chose to have far-reaching legal consequences attached to it. It is more difficult to justify duties as well as rights on couples who have not taken any formal act. It can be assumed that a marital couple

without interdependence (social, financial and emotional) may not need nor justify protection. There is also a strong practical reason for requiring a minimum duration period of cohabitation, namely that it would avoid overburdening the courts with unmeritorious claims, and in doing so, prevent delaying justice to those most in need. In the Commission's view, a minimum duration period should aim to be long enough to separate casual relationships from those of some permanence, but not so long as to deny relief to those deserving of protection.¹⁶ Moreover, cohabitants do not have the same proof of intention that is indicated by a marriage certificate. Without such definitive evidence, the passage of time by means of a minimum duration period may be used to indicate that a relationship is sufficiently stable to be categorised as cohabitation thus warranting legal recognition in a particular context.¹⁷

2.14 Most laws on cohabitation in other jurisdictions require a minimum duration period before a claim can be made. For example, New South Wales and Portugal require a 2 year threshold to be reached, and New Zealand, South Australia and several Canadian provinces require 3 years. Other jurisdictions do not require a defined period of time; instead they use indicators such as 'long term', 'stability' and 'permanence' to demonstrate the period of time of cohabitation required to qualify for redress.

2.15 *For the purposes of the redress model, the Commission recommends a qualified cohabitant is a cohabitant who has been living with his or her partner for a minimum of three years.*

(b) Cohabitants and Children

2.16 Some jurisdictions do not impose a minimum duration period for cohabitants where there is a child of the relationship and the couple are automatically eligible to make an application to the courts regardless of the duration of the relationship. This is the approach taken in countries such as New Zealand and particular Australian states and has been provisionally

have consciously entered into the legal regime. The same assumption cannot be applied to those cohabitants who have not entered into a legal regime.

¹⁶ Scottish Law Commission Discussion Paper on *The Effects of Cohabitation in Private Law* (86-1990) at 5.14. Attempts to measure the length of cohabiting relationships may be more difficult if the parties are not in agreement about when the relationship began or ended.

¹⁷ Although little empirical evidence exists on the duration of cohabiting relationship in the Irish context, the study carried out by Halpin and O'Donoghue is noteworthy. They calculate that 70% of cohabiting relationships last for at least 2 years and that just over 50% may last for 3 years. The average duration of cohabitation is a little over 2 years, with some lasting 7 years or more. Halpin & O'Donoghue *Cohabitation in Ireland: Evidence from Survey Data* (University of Limerick Working Paper 2004-01).

recommended by the Law Commission for England and Wales in its 2006 Consultation Paper *Cohabitation: The Financial Consequences of Relationship Breakdown*.¹⁸

2.17 The Commission recognises that the introduction of a child and the implications of parenthood can alter the nature of a cohabiting relationship. Notions of dependency and need, contributions and sacrifices, play a more significant role than where there is no child involved. However, extending an automatic right to make an application, regardless of the duration of the relationship, is in the Commission's view far-reaching.¹⁹

2.18 *The Commission recommends cohabitants, of whom there is a child of the relationship, be eligible under the redress model where they have been living together for 2 years.*

(c) Exclusivity

2.19 In the Consultation Paper, the Commission provisionally recommended, that a cohabiting partner would be precluded from making an application to the court on termination of the relationship, where he or she is still married to another. The question of whether an existing marriage (or other form of public registration system) should preclude the married partner or the unmarried partner from eligibility under a redress model was raised during the consultation process. Before the enactment of the *Family Law (Divorce) Act 1996*, it was common for parties to a marriage that had irretrievably broken down to live apart. While they could form new intimate relationships, they could not legally terminate their marital relationship.

2.20 Although parties now have the option of judicial separation and divorce, there are situations where the parties cannot or do not dissolve their marriage. This may be because of religious convictions or the reluctance to go through the emotional and financial cost of court proceedings. In addition, spouses may also be waiting for the 'living apart' threshold to be satisfied. The social reality may be that one partner is technically a spouse in a 'moribund' marriage, but is cohabiting with another.²⁰

¹⁸ (CP 179- 2006).

¹⁹ Halpin & O'Donoghue *Cohabitation in Ireland: Evidence from Survey Data* (University of Limerick: Working Paper 2004-01). They calculate that although cohabitants may have children, they are less likely to have more than one. Children's rights are recognised as recognised in a number of different contexts, for example in succession and maintenance. A child as a right to maintenance under section 5 of the *Family Law (Maintenance of Spouses and Children) Act 1976* deals with the maintenance rights of marital children. See also *Succession Act 1965* relating to inheritance rights.

²⁰ Mee "Property Rights and Personal Relationships: reflections on reform" (2004) 24 *Legal Studies* 3.

2.21 As discussed earlier, marriage is a ‘rite of passage’, a status-changing event.²¹ Moreover, the law, reflected at its highest level in Article 41 of the Constitution, gives it a privileged status in Irish society. In the Consultation Paper, and in the Irish Human Rights Commission’s Report on *The Rights of De Facto Couples*, it was claimed that the recognition of an extra-marital union and an attempt to equate it with marriage may undermine the position of marriage, and thereby be held unconstitutional.²² In seeking to devise an appropriate legal framework for cohabitants, the Commission is, however, not attempting to create a new status, parallel to that of marriage. Conversely, a safety-net regime or default system for those who have not opted-in to marriage is being proposed. Such a system aims to look at the current situation and whether it requires some remedy or redress to address the vulnerability of a cohabitant on termination of the relationship.²³

2.22 Having considered this issue, the Commission accepts that an existing marriage can and should be taken into consideration as an indicator that there might not have been cohabitation. However, the Commission has concluded that an existing marriage should not automatically preclude the finding that there was cohabitation or prevent the cohabitant from making an application under the legislative scheme. Where such an application is made, the Commission emphasises that any rights which an existing or former spouse may have, would, in accordance with Article 41 of the Constitution have to be fully taken into account.²⁴ The Commission accordingly recommends that, while an existing marriage should not be a bar to an application under the proposed redress model, the model should include a requirement that notice of an application under it by a cohabitant must be served on any spouse of a marriage or previous marriage of the parties.

2.23 *The Commission recommends that an existing marriage should not preclude a cohabitant from making an application to court under the*

²¹ Murray J in *T v T* [2003] 1 ILRM 321 : “The moment a man and woman marry, their bond acquires a legal status. The relationship once formed, the law steps in and holds the parties to certain obligations and liabilities.”

²² Walsh & Ryan *The Rights of De Facto Couples* (Irish Human Rights Commission 2006) at 85.

²³ Mee “Property Rights and Personal Relationships: reflections on reform” (2004) 24 *Legal Studies* 3. Mee suggests that a cohabitant who leaves her occupation to care for the children of a cohabiting relationship will not be any less vulnerable on the termination of the relationship simply because her partner happens to be married to someone else. . Mee also points to a practical difficulty whereby a remedy on separation is based on contributions of the parties over the course of the relationship. An artificial division creates two parts in the relationship- the excluded period when one of the cohabitants was married and the period after that marriage was dissolved. The first half of the relationship is excluded.

²⁴ Article 41 deals with the family and divorce generally.

redress model. Any rights which an existing or former spouse may have, would, in accordance with Article 41 of the Constitution have to be fully taken into account.²⁵ The Commission recommends notice of an application by a cohabitant be served on any spouse of a marriage or previous marriage of the parties.

(3) Exceptions

(a) Children

2.24 Dilemmas can arise when one recognises the complexity of family forms. There may be situations where there are children from previous relationships, but are not born of the cohabiting relationship. Although both cohabitants may be the ‘social parents’ and accept responsibility for the upbringing of the child, one of the cohabitants might not be the legal parent. The need for redress and protection of the weaker party may require that serious injustice would result in a cohabitant being precluded from making an application. A child, of the parents or of one parent, is a factor that is inevitably considered by the courts on breakdown of a spousal relationship, whether in relation to property adjustment orders, maintenance provision or succession.

2.25 The Commission considers that a cohabitant, of whom there is a child of the relationship, should be eligible as a qualified cohabitant where they have been living together for two years. The Commission recommends that cohabitants who have been living together for two years and are not the biological parents or adoptive parents to a child of the relationship, be entitled to apply for relief under the redress model, in circumstances where serious injustice would arise if no right of application were granted.

2.26 *The Commission recommends cohabitants who have been living together for two years and are not the biological parents or adoptive parents to a child of the relationship, be entitled to apply for relief under the redress model, in circumstances where serious injustice would arise if no right of application were granted.*

(b) Threshold

2.27 Requiring a minimum duration period creates problems if the defined period or threshold has not been reached. Shorter relationships are perhaps less likely to give rise to the vulnerability that can occur on termination of a relationship, on breakdown or death where the threshold has been reached. Where the 3 year threshold has not been reached, claims by a qualified cohabitant should be limited to requiring the applicant to demonstrate that serious injustice would arise if no right of application were

²⁵ Article 41 of the Constitution of Ireland deals with the family generally.

granted. This may occur for example where a substantial contribution has been made early in the relationship by one partner.

2.28 *The Commission recommends cohabitants should be entitled to apply for relief under the redress model in circumstances where serious injustice would arise if no right of application were granted.*

CHAPTER 3 CONTRACT MODEL

A Introduction

3.01 In this Chapter, the Commission discusses the contract model and its role within the reform process. Under the contract model, the parties choose the terms of a contract. They can do this directly through cohabitation agreements with the force of law or they can do it indirectly, by making co-ownership agreements and wills.¹ The main feature of the contract model is that the terms agreed at the outset will largely determine what is to happen when the relationship comes to an end. The contract model aims to recognise and respect people's right to order and arrange their financial affairs without court intervention. A balance must be achieved between enabling people to make their own legally binding agreements and the need to provide adequate safeguards to protect people from making, and being held to, unfair bargains.

3.02 Part B examines the enforceability of cohabitation agreements and the relevance of the decision in *Ennis v Butterly*.² The Commission discusses the status of a cohabitation agreement and whether specific formalities should apply to ensure the parties are fully informed and aware of the consequences of entering a cohabitation agreement. Such safeguards encourage certainty and fairness for the parties concerned.

3.03 Part C highlights the significance of co-ownership agreements in the specific context of cohabitants arranging their property affairs. Cohabitants should be made aware of the implications of a joint tenancy and a tenancy in common. The Commission highlights the role that the Family Support Agency could play in disseminating information on such issues.

3.04 In addition to providing clarity on the enforceability of cohabitation and the need to encourage couples to draw up co-ownership

¹ Although there is no evidence on the existence of the common law marriage myth in an Irish context, Barlow claims that the common law marriage myth affects the way in which cohabitants regulate their affairs in England and Wales. See Chapter 3 "The Common Law Marriage Myth and 'Lived Law'" in Barlow et al *Cohabitation, Marriage and the Law: Social Change and Legal Reform in the 21st century* (Hart 2005) in Chapter 3 "The Common Law Marriage Myth and 'Lived Law'".

² [1996] 1 IR 426.

agreements, the Commission highlights the current treatment of cohabitants under specific aspects of the taxation code. In the Commission's view, taxation should be viewed against the general background of encouraging cohabitants to make agreements and arrange their financial affairs.

B Cohabitation Agreements

(1) Consultation Paper Recommendation

3.05 The Commission recommended that the decision in *Ennis v Butterly*³ should not operate as a bar to the enforceability of a cohabitation agreement where the agreement does not attempt to replicate the marriage contract, or does not have an immoral purpose, but restricts itself merely to regulating the financial and property affairs of the parties.

(2) Discussion

(a) Relevance of *Ennis v Butterly*

3.06 Certain types of contracts have long been regarded as unenforceable in law because they are contrary to public policy. The courts have included cohabitation agreements in this category, especially where they have involved the implication of a promise of intimate relations outside marriage. This approach was confirmed against unusual facts in *Ennis v Butterly*.⁴ In this case, the plaintiff and defendant were both married (not to each other), but had separated from their spouses in the 1980's. They had lived together from 1985 to early 1993. In 1993, it appeared that the defendant resumed his relationship with his wife and had an intimate relationship with another woman. The plaintiff told him to leave their shared house. Within a few months, he wanted to come back to the plaintiff and, in this context, apparently bought her an 'engagement ring' and verbally promised to divorce his wife and marry the plaintiff if divorce legislation was introduced in Ireland.⁵ It is noteworthy that the defendant merely made a verbal promise to the plaintiff at this time. She summarised it as being that she would be "loved, honoured and cherished by [the defendant] as his wife, that he would be loyal and faithful to her, and that she would be emotionally and financially secure for life".⁶ The parties resumed their relationship, but

³ [1996] 1 IR 426.

⁴ [1996] 1 IR 426.

⁵ These verbal promises were made sometime in September 1993. The *Family Law (Divorce) Act 1996* introduced a divorce law in the State, after an amendment to Article 41 of the Constitution (which, in its original form, had prohibited dissolution of marriage in the State) had been approved in a referendum held in 1995.

⁶ [1996] 1 IR 426 at 433. In this sense, it can be said that cohabitation was the consideration for the agreement.

unfortunately it did not last. The plaintiff then sought to enforce the verbal promises given to her by the defendant, which she claimed had induced her to give up her paid career. While the case does not involve a written cohabitation agreement, the relevant principles of contract law are the same. Relying on the decision of Henchy J in *State (Nicholau) v An Bord Uchtala*,⁷ Kelly J said to allow an “express cohabitation contract (such as is pleaded here) to be enforced would give it a similar status in law as a marital contract”.⁸ He held this was not permissible in light of Article 41 of the Constitution, and that accordingly “as a matter of public policy, such a contract was void insofar as it was a contract “the consideration for which is wifely services rendered on the part of a mistress”.⁹

3.07 The Commission notes that the basis of the verbal contract in *Ennis v Butterly* did not merely involve financial and property affairs but appeared to replicate a marital contract.¹⁰ Such a contract is unenforceable, but this should not signify that all cohabitation contracts are void. Such decisions do not operate as a bar to the enforceability of a cohabitation agreement where the agreement does not attempt to replicate the marriage contract, or does not have an immoral purpose, but restricts itself merely to regulating the financial and property affairs of the parties. In light of the uncertainty on this issue, the Commission believes the position as to the status and validity of cohabitation contracts be clarified. This has also been recommended at Council of Europe level.¹¹

3.08 *The Commission recommends the present law be amended to remove uncertainty as to the status and validity of cohabitation contracts.*

⁷ [1966] IR 526.

⁸ [1996] IR 426 at 438.

⁹ *Ibid.*

¹⁰ The more recent comments of Kinlen J in *EH v JM* High Court 4 April 2000, appear to support Kelly J’s reasoning based on public policy concerns. In stating that unmarried persons are ‘free agents’ who owe no duty to each other, he considered a separation agreement only in so far as it related to the upbringing of children.

¹¹ The Committee of Ministers has recommended that cohabitation contracts be enforceable. See *The validity of contracts between persons living together as an unmarried couple and their testamentary dispositions* Recommendation (Committee of Ministers of the Council of Europe NoR(88)3 of 7 March 1988) “contracts relating to property between persons living together as an unmarried couple, or which regulated matters concerning their property either during their relationship or when their relationship has ceased, should not be considered invalid solely because they have been concluded under these conditions”.

(b) *Entering a Cohabitation Agreement*

3.09 People enter into cohabitation agreements for a variety of reasons. Some may wish to avoid the financial and emotional costs that can accompany litigation over property and maintenance concerns. Others may not want to leave these issues to the court's discretion. They may want to make it clear which of them owns what property. People who have been in previous relationships, who may have gone through a division of family property at the end of that relationship, may wish to secure their assets from their current partner, and keep it either for themselves or for children of their previous relationship. In this way, cohabitant agreements enable the parties to plan their future financial affairs and avoid the costs, time and emotional trauma of litigation.

3.10 Cohabitation agreements enable the parties to tailor the agreement to suit their particular circumstances. They may include a wide range of concerns such as ownership of property, mortgage payments, household expenses, any financial assets and liabilities of the parties.

(c) *Status of a Cohabitation Agreement*

3.11 A contract should aim to be certain so that couples can be sure a court will uphold their agreement in all but exceptional circumstances.¹² It may be important that those with few assets, who may have greater need to protect them, can make agreements easily and understand the contract in which they have entered. A cohabitation agreement enables the parties to decide what happens to their property and financial affairs on termination of the relationship.¹³ However, the extent to which such an agreement would have the ability to oust the jurisdiction of the court under any new statutory scheme, such as the redress model, depends on the status given to such agreements. On the one hand, the Commission encourages cohabitants to regulate privately their financial and property affairs through a cohabitant agreement. In this way, principles of freedom of choice and autonomy are respected. On the other hand, the Commission is proposing a redress model or safety net regime that enables the court to adjust the financial affairs of cohabitants to avoid injustice on termination of a relationship. The issue arises as to which policy should prevail when the terms of an agreement may produce unfair results.

3.12 A cohabitation agreement could merely be a factor that the court takes into account when making adjustments under the redress model. It

¹² The Law Commission for England and Wales *Cohabitation: The Financial Consequences of Relationship Breakdown* (CP 170-2006) at 281.

¹³ Any agreement which removes or modifies the mutual obligations and responsibilities of the cohabiting partners between themselves cannot affect their financial obligations towards their children.

could be binding, but the court would have the power to ignore the agreement in exceptional circumstances, or it could be completely binding, subject to the general principles of contract law.¹⁴

3.13 The Commission is conscious in this context that the circumstances of the parties may change considerably from the time the contract was entered into. Moreover, the agreement, by choice or otherwise, may not include all of the financial affairs of the parties. However, to intervene and to review their arrangements too readily may undermine the confidence of cohabitants in the integrity, enforceability and validity of cohabitation agreements and as a result provide insufficiently strong incentives to self-regulate their financial matters. For example, if couples have confidence in the enforceability of a cohabitation agreement, it is reasonable to suggest that more of them will enter into private agreements and avoid future litigation.

3.14 In the Commission's view, to ensure an appropriate balance, which respects autonomy, but avoids possible injustice to a vulnerable party, cohabitation agreements must be executed in a manner which draws both parties' attention to the significance of the steps being taken. This is to ensure that the parties are fully informed and agree with the terms of the agreement. Agreements must limit opportunities for the exercise of undue influence on the party who potentially stands to lose more as a result of the agreement.

(d) Formalities

3.15 The question arises whether the enforceability of cohabitation agreements should be subject to the satisfaction of a number of formalities, and whether the legislative scheme should include an overriding power to set aside or vary an agreement if its enforcement would lead to serious injustice. The more criteria required, the less opportunity there should be for the courts to overturn it.¹⁵ For example, parties who had been given the opportunity to consider an agreement carefully and to take advice on it should not be permitted to apply to the courts to overturn the agreement simply because one or both of the parties have changed their mind.¹⁶ Conversely, the less demanding the formalities, or the fewer the safeguards, the more expansive should be the grounds for review.¹⁷

¹⁴ The Law Commission for England and Wales *Cohabitation: The Financial Consequences of Relationship Breakdown* (CP 170-2006) at 281.

¹⁵ *Ibid* at 286.

¹⁶ *Ibid*

¹⁷ *Ibid*.

3.16 In Sweden, cohabitation agreements must be in writing and signed by the parties to be valid.¹⁸ In New Zealand, a cohabitation agreement must not only be in writing and signed by both parties, but each party must have had independent legal advice before the agreement is signed. A lawyer must witness the signature of each party and certify that he explained to his client the effect and implications of the agreement.¹⁹

3.17 Further criteria are required in New South Wales for a cohabitation agreement to be valid. A cohabitation agreement will be binding if (1) it is in writing; it is signed by the party against whom it is sought to be enforced; (3) each party to the relationship is furnished with a certificate by a solicitor which states that the solicitor provided legal advice to that party, independently of the other party to the relationship, as to: (a) the effect of the agreement on the rights of the parties to an order for property adjustment or maintenance; and (b) the advantages and disadvantages, at the time that the advice was provided, to the party of making the agreement; and (4) the certificates referred to accommodate the agreement.²⁰ Although the court has power to depart from the agreement where it does not satisfy one or more of the conditions, it may nonetheless have regard to the terms of the agreement when making an order. Moreover, the court is able to make an order even if there is a provision in the agreement that states otherwise.²¹ If the agreement does comply with the formalities, the court cannot make an order that is inconsistent with the agreement.²² In short, an agreement cannot oust the jurisdiction of the court but it can limit the options available to the court when making an order. For example, an agreement may state that the home in which the couple resides is to remain the sole property of one partner and therefore the court cannot include it in the pool of assets for any property adjustment it may be called upon to determine.

3.18 The enforceability of cohabitation agreements is called into question where an event subsequent to the making of the agreement changes the circumstances of the parties significantly. This could be caused by the birth of a child, marriage of the parties, or a major unforeseen event. In New Zealand and some states in Australia, a cohabitation agreement may be set aside on the grounds that it would cause serious injustice to one or other party if it were enforced.²³ In other Australian states, the court has the right

¹⁸ Section 9 of the *Cohabitees Act 2003* (Sweden).

¹⁹ Section 21 F(2)-(5) of the *Property (Relationships) Act 1976* (New Zealand).

²⁰ Section 47(1)(b)-(e) of the *Property (Relationships) Act 1984* (New South Wales).

²¹ Part 3 of the *Property (Relationships) Act 1984* (New South Wales).

²² Section 47(1) of the *Property (Relationships) Act 1984* (New South Wales).

²³ Northern Territory, Queensland, the Australian Capital Territory.

to vary an agreement if, since its making, the circumstances of the parties have so changed that it would cause serious injustice to enforce the original agreement.²⁴ In Sweden, a cohabitation contract may be set aside if it is “unreasonable”.²⁵

3.19 In light of this comparative review, the Commission has come to the following conclusions on the enforceability of a cohabitation agreement. The Commission considers that a cohabitation agreement should be written, signed and witnessed. Parties should receive separate legal advice before the agreement is signed. Such formalities would offer a degree of certainty and ensure that the parties had in fact considered and agreed to the terms of the agreement. Cohabitation agreements should be given full effect if the parties have adhered to certain safeguards. An agreement which does not comply with the suggested safeguards should not be enforceable. The contract would also be subject to general contract law principles and would be susceptible to challenge on the grounds of fraud, duress, undue influence, misrepresentation, and mistake. The courts should be able to set aside the agreement if enforceability would cause serious injustice to one or both of the parties.

3.20 *The Commission recommends a cohabitant agreement should be written, signed and witnessed. Parties should receive separate legal advice before the agreement is signed. An agreement, which does not comply with the suggested safeguards, should not be enforceable. The contract would also be subject to general contract law principles. The courts should be able to set aside the agreement if enforceability would cause serious injustice to one or both of the parties. For the purposes of clarity and to distinguish agreements dealing with financial matters only from the wider potential scope of cohabitation agreements, the Commission refers to such agreements as cohabitant agreements in the Cohabitants Bill 2006.*

C Co-ownership Agreements

(1) Consultation Paper Recommendation

3.21 The Commission is aware that the current practice of legal advisers in Ireland is to recommend cohabitants to draw up co-ownership agreements. The Commission considers there is a pressing need to increase public awareness of the importance of such agreements. In light of this, the Commission stated in the Consultation Paper that bodies such as the Family Mediation Service should be encouraged to increase public awareness of co-ownership agreements through education and training.

²⁴ New South Wales, Tasmania and Western Australia.

²⁵ Section 9 of the *Cohabitees Act 2003* (Sweden).

(2) **Discussion**

3.22 A co-ownership agreement arises when two or more persons agree to own property concurrently.²⁶ It sets out the beneficial interests of the parties in the property. It thereby avoids the necessity of the parties resorting to the purchase money resulting trust in order to determine their entitlements. The main disputes which generally arise between cohabitants who are co-owners are in relation to the beneficial ownership and the decision to sell the property. It is therefore essential, in the Commission's view, that legal practitioners explain to purchasing clients the difference between a joint tenancy and a tenancy in common.

3.23 *The Commission recommends cohabitants should be encouraged to regulate their relationships by means of co-ownership agreements.*

3.24 As discussed in Chapter 1, the introduction of any legislative scheme should be preceded by a widespread public information campaign to ensure cohabitants are informed and are aware of the need to prove contrary intention if they do not wish the provisions of the scheme to apply. The Commission believes that such a public information campaign should be accompanied by an education role carried out by the Family Support Agency (FSA), rather than the Family Mediation Service as suggested in the Consultation Paper. This is in light of the FSA's statutory responsibility to provide information on a wide range of family issues. The FSA also has statutory responsibility for the Family Mediation Service. However, the provision by the FMS primarily relates to its function to assist those couples who have decided to separate to resolve the details of their separation. By assigning responsibility to the FSA, it can decide on the most appropriate method to use to educate on wider issues of cohabitation. Such a role would operate in tandem with the public awareness campaign mentioned above.

3.25 *The Commission recommends cohabitants should be informed of the need to enter into agreements to regulate their financial affairs and the need to prove contrary intention if they do not wish the provisions of the redress model to apply. In conjunction with the public information campaign discussed in Chapter 1, the Commission recommends the FSA should play a role in providing information on such issues.*

²⁶ Unlike cohabitation agreements, the legality of co-ownership agreements has never been in doubt.

D Taxation

(1) Consultation Paper Recommendation

3.26 The Commission was not in favour of any changes to the treatment of cohabitants for income tax²⁷ or capital gains tax. The Commission recommended qualified cohabitants be placed in group threshold (1) for the purposes of Capital Acquisitions Tax. The Commission also recommended that qualified cohabitants be entitled to the same relief as ‘related’ persons for the purposes of stamp duty.

(2) Discussion

3.27 The Commission believes the current treatment of cohabitants under specific aspects of the taxation code should be viewed against the general background of encouraging cohabitants to make agreements and arrange their financial affairs.

(a) Stamp Duty

3.28 Stamp duty is a charge on written or e-documents, or instruments. In certain circumstances, a reduced rate of 50% stamp duty will apply to transactions between ‘related persons’.²⁸ A person is related to another person if he or she is the lineal descendant, parent, grandparent, stepparent, brother or sister, uncle or aunt, or a lineal descendent of a parent, husband, wife or brother.²⁹ No such relief applies to opposite-sex and same-sex cohabitants.

3.29 *The Commission recommends qualified cohabitants be entitled to the same relief as ‘related persons’ for the purposes of stamp duty.*

(b) CAT

3.30 Capital Acquisitions Tax is a tax on gifts and inheritances.³⁰ The Commission notes that cohabiting couples are already exempt from CAT for the principal private residence they shared with the deceased partner but the entitlement to such relief is circumscribed by a number of conditions. The Commission believes qualified cohabitants should be placed in Group threshold (1) for the purposes of Capital Acquisitions Tax. This would mean that a qualified cohabitant would be entitled to receive aggregated benefits

²⁷ See *Gilligan and Zappone v Revenue Commissioners* High Court No2004/19616P. In litigation currently before the High Court, a same-sex couple who have previously gone through a ceremony of marriage in Canada are contesting the refusal of the Revenue Commissioners to accord them the various income tax reliefs extended to married couples.

²⁸ 50% only applies on conveyance of salehead.

²⁹ Section 96(1) of the *Stamp Duties Consolidation Act 1999*.

³⁰ *Capital Acquisitions Tax Consolidation Act 2003*.

from a qualified cohabitant up to a maximum amount of €478,155 from 1 January 2006.

3.31 *The Commission recommends qualified cohabitants be placed in Group threshold (1) for the purposes of Capital Acquisitions Tax.*

E Conclusion

3.32 The Commission recognises that some couples will never enter agreements for diverse reasons. They may be unaware of the legal consequences of their cohabitation nor see the need to make such an agreement. Their relationship may be a casual one or they may have existing obligations to a person, such as a child. A system limited, however, to private regulation between the parties does not provide for the situation where no agreement is made or where the agreement is set aside due, to for example, undue influence or duress, or non-adherence to the formalities required. In such a case, the parties will be left with little legal protection. For this reason, the Commission believes a contractual approach can only play a supplementary role within a comprehensive scheme of reform.

CHAPTER 4 GENERAL RECOGNITION

A Introduction

4.01 Legislative change in recent years has extended recognition to opposite-sex cohabitants in certain contexts. The Social Welfare Acts treat opposite-sex cohabitants as married couples in some circumstances.¹ The *Civil Liability (Amendment) Act 1996* broadens the definition of ‘dependent’ to include a person who was not married to the deceased but who, until the date of the deceased’s death, had been living with the deceased *as husband or wife* for a continuous period of not less than three years.² The *Domestic Violence Acts* extends the categories of persons who may seek the protection of the law against domestic violence to include opposite-sex cohabitants.³ The *Parental Leave Act 1998* includes the categories of persons covered as the spouse of the employee of a person with whom the employee or a person with whom the employee is living as husband and wife.⁴ Under the *Residential Tenancies Act 2004*, the definition of a ‘family member’ includes a person who is not a spouse of the tenant but who cohabited with the tenant as husband and wife in the dwelling for a period of at least 6 months ending on the date of the tenant’s death.⁵ The *European Communities (Free Movement of Persons) Regulations 2006* includes the facilitation of the admission of partners of European Union citizens who are in a durable relationship.⁶

¹ The exceptions are those payments which are recognised as specific to marriage. The Widow’s and Widower’s Contributory Pensions are confined to persons who are married.

² See section 1 of the *Civil Liability (Amendment) Act 1996*. This is in respect of a deceased person whose death is caused by a wrongful act.

³ Certain eligibility criteria, such as residency requirements apply.

⁴ See Section 13 of the *Parental Leave Act 1998*. An employee is entitled to ‘force majeure’ leave where for urgent reasons owing to injury or illness of a person, the presence of the employee is indispensable.

⁵ Section 39 of the *Residential Tenancies Act 2004*.

⁶ Section 1 No.226 of 2006 which implemented the *EC Free Movement of Persons Directive 2004/38/EC*.

4.02 The Commission notes from these recent legislative changes that, in a variety of contexts, Irish law has acknowledged cohabitation as a developing phenomenon and the consequential need to recognise that by virtue of being a cohabitant, their relationship exists. In interpreting such legislation, however, difficulties can arise. Using the analogy with husband and wife, recognition has been restricted in a number of contexts to opposite-sex cohabitants only and signifies the exclusion of same-sex cohabitants.

4.03 In this Chapter, the Commission examines such areas where recognition of same-sex cohabiting relationships is required. Part B and C discuss the current law in the contexts of social welfare and tenancies. Part D examines the protection extended to cohabitants in the context of domestic violence. It attempts to highlight the reasoning behind eligibility requirements for orders under the *Domestic Violence Act 1996*. Part E discusses a number of health related issues, whereby recognition should be extended to cohabitants.⁷

B Social Welfare

(1) Consultation Paper Recommendation

4.04 The Commission recommended that same-sex cohabitants be regarded as capable of ‘cohabiting’ for the purposes of social welfare. The Commission also recommended the retention of the current arrangements for cohabitants under the social welfare code.

(2) Discussion

4.05 Several social welfare benefits are contingent on the marital status of the parties. Such differential treatment in certain circumstances may be justified as domestic and financial arrangements between spouses vary considerably. Each individual case must be considered on its own particular facts. In certain contexts, legislation has extended recognition to opposite-sex cohabitants. The terminology used by the legislation is noteworthy. The *Social Welfare Consolidation Act 2005*, defines a ‘couple’ as “a married couple who are living together or a man and woman who are not married to each other but are cohabiting as husband and wife”.⁸ The meaning of a ‘spouse’ is defined in some social welfare contexts as including “a man and woman who are not married to each other but are cohabiting as husband and wife”.⁹ Furthermore, a reference to ‘spouse’ in the definition of a ‘qualified

⁷ See *Karner v Austria* (2003) 2 FLR 623. The ECtHR held same-sex cohabitants are entitled to the same rights as opposite-sex cohabitants.

⁸ See sections 142(4)(a), 144(3) and 217(3) of Part III of the Third Schedule of the *Social Welfare (Consolidation) Act 2005*.

⁹ See sections 3(10)(b), 152(b), 227, and 262 of Part 1 of the Third Schedule of the *Social Welfare (Consolidation) Act 2005*.

adult' includes "a man and woman who are not married to each other but are cohabiting as husband and wife".¹⁰

4.06 The notion of a couple does not include same-sex cohabitants, thereby affecting their entitlement to particular social welfare payments. The Department of Social and Family Affairs is, however, currently conducting an equality overview of the social welfare code and its compatibility with the *Equal Status Act 2000*.¹¹ This is in response to a recent settlement case in which the Department accepted that the Free Travel Pass Scheme, insofar as it did not extent benefits to same-sex and opposite-sex cohabitants on an equal basis, was not in conformity with the provisions of the *Equal Status Act 2000*.¹²

4.07 In light of the current equality overview being conducted by the Department, the Commission does not propose to make a general recommendation concerning the equal treatment of cohabitants and spouses under the social welfare code, other than to repeat the view expressed in the Consultation Paper that same-sex cohabitants should be treated equally with opposite-sex cohabitants.¹³ There is no justification for distinguishing between same-sex and opposite-sex cohabitants.

4.08 *The Commission recommends same-sex cohabitants be regarded as capable of 'cohabiting' for the purposes of social welfare.*

C Tenancies

(1) Discussion

4.09 In the case of *Ghaidan v. Godin-Mendoza*¹⁴, the House of Lords examined the situation where on the death of a protected tenant of a dwelling-house, his or her surviving spouse, if then living in the house, becomes a statutory tenant by succession. Under the *Rent Act 1977*, a person who was living with the original tenant "as his or her wife or husband" is

¹⁰ See sections 3(11)(b) refers.

¹¹ *Equal Status Act 2000*, as amended by the *Equality Act 2004*. The Commission understands that the equality overview will extend to all 9 grounds of discrimination in the Acts. This is in response to a recent Equality Authority case on Free Travel.

¹² Under the scheme, a person who is aged 66 years or over, allows a spouse or partner to accompany him or her free of charge when travelling on public transport services. In this case, the same-sex partner had been refused a Free Travel Pass under the Free Travel Scheme.

¹³ Eligibility requirements for a 'qualified cohabitant' are not appropriate in the context of social welfare.

¹⁴ [2004] UKHL 30.

treated as the spouse of the original tenant.¹⁵ In *Fitzpatrick v Sterling Housing Association*,¹⁶ the court held this provision did not include persons in a same-sex relationship. The question raised in *Ghaidan v Godin-Mendoza*¹⁷ was whether this reading could survive the coming into force of the *Human Rights Act 1998*.¹⁸ The House of Lords concluded that discrimination between opposite-sex and same-sex cohabiting couples infringed Article 14 of the ECtHR when read in conjunction with Article 8.¹⁹

4.10 In the Irish context, the *Residential Tenancies Act 2004* offers certain protection to “a person who was not a spouse of the tenant but who cohabited with the tenant as husband and wife in the dwelling for a period of at least 6 months ending on the date of the tenant’s death”. In light of the decision in *Ghaidan v Godin-Mendoza* and its interpretation of Article 14 and Article 8 of the ECtHR, the Commission believes such legislation discriminates same-sex cohabitants.

4.11 *The Commission recommends section 30 of the Residential Tenancies Act 2004 be amended to include same-sex cohabitants.*

D Domestic Violence

(I) Consultation Paper Recommendation

4.12 The Commission recommended that the residency requirement in respect of safety orders be abolished in the *Domestic Violence Act 1996*. The Commission also recommended that the residency requirement in the *Domestic Violence Act 1996* in respect of barring orders for cohabiting couples which requires cohabitation for 6 months out of the previous 9 be reduced to 3 months out of the previous 12. The Commission recommended the residency requirement be removed for cohabitants seeking a barring order where they have the sole ownership of, or tenancy in the property. The Commission was of the view that the category of persons entitled to apply for an order under the *Domestic Violence Act 1996* be extended to include a

¹⁵ Schedule 1 para 2(2) of the *Rent Act 1997*.

¹⁶ [2001] 1 AC 27.

¹⁷ [2004] UKHL 30.

¹⁸ In *Fitzpatrick v Sterling Housing Association* [2001] 1 AC 27, the original tenant had died in 1994.

¹⁹ Ryan F “Casenote: Ghaidan v. Godin-Mendoza”, (2005) *Journal of Social Welfare and Family Law* 27(3), at 355. Following the decision in *Ghaidan v Godin-Mendoza* [2004] UKHL 30, the England and Wales *Civil Partnership Act 2004* expressly amended statutes applying to cohabiting couples so that they now cover both opposite-sex cohabitants who have not married and same-sex cohabitants who have not registered a civil partnership.

dependent child. The Commission did not recommend that a special regime apply where there is a child in common.

(2) **Discussion**

4.13 The introduction of the *Domestic Violence Act 1996* represented an improvement in the way in which persons are protected from domestic violence. The aims of the 1996 Act are:

- (a) to protect spouses and children and other dependent persons, and persons in other domestic relationships where their safety or welfare is at risk because of the conduct of the other person in the domestic relationship;
- (b) to increase the powers of An Garda Síochána to arrest without warrant in certain circumstances; and
- (c) to provide for the hearing at the same time of applications to court for other orders regarding custody and access, maintenance conduct leading to the loss of the family home, restriction on the disposal of house chattels, and child care orders.²⁰

The legislation extends its protection from being an exclusively spousal remedy to a remedy available to those suffering from physical, sexual, emotional or mental abuse in a relationship that may or may not be based on marriage.²¹ This included the extension of protection to cohabitants who fulfil certain criteria.²² This is a progressive step considering the number of applications for domestic violence orders from cohabitants under the *Domestic Violence Act 1996*. For example, in 2003 the Courts Service recorded that cohabitants were granted 30% of protection orders, 27% of barring orders, 28% of safety orders and 24% of interim barring orders.²³

4.14 However, eligibility criteria restrict the grounds upon which a person can seek protection. In an analysis of the response of the legal system to victims of domestic violence, it was estimated in the Dublin Metropolitan District Court, that approximately 10 cases a week were ruled out at preliminary interview stage on grounds of eligibility.²⁴ The 1997 Government Task Force on Violence against Women noted that the property restrictions and the residency requirement had given rise to some concern

²⁰ Preamble to *Domestic Violence Act 1996*.

²¹ Includes cohabitants and family members. The safety and welfare of the victim must be at risk due to the other person in the domestic relationship.

²² See sections 2 and 3 of the *Domestic Violence Act 1996*.

²³ Courts Service *Annual Report 2003* (Courts Service Dublin 2004).

²⁴ Kelleher & O'Connor *Safety and Sanctions: Domestic Violence and the Enforcement of Law in Ireland* (Dublin 1999).

and recommended that they be addressed in a review of the operation of the Act.²⁵

(a) *Opposite-sex and Same-sex Cohabitants*

4.15 For the purpose of the *Domestic Violence Act 1996*, an applicant is defined as including a spouse of the respondent, or a person who, though “not the spouse of the respondent, has lived with the respondent *as husband and wife* for at least six months in aggregate during the previous twelve months”. The term ‘as husband and wife’ suggests that the protection is confined to opposite-sex cohabitants. Such differential treatment may be relieved by the fact that the legislation provides relief for a person who is residing with the respondent in a relationship, the basis of which is not primarily contractual.²⁶ This may include a same-sex cohabitant. In the case of such persons, however, there is no required minimum period of cohabitation.

4.16 *The Commission recommends recognition of opposite-sex cohabitants under the Domestic Violence Act 1996 be extended to same-sex cohabitants.*

(b) *Safety Orders*

4.17 A safety order is an order which obliges the offending party not to use or threaten to use violence against the applicant or a dependent person; not to molest or put the applicant or dependent person in fear, or if the parties do not reside together not to watch or beset the applicant’s residence.²⁷ It protects the respondent from the risk of violence but does not have the additional effect of barring the respondent from the family home.

(i) *Residency Requirement*

4.18 A cohabitant can only apply for a safety order if s/he has lived with the respondent for 6 out of the previous 12 months. As the order does not infringe on the property rights of the respondent, but acts to refrain the offending party from inflicting harm on the other party, there is no justification for the residency requirement. For this reason, the Commission believes that the residency requirement for cohabitants be removed.

²⁵ *Report of the Task Force on Violence against Women* (Office of the Tanaiste 1997) at 51.

²⁶ See section 2(1)(a)(iv) of the *Domestic Violence Act 1996*.

²⁷ Section 2(2) of the *Domestic Violence Act 1996*. A safety order may be granted for a maximum of five years or such shorter time as the court deems appropriate- section 2(6)(a).

4.19 *The Commission recommends the residency requirement as it applies to cohabitants under section 2 (1)(ii) of the Domestic Violence Act 1996 be removed.*

(c) *Child of the Relationship*

4.20 It has been claimed that domestic violence legislation was introduced to address the laws relative inadequacy to provide expeditious protection for victims of domestic violence. Domestic violence, however, is not restricted to couples who reside together and may require a remedy beyond what is offered by the criminal justice system.²⁸ In 2002, 9% of callers to the Women's Aid National Free Phone Helpline reported that they were being abused by a former partner. A national study revealed that on one research site 14% of applicants for protective orders were ex-spouses/partners. Furthermore a UK study of 200 women who had experienced domestic violence found that, after the relationship had ended 76% were subjected to emotional and verbal abuse, 41% were subjected to serious threats either towards themselves or their children, 23% were subjected to physical violence and 6% were subjected to sexual violence.²⁹ Moreover, a study by Women's Aid which examined 65 individual cases and surveyed 21 frontline service providers, found that violent men used access to children to further abuse and control their former partners. Through access arrangements, they reported physical, emotional and sexual abuse and threats and intimidation carried out by their former partner.

4.21 The criminal law intervenes after the assault has taken place. If criminal proceedings are taken against the abusive party, this does not afford the victim the on-going protection of, for example, a safety order.³⁰ Where there is such an order in place, the gardaí have greater power to intervene when an alleged incident has taken place. The 1997 Government Task Force on *Violence against Women* recognised that:

²⁸ The inadequacy of the criminal justice system to deal with domestic violence is evidenced by the low conviction and sentencing rates for domestic violence crime. Research has shown the only 1-6% of domestic violence incidents result in a prison sentence. Kelleher & O'Connor *Safety and Sanctions: Domestic Violence and the Enforcement of Law in Ireland* (Dublin 1999). In 2002, An Garda Síochána recorded 10,248 domestic violence incidents. 1,638 incidents resulted in arrest and 651 resulted in a conviction. Annual report of An Garda Síochána 2002 (Stationary Press 2003).

²⁹ Humphreys & Thiara *Routes to Safety: Protection issues facing abused women and children and the role of outreach* (Women's Aid Federation 2001).

³⁰ This is one of the reasons which led to the introduction of protective orders for spouses.

“where a violent unmarried father, exercising his rights of access, harasses or terrorises the mother of the child, the legislation does not provide any remedy under the Act.”³¹

In similar sentiment, the Law Society’s Law Reform Committee’s Report on Domestic Violence concluded that there “is no reason why an unmarried parent who threatens or uses violence against the other should not be restrained using a safety order or a barring order”.³²

4.22 The Commission believes one of the principal objectives of anti-domestic violence measures is to offer protection to as many victims as practicable. It considers that the *Domestic Violence Act 1996* should provide protection to persons who are experiencing abuse in instances where the couple have a child in common but do not reside together.

4.23 *For the purposes of section 2(1)(a) of the Domestic Violence Act 1996, the Commission recommends a person should be able to apply for a safety order against a person with whom s/he has a child in common. The Commission also recommends that the category of persons entitled to apply for a safety order be extended to include a dependent child.*

(d) Barring Orders

4.24 A barring order directs the respondent, if residing at a place where the applicant or the dependent person resides, to leave such place, and prohibits the respondent from entering such place until further order of the court or until such other time as the court specifies.³³

(i) Residency and Ownership Requirements

4.25 Personal safety is the primary objective of the legislation. This is evident from the impact of barring orders which allow the victim to occupy a residence to the exclusion of the violent or abusive party.³⁴ This category of order as it applies to cohabitants is however restricted, having regard to the right to private property.³⁵ In this way, barring orders represent a balance to be struck between the need to protect the applicant from violence³⁶ and the need to respect the property rights of the respondent.

³¹ *Report on the Task Force on Violence against Women* (Office of the Tanaiste 1997) at.51.

³² *Domestic Violence: The Case for Reform* (Law Society’s Law Reform Committee 1999) at 17. See also Kelleher and O’Connor *Safety and Sanctions: Domestic Violence and the Enforcement of Law in Ireland* (Dublin 1999).

³³ whether resident or not.

³⁴ In this way, they can be known as ‘occupation orders’.

³⁵ See Article 43 of the Constitution of Ireland.

³⁶ This can be termed the applicants constitutional right to bodily integrity.

4.26 Section 3(4) of the *Domestic Violence Act 1996* provides that the court may not grant a barring order in respect of an unmarried applicant where the respondent has a greater interest in the property. The implications of such a restriction is that a barring order will only be made available if the applicant is the sole owner or tenant in many cases.³⁷ Moreover, an applicant must have been living with the respondent for 6 out of the previous 9 months. The court when considering the application for a barring order must be of the opinion that there are reasonable grounds to believe that the safety or welfare of the applicant requires the making of the order.

4.27 The Commission believes that the residency criterion, requiring that the couple have been living together for 6 out of the previous 9 months does not serve any purpose where the cohabiting applicant is sole owner or tenant of the property and has an equal or greater share in the property.

4.28 *The Commission recommends the residency requirement, under section 3(1)(b) of the Domestic Violence Act 1996 be removed in cases in which the cohabiting applicant is sole owner or tenant of the property, or where the applicant has an equal or greater share in the property.*

E Wrongful Death Actions

(1) Consultation Paper Recommendation

4.29 The Commission recommended that section 47(9)(1)(c) of the *Civil Liability Act 1961*, as amended by the *Civil Liability (Amendment) Act 1996*, which deals with civil actions for wrongful death, be extended to include qualified cohabitants within the definition of dependents.

(2) Discussion

4.30 The amendment made by the *Civil Liability (Amendment) Act 1996* to section 47(9)(1)(c) of the *Civil Liability Act 1961 Act*³⁸ extended the right to sue for the wrongful death of a partner to a cohabiting partner

³⁷ Shannon Law Society of Ireland Family Law Manual (2nd ed Oxford University Press 2003): “The court is required to form an opinion regarding the legal or beneficial interest in the property as a preliminary issue where the applicant is a cohabitant or a parent of the respondent. Some District Court Judges have refused to make orders on the basis that they do not believe that the applicant has an equal or greater interest in the property even though the title deeds are in joint names. The District Family Court has jurisdiction under the *Family Home Protection Act 1976* where the rateable valuation of the land does not exceed £20 by virtue of the *Family Law Act 1995*. It does not, however, have a remit in the determination of property disputes per se. Applications concerning the ownership of other property can be determined by the Circuit Family Court in accordance with the Family Law Act, 1995, s36. Applications to determine the ownership of non-spousal property must also be made in the higher courts” at 210.

³⁸ Amending section 47(1)(c) of the *Civil Liability Act 1961*.

who has been “living with the respondent as husband or wife” for at least 3 continuous years. The terminology used in the legislation ‘husband and wife’ excludes same-sex cohabitants.

4.31 In the context of extending recognition to cohabitants, the Commission believes legislative provisions should avoid using a marriage analogy. The Commission believes the legislation be amended to include a couple, of the same-sex or opposite-sex, in an intimate relationship who at the time of death had been living with the deceased for a continuous period of not less than 3 years.

4.32 *The Commission recommends section 47(9)(1)(c) of the Civil Liability Act 1961 be amended to include a couple of the same-sex or opposite- sex in an intimate relationship who at the time of death had been living with the deceased for a continuous period of not less than 3 years.*

F Health Care

(1) Visitation Rights

4.33 If a cohabiting partner goes into hospital for treatment, there is no automatic right of visitation for the other partner. Although in practice, many hospitals have adopted a policy that permits visitation by a partner, an automatic right of visitation should exist for both opposite-sex and same-sex cohabitants.

(2) Consent and Treatment

(a) Consultation Paper Recommendation

4.34 The Commission suggests that consideration be given to include cohabitants within the category of persons with whom a doctor should confer when treating a seriously ill patient who is unable to communicate or understand.

(b) Discussion

4.35 Unless a person is mentally incapacitated, he can make decisions regarding his treatment. A person may not be subject to medical treatment or surgery without that person’s full, free and informed consent. As a general rule, neither the next of kin nor the spouse of a person may interfere in the decision.³⁹ Indeed, a doctor will only be justified in approving medical

³⁹ See for full discussion on capacity and healthcare decisions *Vulnerable Adults and the Law: Capacity* (LRC CP 37-2005) Chapter 7 “Capacity To Make Healthcare Decisions”. Access to medical information and records is governed by the contract between a patient and their medical practitioner, and the *Data Protection Acts 1988-2003*, the *Freedom of Information Acts 1997 and 2003*, and by discovery in court proceedings. The Medical Council state that information must not be disclosed to any person without the consent of the patient.

treatment in relation to an incapacitated adult where the treatment is justified by the doctrine of necessity.

4.36 The Irish Medical Council has recommended that a doctor treating a seriously ill patient who is unable to communicate or understand should confer with the patient's family before reaching a decision on "the use or non use of treatments which will not contribute to recovery from primary illness".⁴⁰ While Medical Council guidelines recommend consultation with the next of kin and/or the spouse of a person, no provision is made for consultation with a cohabiting partner.⁴¹

4.37 *The Commission recommends consideration be given to include cohabitants within the category of persons with whom a doctor should confer when treating a seriously ill patient, who is unable to communicate or understand.*

(3) Enduring Powers of Attorney

(a) Consultation Paper Recommendation

4.38 The Commission recommended in its Consultation Paper *Law and the Elderly*⁴² that the *Powers of Attorney Act 1996* be extended to include some health care decisions to qualified cohabitants. The Commission also recommended that the *Powers of Attorney Act 1996* be amended to include qualified cohabitants as notice parties for the purposes of an enduring power of attorney.

(b) Discussion

4.39 The Enduring Power of Attorney (EPA) is an instrument signed by a donor permitting the attorney to act on the donor's behalf in accordance with the terms of the instrument. This gives the attorney power to make decisions regarding property, finance, business and personal care in respect of the donor. It does not confer the power to make decisions regarding surgery or medical treatment.

⁴⁰ *A Guide to Ethical Conduct and Behaviour* (5th ed Irish Medical Council 1998) at 38. Available at www.medicalcouncil.ie.

⁴¹ Walsh & Ryan *The Rights of De Facto Couples* (Irish Human Rights Commission 2006) "as the guidelines do not derive from a statute or other rule of law, they fall within the scope of the Equal Status Acts 2000-2004 and are open to challenge on that basis. As a public body, the Medical Council is also obliged to carry out its functions in accordance with Convention standards, including the discrimination prohibition under the *ECHR Act 2003*."

⁴² (LRC CP 37-2005).

4.40 Notice of execution of an EPA must be given to at least two persons.⁴³ The donor must give notice of the execution of the EPA as soon as practicable to at least two persons. Neither person may be an attorney under the power. At least one such person must be the donor's spouse, if living with the donor. If this does not apply (if the donor is unmarried, widowed or separated) notification must be given to a child of the donor (if applicable); or if this does not apply, notification must be given to any relative (ie parent, sibling, grandchild, widow/er of a child, nephew or niece, in that order). Where a spouse is appointed as attorney, the spouse may not be notice party and the donor should notify a child, or another relative if there are no children or the child/children are also appointed as attorneys under the power. These notice parties must be given Notice of Intention to apply for registration by the Attorney if that application is subsequently made. Although cohabitants can currently be appointed attorneys, they are not within the relevant category of persons for notice purposes. There is no obligation to confer with the patient's cohabiting partner unless the person has been granted an enduring power of attorney.

4.41 *The Commission recommends the amendment of the Powers of Attorney Act 1996 to include qualified cohabitants as mandatory notice parties for the purposes of an enduring power of attorney.*

⁴³ It is important that a solicitor advises the client carefully of the order of persons who must be notified. See Paragraph 7 of the *Enduring Powers of Attorney Regulations 1996* and Law Society of Ireland "Enduring Powers of Attorney: Guidelines for Solicitors" (Issued by the Probate, Administration and Taxation Committee 2004) at 3-4.

CHAPTER 5 SUCCESSION

A Introduction

5.01 The *Succession Act 1965* regulates succession law. Part 6 of the 1965 Act outlines the succession rights of surviving spouses and children where the deceased dies intestate and Part 9 of the 1965 Act sets out the succession rights of surviving spouses and children where the deceased dies having made a will. However, cohabitants have no succession rights under Part 6 or Part 9 of the *Succession Act 1965*. As there is no blood or legal relationship between them, they do not come within any of the categories of person entitled to inherit on intestacy under the 1965 Act. Where the deceased dies leaving no surviving relatives, his or her estate will pass to the State as the ultimate successor. If no provision is made for a surviving cohabitant by the deceased's will or if the deceased dies without making a will, the only possible legal avenue open to the surviving cohabitant is to try and establish a beneficial interest in the deceased's property under equitable principles, such as the purchase money resulting trust or proprietary estoppel.¹

5.02 In Part C of this Chapter, the Commission discusses the objectives for reform in addressing the current situation for cohabitants on death of a partner. Rather than equating cohabitants with spouses, the Commission highlights the principle behind the redress model and how it might apply as a safety-net scheme for cohabitants on death of a partner. It proposes a limited discretionary remedy for cohabitants where inadequate or no provision has been made in the deceased's will or under the rules relating to intestacy.

5.03 In Part D, a comparative review of the law in other jurisdictions is discussed. A legal spouse is entitled to an automatic legal right share of the estate on death of his or her spouse. The advantages and disadvantages in extending a mandatory or discretionary scheme to cohabitants is examined. In light of the wide spectrum of cohabiting relationships and the varying intentions of cohabitants themselves, a mandatory entitlement to a share of

¹ Where property is held by two parties in a joint tenancy, on the death of one partner, the survivor is deemed to take the entire property. If the property is held as a tenancy in common, the proportion of the property belonging to a deceased owner will pass to his or her beneficiaries under his or her will, or under the rules of intestacy.

the deceased's estate may not be fitting. A one-size fits all approach may not be appropriate in this context.

5.04 With increasing diversity in the nature of family relationships, the Commission recognises the need to address the possibility of conflicting claims on the estate of the deceased. Such concerns are discussed in consideration of an application made by a cohabitant on death of a partner. Spouses, former spouses and children are considered.

5.05 Part E discusses how a discretionary remedy might operate in practice. It highlights the relevant factors to be considered by the court in establishing whether inadequate or no provision has been made for the applicant in the deceased's will or under the rules relating to intestacy.

B Consultation Paper Recommendation

5.06 The Commission recommended a discretionary scheme be established whereby a qualified cohabitant can make an application to Court where the qualified cohabitant feels that proper provision has not been made for him or her in the deceased's will or under the rules relating to intestacy. The Commission recommended that, as with section 117 of the *Succession Act 1965*, an application should be made within 6 months of the first taking out of representation to the deceased's estate or 12 months from the death of the deceased, whichever comes earliest.

5.07 The Commission was of the view that Order 79 of the Rules of the Superior Courts 1986² should be amended to allow a qualified cohabitant to extract a grant of administration of the estate of the deceased. This power would be subject to the discretion of the Probate Office on the production of such proofs as may be required. The Commission was of the view that a qualified cohabitant should be placed above siblings of the deceased in the list of persons entitled to extract the grant.

C Discussion

(1) Objectives of Reform

5.08 The absence of inheritance rights can cause serious hardship for cohabitants on the death of a partner. In addition, the fact that a couple have not married and have not made a will cannot be taken as evidence that they do not wish to grant each other inheritance rights; it may simply be that they have not addressed the issue.³ Where inadequate or no provision has been

² S.I. No.15 of 1986.

³ Wills "Reforming Inheritance Law- Providing for the Non-Marital Family" (2002) 17 *Conveyancing and Property Law Journal* 58.

made by a will for a surviving cohabitant, or where there is no will, the redress model would operate as a safety net and extend a limited discretionary remedy to cohabitants.⁴

5.09 As noted earlier, there is a distinction to be drawn between issues that arise when a relationship is ongoing and the situation that arises on break up. When a relationship is ongoing, any recognition of the relationship can be described as the State, or public law, recognising the reality of the relationship the parties have chosen for themselves. It is, in a sense, giving effect to the intention of the parties and acknowledging the existence of an intimate relationship. A cohabiting relationship exists up and until the time of death. For this reason, a test of economic dependency, required on making an application for ancillary relief on breakdown of the relationship, is not necessitated in the context of succession.

D Comparative Review

5.10 Some other States have legislated for surviving cohabitants where no will has been made. All Australian states and the Canadian provinces of Alberta, British Columbia, Manitoba and Saskatchewan confer automatic inheritance rights on cohabitants who satisfy a minimum duration requirement. Many provide automatic entitlement where a cohabitant had a child with the deceased partner,⁵ regardless of the length of the relationship. In New Zealand, cohabitants inherit as surviving spouses if they satisfy a 3 year duration requirement.⁶ New South Wales, the Northern Territory and Tasmania go further; a cohabitant of any duration inherits in the same way as a surviving spouse.⁷ They also inherit if they had children with the deceased,

⁴ Wills “Reforming Inheritance Law- Providing for the Non-Marital Family” (2002) 17 *Conveyancing and Property Law Journal* 58. In recent decades, inheritance rights have been extended beyond the confines of the marital family. For example, Irish law has expanded the inheritance rights of non-marital children, granting them the same intestate shares as children born in wedlock and also the same rights under Section 117 of the *Succession Act 1965*. Siobhan Wills states that such reforms demonstrate the law’s responsiveness to social change. See Wills “Reforming Inheritance Law- Providing for the Non-Marital Family” (2002) 17 *Conveyancing and Property Law Journal* 58.

⁵ *Intestate Succession Act 2000 (Alberta)*, *Estate Administration Act 1996 (British Columbia)*, *Intestate Succession Act 1990 (Manitoba)* and *Intestate Succession Act 1996 (Saskatchewan)*.

⁶ *Administration Act 1969 (New Zealand)*.

⁷ *Wills, Probate and Administration Act 1898 (New South Wales)*, section 61B(2), *Administration and Probate Act 1970 (Northern Territory)*, schedule 6, art II(a), and *Administration and Probate Act 1935 (Tasmania)*, section 44(3B). In the Northern Territory and Tasmania, this does not apply where the intestate leaves issue.

or if they made a substantial contribution to the relationship and if serious injustice would result if they did not inherit.

5.11 The England and Wales *Inheritance (Provision for Family and Dependents) Act 1975* provided that, if a person dies without making 'reasonable financial provision' for close family members, they may apply to the court to have such provision made for them out of the estate. This applies whether or not the deceased made a will.⁸ The England and Wales *Law Reform (Succession) Act 1995* extended the category of persons entitled to make a claim for financial provision under the *Inheritance (Provision for Family and Dependents) Act 1975* to include surviving cohabitants. Although a cohabitant was entitled to make a claim under the *Inheritance (Provision for Family and Dependents) Act 1975*, it was necessary to establish that the cohabitant was dependent on the deceased. Since the enactment of the *Law Reform (Succession) Act 1995*, it is not necessary to establish dependency, but merely that the cohabitant lived with the deceased as man and wife for two years prior to the deceased's death. In considering a surviving cohabitant's application, the court will, in addition to the criteria listed in the *Inheritance (Provision for Family and Dependents) Act 1975*,⁹ have regard to the age of the applicant, the length of the cohabitation and any contributions, direct or indirect, made by the applicant to the household.

5.12 The Scottish Law Commission in its *Report on Family Law*¹⁰ rejected the idea that legal rights and prior rights of the surviving spouse should be extended to cohabitants. It was of the opinion that cohabitants should only have a right to apply to the court for discretionary provision out of the deceased's estate. The court would be permitted to make an order if satisfied that the disposition of the deceased's estate was not such as to make such financial provision for the applicant as it would be reasonable to expect taking into account all the circumstances of the case and in particular: the length of the cohabitation; the existence of any children of the relationship

⁸ Section 1 of the *Inheritance (Provision for Family and Dependents) Act 1975*.

⁹ Section 3(1) of the *Inheritance (Provision for Family and Dependents) Act 1975* sets out guidelines which must be considered by the court in determining all such applications: (1) the financial resources and financial needs which the applicant has or is likely to have in the foreseeable future; (2) the financial resources and needs which any other applicant for an order has or is likely to have in the foreseeable future; (3) the financial resources and financial needs which any beneficiary of the estate of the deceased has or is likely to have in the foreseeable future; (4) any obligations and responsibilities which the deceased had towards any applicant for an order or any beneficiary of the estate of the deceased; (5) the size and nature of the net estate of the deceased; (6) any physical or mental disability of any applicant for an order or any beneficiary of the estate; (7) any other matter, including the conduct of the applicant or any other person, which in the circumstances of the case the court may consider relevant.

¹⁰ Scottish Law Commission *Report on Family Law* (135-1992) at 16.24.

between the applicant and the deceased or of any children treated by them as children of their family; the size and nature of the deceased's net estate; any benefit received or to be received by the applicant on, or as a result of the deceased's net estate; the nature and extent of any contributions made by the applicant from which the deceased has derived economic advantage; the nature and extent of any economic disadvantage suffered by the applicant in the interests of the deceased or of their children. The Scottish Law Commission recommended that cohabitants be able to apply to the court for an award out of their deceased partner's estate if reasonable provision had not been made for them.¹¹

5.13 Many of the recommendations made by the Scottish Law Commissions were implemented in the *Family Law (Scotland) Act 2006*. Provision is made for surviving cohabitants to make a claim on their deceased partner's estate. It allows a cohabitant to apply for discretionary provision where the deceased died without making a will.¹² The circumstances in which a claim can be made are strictly defined: the deceased must have died without having made a will; the deceased must have been, at death, domiciled in Scotland; the deceased must have been, at death, cohabiting with the surviving cohabitant; and the application must be made within 6 months of the deceased's death.¹³ If the claim is successful, the court has power to make payment of a capital sum or to make a 'transfer of property order'. It will, amongst other things, consider any competing claims on the deceased's estate. It can be said that the *Family Law (Scotland) Act 2006* is drafted carefully to ensure that cohabitants do not acquire better rights than spouses. Hence, claims are restricted to the estates of cohabitants who made no will, and awards, whether final or interim, may not exceed an amount equivalent to the amount that would have been received by way of legal rights and prior rights had the survivor been a spouse.

(I) A Mandatory or Discretionary Scheme

5.14 In the course of the Commission's consultation process, submissions received by the Commission raised the possibility of a fixed legal right share being extended to cohabitants on the death of a partner. The Commission acknowledges that a scheme based on fixed rights would introduce an element of certainty. It would enable persons to be aware of their entitlements on death, and avoid litigation that occurs in a discretionary scheme. However, the Commission asserts the legal right share provisions

¹¹ Whether the deceased died testate or intestate.

¹² Section 29 of the *Family Law (Scotland) Act 2006*.

¹³ The court has discretion to consider late applications on cause shown. A potential claim by a cohabitant will be overridden by a will.

are not based on need and are not based on a theory of return for presumptively equal contributions to the relationship. Instead, they are based on the status of marriage as a constitutionally protected institution.¹⁴ Such a status can be contrasted with the redress model proposed in this Report. The Commission does not intend to imply that cohabitation is a parallel institution to marriage. Moreover in extending a fixed right to cohabitants the law would be making a uniform assumption about the nature of cohabiting relationships and ignoring the variety of factual circumstances that arise within cohabiting relationships.¹⁵ In this respect, the Commission reiterates the view expressed in the Consultation Paper that the legislative scheme should be discretionary in nature.

5.15 *The Commission recommends a discretionary scheme under the redress model be established whereby a qualified cohabitant can make an application to court where the qualified cohabitant feels inadequate or no provision has been made for him or her in the deceased's will or under the rules relating to intestacy.*

(a) *Conflicting Claims*

5.16 On the death of a cohabitant, the administration of the deceased's estate depends on a number of factors. For instance, there may be surviving children, a surviving spouse or an ex-spouse, with existing rights. There may also be a cohabitation agreement detailing how property and financial affairs are to be dealt with on the death of one of the cohabitants. In this respect, the Commission notes that the issue of potentially conflicting rights needs to be addressed. This has been faced by other jurisdictions, and different approaches have been taken. In some states, it is the most recent relationship that takes priority; in others, it is the marriage; in still others, the spousal/cohabitant share is equally divided among the applicants.

(I) *Spouses and Cohabitants*

5.17 The Commission recommends that a 3 year 'living together' period must be reached in order to be a qualified cohabitant under the redress model. An existing marriage should not automatically preclude the finding that there was cohabitation or that a cohabitant could be eligible under the redress model. The existing marriage can and should be taken into consideration as an indicator that there might not have been cohabitation.

¹⁴ Article 41.3.1 of the Constitution of Ireland. The State is constitutionally obliged to protect with special care the institution of marriage. Gallagher "Reforming Inheritance Law- Providing for the Non-Marital Family: A Practitioner's Response" (2003) *Conveyancing and Property Law Journal* 18.

¹⁵ See 1.15. The different forms of cohabitation include first-time cohabitation, pre-marital cohabitation, cohabitation as an alternative to marriage, and post-marital cohabitation.

The Commission believes that as a state-recognised institution, marriage should retain its privileged position, entitled to an automatic fixed share, on the death of the spouse. A qualified cohabitant can only make an application on the net estate of the deceased.

5.18 *The Commission recommends an application by a qualified cohabitant be made on the 'net estate' of the deceased. An existing spouse will retain his or her legal right share and will not be affected by a qualified cohabitant's application under the redress model.*

(II) *Former Spouses and Cohabitants*

5.19 Unless what is termed a 'blocking order' has been made under section 18(10) of the *Family Law (Divorce) Act 1996*, a former spouse retains a residual right to make an application to the court for provision to be made out of the former spouse's estate on his or her death.¹⁶ The court may make such an order only where it is satisfied, having regard to all the circumstances, and to any orders made and also to the rights of other interested parties, that proper provision was not made for the applicant during the deceased's lifetime.

5.20 *The Commission recommends a claim pursued by a former spouse be considered by the Court when addressing any entitlement to the estate by a qualified cohabitant.*

(III) *Children and Cohabitants*

5.21 While the surviving spouse is entitled to an automatic fixed share of the testator's estate, the rights of surviving children, set out in section 117 of the *Succession Act 1965*, are very different. The rights of the surviving child are dependent on an application being made by the child to the court and on judicial discretion. Section 117(1) of the *Succession Act 1965* allows the court to make provision for a child out of the deceased's estate where the child, or someone on his behalf, makes an application and the court is of the opinion that the testator has failed in his moral duty to make proper provision for the child. A considerable body of case-law has built up around the factors which the courts consider relevant when adjudicating on an application under section 117 of the *Succession Act 1965*. These include: the provision made by the testator for the spouse, the number of children, their ages and positions in life, the means of the testator, the age of the applicant and his or her position in life and whether the testator made provision for the

¹⁶ Section 18(10) of the *Family Law (Divorce) Act 1996* and section 15(a)(10) of the *Family Law Act 1995*. On the grant of a divorce decree or a judicial separation, or at any time thereafter, the court, on application to it by either of the spouses concerned during the lifetime of the other spouse, may, if it considers it just to do so, make an order that either or both spouses shall not, on the death of either of them, be entitled to apply for an order under this section.

child during his or her lifetime. In determining the relevant time for consideration as to whether there was a failure in moral duty, the courts can take into account the circumstances existing at the date of the hearing.

5.22 *The Commission recommends a claim pursued by surviving children must be considered by the Court when addressing any entitlement to the estate by a qualified cohabitant.*

E Application

5.23 Where inadequate or no provision has been made by will for a surviving cohabitant, or where there is no will, the redress model will operate as a safety net and extend a limited discretionary remedy to cohabitants. It would allow qualified cohabitants the right to apply to the court for relief. The court, taking into account all the circumstances of the case, would then decide what award, if any, is appropriate in the circumstances. The main advantage of such a scheme is that an equitable result would be achieved based on the particular circumstances of the relationship and what is reasonable in the circumstances. A cohabitant, however, can only apply for relief where they feel inadequate or no provision has been made for them.

5.24 In deciding whether or not to make an order and in consideration of what provision is reasonable in the circumstances, the court is to have regard to the following matters:

- i) the rights of any spouse;
- ii) the rights and existence of any children of a previous relationship; or any children of the relationship between the applicant and the deceased or of any children treated by them as children of their family;
- iii) the rights of any ex-spouse;
- iv) the nature of the relationship and duration of the cohabitation;
- v) the size and nature of the deceased's estate;
- vi) the provision made by the deceased for the applicant during his/her lifetime by property adjustment order/maintenance order or otherwise;
- vii) any benefit received or to be received by the applicant on, or as a result of the deceased's death other than out of his/her net estate
- viii) the interests of the beneficiaries of the estate;
- ix) the financial needs, obligations and responsibilities which the applicant has or is likely to have in the foreseeable future;

- x) the contributions which the applicant made or is likely to make in the foreseeable future to the welfare of the family including any contribution made to the income, earning capacity, property and financial resources of the deceased and any contribution made by looking after the home or caring for the family;
- xi) the effect on the earning capacity of the applicant of the familial responsibilities assumed during the period they lived together and in particular the degree to which the future earning capacity of the applicant was impaired by reason of having relinquished or forgone the opportunity of remunerative activity in order to look after the home or care for the family;
- xii) any physical or mental disability of the applicant;
- xiii) any other matter, which in the circumstances of the case the court may consider relevant.

5.25 There is no fixed entitlement for applicants making such claims. Any award is confined to such financial provision as would be reasonable in consideration of all the circumstances. For example, in considering whether to make an order, the court shall have regard to any lump sum order or property adjustment order made in favour of the applicant, and any devise or bequest made by the deceased to the applicant. Moreover, in deciding whether to make an order under a provision referred to and in determining the provisions of such an order, the court shall have regard to the terms of any cohabitation agreement, that has been entered into by the cohabitants.

5.26 *The Commission recommends the Court have regard to the factors listed above in consideration of what provision is reasonable in the circumstances.*

F Conclusion

5.27 In seeking to devise an appropriate legal framework for cohabitants, the Report proposes a form of redress model, which would not attempt to create a new status, parallel to that of marriage, but would operate as a default system of redress for those who do not opt-in for marriage. In this way, it does not rely on the parties having entered into either a status or a contract. Such a scheme would have appropriate regard to the autonomy of the parties while attempting to provide a safety net to address the needs of particularly vulnerable persons on death of a partner.

5.28 *The Commission recommends Order 79 of the Rules of the Superior Courts 1986 be amended to allow a qualified cohabitant to extract a grant of administration of the estate of the deceased. This power would be subject to the discretion of the Probate Office on the production of such proofs as may be required. The Commission is of the view that a qualified*

cohabitant be placed above siblings of the deceased in the list of persons entitled to extract the grant.

CHAPTER 6 RELATIONSHIP BREAKDOWN

A Introduction

6.01 The availability of ancillary relief such as property adjustment orders, compensatory maintenance orders, pension adjustment orders and pension splitting orders, for qualified cohabitants on breakdown of a relationship are based on the redress model proposed in this Report. It does not attempt to create ancillary relief as it applies to spouses. In fact, the model in this Report reflects a default system for those who do not opt-in for formal registration, whether marriage or any proposed registration system. In this way, the redress model would operate as a safety net to address the needs of vulnerable qualified cohabitants on breakdown of the relationship.

6.02 In this Chapter, the Commission considers the provisional recommendations outlined in the Consultation Paper on *Rights and Duties of Cohabitees*.¹ Part B examines property related concerns and the availability of property adjustment orders on breakdown of a cohabiting relationship. Part C examines the availability of compensatory maintenance orders and Part D examines the availability of pension adjustment orders and pension splitting orders. Rather than basing such orders on separate individual models,² the Commission considers common factors apply. The objective of such factors is to enable the court to have regard to all the circumstances of the relationship.

6.03 The Commission believes not all cohabiting relationships warrant redress on breakdown of the relationship. Casual or short-term relationships without interdependency do not require ancillary relief. The court should therefore have regard to the vulnerable position of the applicant. On making an application, a test of ‘economic dependency’ must be proven. Once economic dependency has been established, the court, in consideration of a wide range of factors and in light of the safety-net approach of the redress model would consider whether relief should be awarded. In essence, the

¹ (LRC CP 32-2004).

² For example, in the Consultation Paper *Rights and Duties of Cohabitees* (LRC CP 32-2004), the Commission based its proposals in relation to property adjustment orders on a New South Wales model.

parameters of relief should be contingent on such factors reflecting the particular relationship and the needs of the applicant.

6.04 Part F considers the Commission's provisional recommendations in its Consultation Paper as they apply to public and private pension schemes and their treatment cohabitants.

B Property

(1) Consultation Paper Recommendation

6.05 The Commission was of the view that the provisions of the *Family Home Protection Act 1976* should not be extended to qualified cohabitants. The Commission recommended the enactment of legislation providing for property adjustment orders for qualified cohabitants in exceptional circumstances where the court considers it just and equitable to do so having regard to:

(a) the financial and non-financial contributions made directly or indirectly by or on behalf of the parties to the relationship to the acquisition, conservation or improvement of any of the property of the parties or either of them or to the financial resources of the parties or either of them; and

(b) the contributions made by either of the parties to the relationship, to the welfare of the other party to the relationship, or to the welfare of the family.

(2) Discussion

6.06 The Consultation Paper considered the equitable concept of the purchase money resulting trust doctrine as it can apply to cohabitants, and other methods by which a cohabitant might acquire an interest in property, for example, through constructive trusts, co-ownership agreements and the equitable concept of proprietary estoppel. Although one of the most effective methods for a non-owning cohabitant to acquire an interest in property is to establish a beneficial interest in the property under a purchase money resulting trust,³ the Commission stated in its Consultation Paper that the failure of the purchase money resulting trust to recognise the value of unpaid work within the home as distinct from unpaid work outside the home is unjust. In the Consultation Paper, the Commission also noted that an anomaly existed whereby paying for improvements in cash will not generate a beneficial interest but repaying a mortgage raised for the purposes of

³ See generally Delany *Equity and the Law of Trusts in Ireland* (3rd ed Thompson Round Hall 2003) at 131-194; Lyall *Land Law in Ireland* (2nd ed Round Hall Sweet & Maxwell 2000) at 451-471; Mee *The Property Rights of Cohabitants* (Hart 1999) at 34-60; Shatter *Family Law* (4th ed Butterworths 1997) at 720.

paying for improvements will create a beneficial interest. Moreover, the proportionate interest test, whereby the beneficial interest to be awarded must correspond to the proportion of the financial contribution to the purchase price, may create difficulties for the court where the contributions made are difficult to calculate. Cohabitants are further disadvantaged because the presumption of advancement does not apply to them. In the Consultation Paper on *Rights and Duties of Cohabitees*,⁴ the Commission also considered the extent to which the legislative protection afforded to spouses in respect of the family home should be extended to cohabitants.⁵ A cohabitant who does not appear on the title deeds of a property can be in a vulnerable position.

6.07 Under the contract model, cohabitants have the option of setting out their property and financial arrangements in a binding cohabitation agreement. A system limited, however, to private regulation between the parties does not provide for the situation where no agreement is made or the agreement is set aside due, to for example, undue influence or duress, or non-adherence to the formalities required. In such a case, the parties would be left with little legal protection. For this reason, the Commission believes a contractual approach can only play a supplementary role within a comprehensive scheme of reform.

(3) *Family Home Protection Act 1976*

6.08 In the Consultation Paper on Rights and Duties of Cohabitees,⁶ the Commission considered extending the *Family Home Protection Act 1976* to cohabitants. At present, spouses have to sign a family home declaration. If the property is a family home, the prior consent of the spouse is required. The marriage certificate is used as proof of the marital relationship. In addition, a spouse may apply to the court for an order to enforce his or her right to remain in occupation, to exclude the other spouse or to regulate the occupation of either or both of them.⁷

6.09 Due to the absence of a marriage certificate the requirement of a cohabitant's consent in a conveyance is not a possibility. Moreover, a statutory right of occupation has been described in England as "a weapon of great power and flexibility".⁸ However, the question remains whether there should be some limited protection extended to the non-owning cohabitant

⁴ (LRC CP 32-2004).

⁵ See Consultation Paper *Rights and Duties of Cohabitees* (LRC CP 32-2004) Chapter 3 "Property Rights".

⁶ (LRC CP 32-2004).

⁷ Section 33 of the *Family Home Protection Act 1976*.

⁸ *Wroth v Tyler* [1974] 2 WLR 1217.

who is being forced to leave the family home. This scheme would not require the owner to obtain the qualified cohabitant's consent to any sale or disposition of the property, but would allow a qualified cohabitant to make an application to the court. The court would consider the circumstances of the case and whether protection or disposal of the family home is necessary.

6.10 In England and Wales, an extension of matrimonial home rights of occupation to cohabitants was made under the *Family Law Act 1996*.⁹ Where one cohabitant owns the house, and the cohabitant lives, used to live, or intended to live there with the other cohabitant as husband and wife, the non-owning cohabitant may apply for an order under Section 36 of the *Family Law Act 1996*. Such an order may permit the non-owning cohabitant to occupy the home, exclude the owning cohabitant from the home or regulate the occupation by either or both of them. In deciding whether to make an order, the court must have regard to the circumstances of the case, including: the housing needs and resources of each of the parties, and of any relevant child; the financial resources of each of the parties; the likely effect of any order on the health, safety or well-being of the parties and of any relevant child, and the conduct of the parties in relation to each other and the nature of the parties' relationship. Section 41 provides that, when considering the nature of the cohabitants' relationship, the court is obliged to have regard to the fact that they have not given each other the commitment involved in marriage.

6.11 The Commission recognises the vulnerable position cohabitants may be in where their legal interest in the family home is not declared. The absence of a marriage certificate would however have serious evidential issues for conveyancers in establishing whether the property is the family home. The discretionary remedy under the England and Wales *Family Law Act 1996* does not have an affect on third party dealings and the right of occupation if granted is of a short period. The Commission believes that extending the spousal protection evident in the *Family Home Protection Act 1976* to cohabitants or introducing a remedy similar to the England and Wales *Family Law Act 1996*, would have serious practical difficulties for conveyancers and the courts. The Commission believes that existing law already allows a cohabitant to register their interest in a property with the Property Registration Authority under the *Registration of Title Act 1964* and the *Registration of Deeds and Title Act 2006*.¹⁰ Conveyancers should advise cohabitants of the existence of such a right and encourage them to register

⁹ See also section 18 of the *Matrimonial Homes (Family Protection) (Scotland) Act 1981*.

¹⁰ See sections 32-36 *Registration of Deeds and Title Act 2006*, section 116 *Registration of Title Act 1964*, as amended by section 67 of *Registration of Deeds and Title Act 2006*.

their interest in the public registry. In this way, their interest in the property can be protected.

(4) Property Adjustment Orders

6.12 The Consultation Paper on *Rights and Duties of Cohabitees*¹¹ highlighted the inadequate protection extended by property law in its treatment of the financially weaker cohabitant. For example, with a purchase money resulting trust, post-acquisition contributions cannot generate a beneficial interest in property. In the absence of a written agreement, the financially weaker cohabitant cannot obtain a proprietary interest in a family home which was paid for by the legal owner prior to the commencement of the relationship, or which was inherited. In contrast, under Irish family law, a property adjustment order can be made in favour of a spouse, whether the property was purchased or inherited before or after the marriage, and the contribution made by the applicant spouse is only one of a series of factors that the court considers in deciding whether to grant an order.¹² The following is a discussion of possible approaches in extending property adjustment orders to cohabitants on breakdown of their relationship.

(a) An approach based on matrimonial legislation

6.13 One option for reform is applying the marital rules dealing with property adjustment orders to cohabitants. For example, Shatter recommends the court should be able to make property adjustment orders in favour of cohabitants upon breakdown of a couple's relationship by consideration of the parties overall circumstances and by the application of factors similar to those prescribed by section 16 of the *Family Law Act 1995* and section 20 of the *Family Law (Divorce) Act 1996*.¹³ Such an approach could modify the criteria for the exercise of judicial discretion so as to ensure different treatment for spouses and cohabitants.¹⁴ The advantage of using a modified version of section 20 of the *Family Law (Divorce) Act 1996* is that practitioners and judges are familiar with the legislation. It is a discretionary formula, which would allow the courts to consider many aspects of the relationship. Considering the nature of cohabitation itself, such a broad spectrum of factors would allow the courts to look at its functional characteristics and assess the contributions made. Having considered the factors, the court would have the power to make a property adjustment order as it considers 'just and equitable' in the circumstances.

¹¹ (LRC CP 32-2004).

¹² See section 16(2) of the *Family Law Act 1996* and section 20(2) of the *Family Law (Divorce) Act 1996*.

¹³ Shatter *Shatter's Family Law* (4th ed Butterworths 1997).

¹⁴ Mee, "Property rights and personal relationships: reflections on reform" (2004) 24 *Legal Studies* 3.

6.14 Mee refers to a similar approach which would involve applying the marital rules to cohabitants but restricting the range of remedies to property adjustment orders.¹⁵ One direct way of doing so would be to stipulate that cohabitants should be awarded some fraction of what they would have been awarded had they been married. For example, in the case of a claim by a cohabitant, one would apply the established criteria applicable to married couples and then reduce the award appropriately.¹⁶

(b) *An approach based on ‘economic advantage’ and ‘economic disadvantage’*

6.15 Another reform option is that recently introduced by Scotland in the *Family Law (Scotland) Act 2006*¹⁷ and proposed by the Law Commission for England and Wales.¹⁸ The purpose of the *Family Law (Scotland) Act 2006*, as it relates to financial consequences on breakdown of the relationship is to balance any economic advantage or disadvantage gained or suffered by either party. Section 28 provides for financial provision between parties whose cohabitation has ended for reasons other than death, including orders for payment of a capital sum by one party to the other. This is not a power to order transfers of property such as a house or a pension. There are complex formulae by which the amount to be paid is to be worked out. The parties’ respective economic advantages from the other’s contribution, and the disadvantages suffered in the interests of the other, must be determined and balanced against each other. An economic advantage includes gains in capital, income and earning capacity, and economic disadvantage is to be construed accordingly. A contribution may be financial or non-financial, and includes looking after the children and the home. Where the parties are parents of a child, a cohabitant may further seek an order requiring the other cohabitant to pay an amount in respect of the economic burden of caring for the child after the end of the cohabitation. Economic disadvantage suffered by a cohabitant in the interests of such a child, or a child accepted by the cohabitants as part of their family, is a factor to be taken into account in assessing the orders to be made. The court may order the amount payable on a specified date or in instalments. Any application under these provisions must be made within one year of the day on which the parties cease to cohabit. The court has also the power to make interim orders.

¹⁵ Mee, “Property rights and personal relationships: reflections on reform” (2004) 24 *Legal Studies* 3 at 435.

¹⁶ *Ibid.*

¹⁷ It came into force on 4 May 2006.

¹⁸ It has also been proposed by the Law Society of England and Wales and originally put forward by the Scottish Law Commission in 1992. See the Law Society Cohabitation-*The Case for Clear Law* (2002) and Scottish Law Commission *Report on Family Law* (135- 1992) at 16.14-16.23.

6.16 In 2006, the Law Commission for England and Wales provisionally recommended that the court should have regard to whether, and to what extent, either party's economic position following separation, in terms of capital, income or earning capacity was:

1. Improved by the retention of some economic benefit arising from contributions made by the other party during the relationship ('economic advantage'), or
2. Impaired by economic sacrifices made as a result of that party's contributions to the relationship, or as a result of continuing child-care responsibilities following separation ('economic disadvantage').

The Law Society of England and Wales, in its 2002 Paper *Cohabitation: The Case for Clear Law*, argued that the proposed approach would differ 'significantly' from the ancillary relief regime upon divorce. It points as a means of contrast to the situation in the divorce context, whereby the courts can look to the present and reasonably foreseeable needs and resources of the parties.¹⁹ However, the approach adopted in the Law Commission for England and Wales's Consultation Paper, discusses its ability to accommodate the impact of child-care on the primary carer's future earning capacity. The most important type of claim that should be possible would relate to the economic disadvantage sustained by a partner who reduces paid employment in order to undertake child-care, care for another dependent family member or other domestic tasks.

6.17 Contributions would trigger a claim for financial relief based on their positive value only where the applicant can prove that they had given rise to an identifiable economic advantage (whether in the form of capital, income or earning capacity) retained by the respondent at the point of separation. This principle would operate in tandem with the economic disadvantage principle.²⁰ The Law Commission suggests that any relevant sacrifices include personal losses sustained by the applicant on separation in consequence of child-care provided during and following the relationship, such as: loss of income; loss of earning capacity; and loss of opportunity to accumulate personal savings.²¹ Any claim between cohabitants should only relate to the contributions that they had made to their relationship. Many

¹⁹ Mee, "Property rights and personal relationships: reflections on reform" (2004) 24 *Legal Studies* 3. Mee questions whether pressure will arise to take account of the needs and resources of the parties, and other factors not specifically referred to, for example, the length of the relationship, as has occurred in New South Wales.

²⁰ The Law Commission for England and Wales *Cohabitation: The Financial Consequences of Relationship Breakdown* (CP 170-2006) May 2006) at 6.128.

²¹ *Ibid* at 6.174.

cohabitants might suffer economic disadvantage when the relationship ends. They may lose the financial support that their partner had been providing, and so are exposed to the economic effect of, for example, being employed. The Consultation Paper insists, however, that it would be necessary to demonstrate that the economic disadvantage suffered on separation was the result of relevant contributions made during, and, in the case of childcare, after the parties relationship.

(c) *An approach based on ‘contributions’ and ‘sacrifices’*

6.18 Another option for reform is to focus on the contributions and sacrifices of the parties. In the Consultation Paper on *Rights and Duties of Cohabitees*,²² the Commission recommended the enactment of legislation providing for property adjustment orders for qualified cohabitants in exceptional circumstances where it is just and equitable to do so. In considering whether such orders should be granted, the Commission suggested that the following factors be relevant: the financial and non-financial contributions made directly or indirectly by or on behalf of the parties to the relationship to the acquisition, conservation or improvement of any of the property of the parties or to the financial resources of the parties; and the contributions made by either of the parties to the relationship, to the welfare of the other party to the relationship, or to the welfare of the family. Such factors were adopted from a New South Wales model evident in the *Property (Relationships) Act 1984*.

6.19 The absence of an express reference to the future needs and means of the parties in the property adjustment provisions of the New South Wales *Property Relationships Act 1984* has led to confusing and divergent case-law on whether the courts have the power to have regard to such issues. The concentration on ‘contributions’ can make it difficult to take account of what might better be termed a ‘sacrifice’ on the part of a claimant. This point may be demonstrated by the scheme’s treatment of assessing ‘home-making contributions’. The cost of lost opportunities where the claimant would have earned more had he or she been in paid employment for the relevant period. Moreover, there may be an impact of such a contribution on future earning capacity. A person who has sacrificed advancement in a career will continue to suffer economic loss after the home-making contribution has ceased.²³

²² (LRC CP 32-2004).

²³ There has been criticism of the *Queensland Property Law Act 1974* and the potential for it to undervalue the role of the home-maker and primary carer. It has been suggested that section 286(1) of the 1974 Act does not provide enough support for the future needs of partners who have assumed certain roles during the course of the relationship. See Queensland Law Reform Commission *De facto relationships* (R44 1993).

C Maintenance

6.20 The Commission considers extending a limited right to maintenance to qualified cohabitants on breakdown of the relationship.

(1) Consultation Paper Recommendation

6.21 The Commission recommended that the proposed scheme should allow a court to award compensatory maintenance in exceptional circumstances where it considers it just and equitable to do so.

(2) Discussion

6.22 At present, a parent is under a statutory obligation to maintain his or her offspring whether they are marital or extra-marital.²⁴ No such provision is in place for cohabitants. Compensatory maintenance is designed to compensate the applicant for prior contributions made directly or indirectly following the break-up of the relationship. The rationale underpinning this form of maintenance is, the applicant has foregone career or training opportunities, which might otherwise have been available, in order to concentrate on the running of the household. The extent that the respondent has acquiesced in or encouraged this activity, then, within the limits of their available resources, in recognition of this contribution, some responsibility should be undertaken by the respondent for the cost of restoring financial independence to the applicant by contributing to the cost of any re-training necessary to enable that person to re-enter the workforce.

6.23 An award of maintenance could take two forms, a lump sum or a periodic payment. The Commission stated in the Consultation Paper that the maximum period for which a periodic payment should be payable is five years. Having satisfied itself that exceptional circumstances exist, which justify the making of an award in principle, the Commission is of the view that in considering whether it is just and equitable to make an award, the court should consider the following:

1. the financial and non-financial contributions made directly or indirectly by or on behalf of the parties to the relationship to the acquisition, conservation or improvement of any of the property of the parties or to the financial resources of the parties, and

²⁴ Section 5 of the *Family Law (Maintenance of Spouses and Children) Act 1976* deals with the maintenance rights of marital children. Section 5(1)(a) deals with the maintenance rights of extra-marital children. This was inserted by the *Status of Children Act 1987*. In considering whether to make an order the court will consider the financial resources and responsibilities of the parents. In addition, the court will not make an order unless it is proved 'on the balance of probabilities' that the respondent is the father of the child.

2. the contributions made by either of the parties to the relationship, to the welfare of the other party to the relationship, or to the welfare of the family.

Rather than the applicant proving that exceptional circumstances exist at the outset, the courts would be obliged to consider a number of additional factors, such as: the absence of a marriage certificate, intentions of the parties, duration of the relationship, the existing rights of any spouse and ex-spouse. Where there are children of the relationship and in a context where there is no ongoing maintenance for the custodial parent, the Court should also take into account the child rearing costs incurred by the custodial parent when making a maintenance order under the *Family Law (Maintenance of Spouses and Children) Act 1976*. In addition, rather than applying a 5 year time limit on maintenance payments, the Commission believes this should be left to the courts' discretion.

D Pensions

6.24 The Commission considers extending a limited right to a pension adjustment order and pension splitting order to qualified cohabitants on breakdown of the relationship.

(I) Consultation Paper Recommendation

6.25 The Commission recommended that pension adjustment and pension splitting orders, which currently apply on marital breakdown, should not apply to qualified cohabitants on the break up of their relationship.

(a) Pension Adjustment Orders

6.26 On divorce and judicial separation, legislation permits the courts to order that a pension be adjusted or split so that one spouse's pension will, once vested, accrue to the benefit of the other spouse. The court must take into account the value of the spouse's pension schemes in the calculation and apportionment of family assets in ancillary relief proceedings on foot of a divorce or judicial separation by making pension adjustment orders.²⁵ A pension adjustment order may provide a non-member spouse with a percentage of the retirement benefits payable under a pension arrangement. A separate pension adjustment order is required in respect of death in service benefits. In considering whether to make a pension adjustment order, the court will consider a wide range of factors. These include information about the spouses as to: (a) financial resources; (b) financial needs; (c) ages; (d) standard of living; (e) physical or mental disabilities; (f) conduct; (g) contribution to the relationship; (h) the length of the marriage; and (i) the

²⁵ Section 12 of the *Family Law Act 1995* and section 17 of the *Family Law (Divorce) Act 1996*.

rights of any third parties. In considering whether to make a pension adjustment order the court is required to have regard to whether adequate and reasonable financial provision exists or can be made for the spouse by means of a property adjustment order, financial compensation order, periodical payment or lump sum order or other specified ancillary orders.

6.27 In deciding whether to make a pension adjustment order, the court is required to have regard to the question of whether ‘proper provision’ exists or can be made for the spouses concerned or any of the orders available. In considering what is ‘proper provision’ the court must have regard to all the circumstances. Where such provision can be made without the necessity for a pension adjustment order, no such order should be made.

6.28 In the Consultation Paper, the Commission considered pension adjustment orders as ‘too deep a right’ to be extended to cohabitants. Having received numerous submissions throughout the consultation process, it became clear that a person’s pension can represent a significant portion of the family wealth and in some cases it is the only family asset in existence at the end of a relationship. For example, cohabitants who are in an economically vulnerable position on breakdown of a relationship will not receive redress through a property adjustment order if there is no asset in existence. It must be recognised that pension adjustment orders will only be awarded where proper provision has not been made through other means of ancillary relief.

E Application

6.29 Deciding whether legislative change is needed to address the position of cohabitants on breakdown of their relationship, and if so, what form it should take, raises questions relating to the basis for redress in this area and the extent to which provision should be made for couples who have not opted-in for marriage. As highlighted earlier, the significance of cohabitation as a family form is varied. Although cohabitation increased by 125% between 1996 and 2002, according to Halpin and O’Donoghue, 70% of cohabiting relationships last for at least 2 years and that just over 50% may last for 3 years.²⁶ They calculate the average duration of cohabitation is a little over 2 years, with some 25% lasting for 6 years or more.²⁷ At present, it can be said that cohabitation may not be replacing marriage as a parallel family form in Irish society.

6.30 It can be said that not all cohabiting relationships necessitate an award of financial relief. Casual, short-term relationships without

²⁶ Halpin & O’Donoghue *Cohabitation in Ireland: Evidence from Survey Data* (University of Limerick Working Paper 2004-01).

²⁷ *Ibid.*

interdependence (social, financial and emotional) may not need nor justify protection. The Commission believes, however, that hardship can arise on breakdown of a cohabiting relationship. The availability of ancillary relief, such as property adjustment orders, compensatory maintenance or pension adjustment orders, for qualified cohabitants on the breakdown of their relationship should be based on a model reflecting a safety-net system of redress as opposed to one based on current existing matrimonial legislation.²⁸ The precise parameters of recognition and in particular the quantification of the award should be contingent on the circumstances of the case. This is significant when one considers the nature of cohabitation itself. An order in favour of an applicant will not always be appropriate.

6.31 Having regard to a cohabitant's situation on breakdown of the relationship, the Commission believes there are a number of common factors to be considered. For this reason, a separate model for property adjustment orders, maintenance orders, and pension adjustment orders is not required. Relying on the redress model as a safety-net for cohabitants on breakdown of a relationship, in making an application, a qualified cohabitant must establish that he or she is economically dependent. Once established, the court is to have regard to the following matters in deciding whether or not to make an order:

- i) the rights of any spouse;
- ii) the rights and existence of any children of a previous relationship; or any children of the relationship between the applicant and the deceased or of any children treated by them as children of their family;
- iii) the rights of any ex-spouse;
- iv) the nature of the relationship and duration of the cohabitation;
- v) the size and nature of the estate;
- vi) the financial needs, obligations and responsibilities which the applicant has or is likely to have in the foreseeable future;
- vii) the contributions which the applicant made or is likely to make in the foreseeable future to the welfare of the family, including any

²⁸ See *Family Law Act 1995* and *Family Law (Divorce) Act 1996*. Mee has questioned whether property regimes for marriage and cohabitation should be the same because of the different levels of commitment involved in the two types of relationships. Mee notes that "the 'commitment' involved in some cohabitations can, in terms of practical actions undertaken in reliance on the relationship, be as great as in many cases of marriage. There is, however, another important sense of commitment as the conscious entering into of an arrangement known to carry certain consequences". Mee "Property Rights and Personal Relationships: reflections on reform" (2004) 24 *Legal Studies* 3 at 434.

contribution made to the income, earning capacity, property and financial resources of the deceased and any contribution made by looking after the home or caring for the family;²⁹

- viii) the effect on the earning capacity of the applicant of the familial responsibilities assumed during the period they lived together and in particular the degree to which the future earning capacity of the applicant was impaired by reason of having relinquished or forgone the opportunity of remunerative activity in order to look after the home or care for the family;
- ix) any physical or mental disability of the applicant, and
- x) any other matter, which in the circumstances of the case the court may consider relevant.

6.32 *The Commission recommends qualified cohabitants be allowed make an application for a property adjustment order.*

6.33 *The Commission recommends qualified cohabitants be allowed make an application for an order of compensatory maintenance.*

6.34 *The Commission recommends qualified cohabitants be allowed make an application for a pension adjustment order and pension splitting order where proper provision has not been made through other means of ancillary relief.*

6.35 *The Commission recommends in application to the court for ancillary relief, a qualified cohabitant must establish economic dependency. Once established, the factors referred to above will be taken into consideration by the court. An order will be made where the court considers it just and equitable to do so.*

F Pension Schemes

(I) Consultation Paper Recommendation

6.36 The Commission recommended no change to the current law regarding private sector pensions. The Commission recommended that public service spouses and children schemes should be amended to allow for the payment of a survivor's pension to a financially dependent partner in circumstances where there is no spouse and where a person nominates a cohabiting partner as a beneficiary.

²⁹ In relation to property adjustment orders, the approach taken in the Consultation Paper *Rights and Duties of Cohabitees* (LRC CP 32-2004) focuses on past contributions. Having reviewed criticism on the implementation of the New South Wales model in this context, the Report states that judicial consideration be given to the future needs and means of the parties.

(2) Discussion

6.37 The expansion of pension schemes has had an enormous effect on family finances.³⁰ The savings accumulated in pension schemes can represent a significant portion of family wealth,³¹ often second only to the family home.³² In some cases, the pension is the only family asset in existence at the end of a relationship.

6.38 Pensions may be categorised as follows: (a) a state pension and (b) a privately-funded pension. Problems can arise when cohabitants are denied access to pension funds that are readily extended to widows and widowers in similar situations. The *Pensions Acts 1990-2005* contain an exemption that protects occupational pension schemes which only provide a survivor's pension to married partners. Section 72(3) provides that it shall not constitute a breach of the principle of equal pension entitlement on the marital status or sexual orientation ground to provide more favourable occupational benefits to a deceased member's widow or widower.

(a) Private Sector Schemes and Death Benefits

6.39 Death benefits can be divided into those which arise when the contributory dies in service, and those which arise when the contributory dies in retirement. The rationale for the availability of death benefit is that it ensures that the contributory's spouse and or dependents will not have to rely solely on a social welfare survivor's pension.

6.40 Where a contributory dies in service, a death benefit can be paid by way of lump sum, or by payment of the pension to the spouse or dependents of the deceased. The extent of the benefit will depend on the rules of the particular scheme. Some schemes provide that the lump sum is payable directly to the legal representative of the deceased employee, or to the deceased's spouse, but other schemes establish a discretionary trust, whereby the trustees are given a discretion to pay the lump sum benefit to one or more or a class of beneficiaries, including the spouse, children, relatives, etc, in such proportions as they deem appropriate. The contributory will usually be given the opportunity of completing a letter of wishes or

³⁰ See generally Finucane & Buggy, *Irish Pension Law & Practice* (Oak Tree Press 1996); McLoughlin, *Pensions, Revenue Law and Practice* (Institute of Taxation 2002).

³¹ Pensions constitute property for the purposes of Protocol 1, Article 1 ECHR, and are subject to the Convention's discrimination prohibition.

³² Finucane and Buggy *Irish Pension Law & Practice* (Oak Tree Press 1996). Despite its value, a person's pension was traditionally regarded as non-transferable. There was no way in which the administrators or trustees of a pension scheme could be forced to pay any or all of the pension benefits accrued by the contributory to his or her spouse in the event of the relationship breakdown.

nomination form, indicating who should receive the benefit on his or her death. The nomination form is invariably expressed in a non-binding fashion, leaving the trustees the option of overriding the expressed intention of the contributory, where they feel the circumstances merit it.

6.41 A pension may also provide for the payment of a spouse's or dependent's pension on the death in service of the member. As with the lump sum, the extent of the benefit payable will depend on the rules of the particular scheme. An important distinction between the payment of a lump sum and the payment of a pension is that, while subject to the rules of the scheme, the lump sum can be paid to anyone; the pension may be paid only to a "dependent" as defined by the revenue practice notes. McLoughlin notes that the revenue practice notes define a dependent as: "(1) the lawful spouse of the deceased; (2) the children of the deceased who are under the age of 18; (3) the children of the deceased who are over the age of 18 but who are engaged in full-time education or vocational training; (4) a child of whatever age who is permanently incapacitated; (5) any other person who is wholly or substantially dependent financially on the contributory at the time of death."

6.42 Although some funds do confer benefits on the surviving partners of deceased employees, pension arrangements vary and depend largely on the discretion of fund trustees. The *Social Welfare (Miscellaneous Provisions) Act 2004* implements *Council Directives 2000/43 EC and 2000/78 EC* establishing that where an occupational pension scheme provides benefits for dependents, such provision covers both same-sex and opposite-sex couples.³³ The Commission welcomes this development. Under current Revenue rules, the definition of a dependent may include cohabitants who can establish they were financially dependent on the deceased at the date of death. In such schemes, trustees of individual schemes have a discretion to pay benefits to such financially dependent persons. However, not all schemes provide this. Although this may cause hardship on a cohabitant on death of a partner, the Commission believes such discretion to choose the class of potential beneficiaries should remain within the choice of the private entity. It must be highlighted that the class of beneficiaries not only impacts on cohabitants but other persons who are not included within the individual scheme. The cost implications of imposing mandatory changes to the class of beneficiaries on a private entity could have an enormous affect on the financial running of a business. A private entity does not have the financial support of State and may not survive such a dramatic affect on the individual schemes. For this reason, the Commission believes

³³ Section 22 of *Social Welfare (Miscellaneous Provisions) Act 2004*, which amended the *Pensions Act 1990* by inserting a new Part VII which implements *Council Directives 2000/43 EC and 2000/78 EC*.

no mandatory change be made to the rules to allow the inclusion of dependent cohabitants within the class of potential beneficiaries.

6.43 *The Commission recommends no change to the current law regarding private schemes.*

(b) Public Sector

6.44 Many public service schemes do not allow the payment of benefits to cohabitants even though they may have been dependent on the member at the time of this death. Only legal spouses can receive a survivor's pension under the Public Service Spouses' and Children's Pension Scheme. Although public servants are required to make payments to this fund, surviving cohabiting partners and their children may not benefit. The Government is currently examining the feasibility of implementing four specific recommendations of the Commission on Public Service Pensions in relation to such schemes. The examination is looking at the possibility of modifying the schemes to allow payment of a survivor's pension to a financially dependent partner in certain circumstances and a system for the nomination of partners put in place. The Commission acknowledges that modifying the schemes in this way could have considerable actuarial consequences for the State. However, it must be recognised that cohabitation is not the majority practice of couples in Irish society. According to Halpin and O'Donoghue, 6% of couples cohabit. Moreover, the impact of any actuarial costs on the State must be viewed against the need to respect a person's choice to nominate their partner.

6.45 *The Commission recommends public service spouses and children schemes be amended to allow for the payment of a survivor's pension to a dependent partner where a person nominates a cohabiting partner as a beneficiary.*

CHAPTER 7 PRACTICAL ISSUES

A Introduction

7.01 In this Chapter, the Commission examines some practical and procedural issues relating to reform in this area. Part B points to the positive aspects of mediation for cohabitants on breakdown of their relationship. Part C discusses the time limits within which a qualified cohabitant must make an application to the court for financial relief on termination of the relationship. Part D examines the issue of retrospectivity on the legislative scheme proposed in this Report. Part E discusses the relevance of the *in camera* rule and hearings involving cohabitants.

B Mediation

7.02 Before instituting proceedings for a judicial separation and divorce decree or before defending such proceedings,¹ a family law practitioner must advise their clients to:²

1. discuss reconciliation; and
2. discuss and advise on mediation; and
3. discuss the possible negotiation and conclusion of a separation deed or agreement.³

Litigation can be costly and traumatic for the parties concerned. Couples should be encouraged to resolve the issues privately without resorting to a

¹ No court order is needed to recognise the termination of a cohabiting relationship.

² Sections 5 and 6 of the *Judicial Separation and Family Law Reform Act 1989*; sections 6 and 7 of the *Family Law (Divorce) Act 1996*. As Bergin & Walls note: “The 1989 and the Divorce Act do not simply give suggestions or guidelines as to how they should deal with persons involved in matrimonial disputes. The relevant sections categorically state what a practitioner ‘shall’ (ie must) do before making an application for a decree of judicial separation or divorce as the case may be.” See Bergin & Walls *The Law of Divorce in Ireland* (Jordan Publishing 1997) at 23-27.

³ Shannon *Law Society of Ireland Family Law Manual* (2nd ed Oxford University Press 2003) at 35. For further discussion of what is required by lawyers in this context, see Bergin & Walls *The Law of Divorce in Ireland* (Jordan Publishing Ltd 1997) at 23-26.

decision made by the court. Such legislation aims to respect their autonomy and freedom to negotiate their affairs.

7.03 On breakdown of a relationship, both marital and cohabiting couples are faced with similar problems and issues to resolve. For this reason, the Commission believes that the requirement to discuss the possibility of reconciliation and mediation should be extended to cohabitants to help effect an agreement.

7.04 *The Commission recommends family law practitioners be required to discuss the possibility of reconciliation and mediation on breakdown of a cohabiting relationship.*

C Time Limits

(1) Consultation Paper Recommendation

7.05 The Commission provisionally recommended a limitation period of 1 year from the breakdown of a relationship should apply.

(2) Discussion

7.06 A time limit should aim to allow cohabitants to ‘save’ the relationship or to resolve the issues amicably, while not leaving an unknown and endless period where a claim can be made. Moreover, the Commission believes on breakdown of a relationship, mediation should be viewed as a means of addressing their financial affairs, rather than resorting to litigation. In this way, the cohabitants, themselves, would choose the outcome and avoid the emotional and financial cost that can accompany court proceedings. Having considered the matter further, the Commission concludes that a 2 year period within which application to court for financial relief must be made, would enable the parties to avail of mediation services and resolve the issues without resorting to court proceedings.

7.07 *The Commission recommends applications must be brought within 2 years of break down of the relationship.*

D Procedure and Jurisdiction

7.08 Family law proceedings are generally subject to the *in camera* rule. This principle requires that family law cases proceed in private and are subject to requirements of confidentiality. While this rule has been relaxed in certain respects by section 40 of the *Civil Liability and Courts Act 2004* the *in camera* requirement broadly serves to exclude from family law proceedings any person not directly involved in the proceedings. It further prevents any person from revealing the identity of the parties concerned. While the *in camera rule* applies in all cases involving spouses, and in all

disputes concerning the guardianship, custody and access to children, it does not apply to disputes between cohabitants.

7.09 *The Commission recommends that family law proceedings involving cohabitants be subject to the in camera rule.*

E Retrospectivity

7.10 Retrospectivity is a central issue in legislative reform. For the purposes of this Report, it is necessary to consider whether any proposed legislation would apply in respect of all relationships or only where the relationship began after a set date.⁴ The sentiments of Barron J. are noteworthy in this context. In *O'H v O'H*,⁵ he commented:

“In considering whether a statute should be construed retrospectively, a distinction is to be drawn between applying the new law to past events and taking past events into account. To do the latter is not to apply the Act retrospectively.”⁶

The Commission considers that past events should be taken into account. However, any legislative reform would remain prospective.

7.11 *The Commission recommends that past event be taken into account. The redress model and application to court shall only apply to cohabitants whose relationship has come to an end (whether by death or otherwise) after the commencement of any legislative scheme. Account may be taken of time prior to such commencement in calculating the duration of the cohabitation relationship.*

⁴ The Law Commission for England and Wales *Sharing Homes: A Discussion Paper* (No 278 2002) at 60; Law Society of England and Wales *Cohabitation- The Case for Clear Law* (2002).

⁵ [1990] 2 IR 558.

⁶ *O'H v O'H* [1990] 2 IR 558, 563.

CHAPTER 8 SUMMARY OF FINAL RECOMMENDATIONS

The recommendations in this Report may be summarised as follows:

8.01 The Commission recommends the scope of reform in this area be limited to cohabitants, either opposite-sex or same-sex, who live together in an intimate relationship, but who are not married to each other.

8.02 The Commission recommends the use of a contract model and redress model as the basis for reform in addressing the rights and duties of cohabitants.

8.03 The Commission recommends the undertaking by the Government of a public information campaign with the aim of highlighting the legal distinctions between spouses and cohabitants.

8.04 The Commission recommends defining cohabitants as couples who live together in an intimate relationship, whether they are of the same-sex or opposite-sex.

8.05 In establishing cohabitation, the Commission recommends use of the general term 'living together'. All of the circumstances of the relationship should be taken into account as may be relevant in the particular context. Such factors include:

- the duration of the relationship;
- the nature and extent of common residence;
- whether or not a sexual relationship exists;
- the degree of financial dependence or interdependence;
- any arrangements for financial support between the parties;
- the ownership and acquisition of property;
- the degree of mutual commitment to a shared life;
- the care and support of children;
- the performance of household duties, and
- the reputation and public aspects of the relationship.

8.06 For the purposes of the redress model, the Commission recommends a ‘qualified cohabitant’ is a cohabitant who has been living with his or her partner for a minimum of 3 years.

8.07 The Commission recommends cohabitants, of whom there is a child of the relationship, be eligible under the redress model where they have been living together for 2 years.

8.08 The Commission recommends an existing marriage should not preclude a cohabitant from making an application to court under the redress model. Any rights which an existing or former spouse may have, would, in accordance with Article 41 of the Constitution have to be fully taken into account. The Commission recommends notice of an application by a cohabitant be served on any spouse of a marriage or previous marriage of the parties.

8.09 The Commission recommends cohabitants who have been living together for two years and are not the biological parents or adoptive parents to a child of the relationship, be entitled to apply for relief under the redress model, in circumstances where serious injustice would arise if no right of application were granted.

8.10 The Commission recommends cohabitants should be entitled to apply for relief under the redress model in circumstances where serious injustice would arise if no right of application were granted.

8.11 The Commission recommends the present law be amended to remove uncertainty as to the status and validity of cohabitation contracts.

8.12 For the purposes of clarity and to distinguish agreements dealing with financial matters only from the wider potential scope of cohabitation agreements, the Commission refers to such agreements as ‘cohabitant agreements’ in the *Cohabitants Bill 2006*. The Commission recommends a ‘cohabitant agreement’ should be written, signed and witnessed. Parties should receive separate legal advice before the agreement is signed. An agreement, which does not comply with the suggested safeguards, should not be enforceable. The contract would also be subject to general contract law principles. The courts should be able to set aside the agreement if enforceability would cause serious injustice to one or both of the parties.

8.13 The Commission recommends cohabitants should be encouraged to regulate their relationships by means of co-ownership agreements.

8.14 The Commission recommends cohabitants should be informed of the need to enter into agreements to regulate their financial affairs and the need to prove contrary intention if they do not wish the provisions of the redress model to apply. In conjunction with the public information campaign discussed in Chapter 1, the Commission recommends the FSA should play a role in providing information on such issues.

8.15 The Commission recommends qualified cohabitants be entitled to the same relief as ‘related persons’ for the purposes of stamp duty.

8.16 The Commission recommends qualified cohabitants be placed in Group threshold (1) for the purposes of Capital Acquisitions Tax.

8.17 The Commission recommends same-sex cohabitants be regarded as capable of ‘cohabiting’ for the purposes of social welfare.

8.18 The Commission recommends section 30 of the *Residential Tenancies Act 2004* be amended to include same-sex cohabitants.

8.19 The Commission recommends recognition of opposite-sex cohabitants under the *Domestic Violence Act 1996* be extended to same-sex cohabitants.

8.20 The Commission recommends the residency requirement as it applies to cohabitants under section 2 (1)(ii) of the *Domestic Violence Act 1996* be removed.

8.21 For the purposes of section 2(1)(a) of the *Domestic Violence Act 1996*, the Commission recommends a person should be able to apply for a safety order against a person with whom s/he has a child in common. The Commission also recommends that the category of persons entitled to apply for a safety order be extended to include a dependent child.

8.22 The Commission recommends the residency requirement, under section 3(1)(b) of the *Domestic Violence Act 1996* be removed in cases in which the cohabiting applicant is sole owner or tenant of the property, or where the applicant has an equal or greater share in the property.

8.23 The Commission recommends section 47(9)(1)(c) of the *Civil Liability Act 1961* be amended to include a couple of the same-sex or opposite- sex in an intimate relationship who at the time of death had been living with the deceased for a continuous period of not less than 3 years.

8.24 The Commission recommends consideration be given to include cohabitants within the category of persons with whom a doctor should confer when treating a seriously ill patient, who is unable to communicate or understand.

8.25 The Commission recommends the amendment of the *Powers of Attorney Act 1996* to include qualified cohabitants as mandatory notice parties for the purposes of an enduring power of attorney.

8.26 The Commission recommends a discretionary scheme under the redress model be established whereby a qualified cohabitant can make an application to Court, where the qualified cohabitant feels inadequate or no provision has been for him or her in the deceased’s will or under the rules relating to intestacy.

8.27 The Commission recommends an application by a qualified cohabitant be made on the 'net estate' of the deceased. An existing spouse will retain his or her legal right share and will not be affected by a qualified cohabitant's application under the redress model.

8.28 The Commission recommends a claim pursued by a former spouse be considered by the Court when addressing any entitlement to the estate by a qualified cohabitant.

8.29 The Commission recommends a claim pursued by surviving children must be considered by the Court when addressing any entitlement to the estate by a qualified cohabitant.

8.30 The Commission recommends the Court have regard to the factors listed below in consideration of what provision is reasonable in the circumstances.

- i) the rights of any spouse;
- ii) the rights and existence of any children of a previous relationship; or any children of the relationship between the applicant and the deceased or of any children treated by them as children of their family;
- iii) the rights of any ex-spouse;
- iv) the nature of the relationship and duration of the cohabitation;
- v) the size and nature of the deceased's estate;
- vi) the provision made by the deceased for the applicant during his/her lifetime by property adjustment order/maintenance order or otherwise;
- vii) any benefit received or to be received by the applicant on, or as a result of the deceased's death other than out of his/her net estate'
- viii) the interests of the beneficiaries of the estate;
- ix) the financial needs, obligations and responsibilities which the applicant has or is likely to have in the foreseeable future;
- x) the contributions which the applicant made or is likely to make in the foreseeable future to the welfare of the family including any contribution made to the income, earning capacity, property and financial resources of the deceased and any contribution made by looking after the home or caring for the family;
- xi) the effect on the earning capacity of the applicant of the familial responsibilities assumed during the period they lived together and in particular the degree to which the future earning capacity of the applicant was impaired by reason of having relinquished or

forgone the opportunity of remunerative activity in order to look after the home or care for the family;

- xii) any physical or mental disability of the applicant;
- xiii) any other matter, which in the circumstances of the case the court may consider relevant.

8.31 The Commission recommends Order 79 of the Rules of the Superior Courts 1986 be amended to allow a qualified cohabitant to extract a grant of administration of the estate of the deceased. This power would be subject to the discretion of the Probate Office on the production of such proofs as may be required. The Commission is of the view that a qualified cohabitant be placed above siblings of the deceased in the list of persons entitled to extract the grant.

8.32 The Commission recommends qualified cohabitants be allowed make an application for a property adjustment orders.

8.33 The Commission recommends qualified cohabitants be allowed make an application for an order of compensatory maintenance.

8.34 The Commission recommends qualified cohabitants be allowed make an application for a pension adjustment order and pension splitting order where proper provision has not been made through other means of ancillary relief.

8.35 The Commission recommends in application to the court for ancillary relief, a qualified cohabitant must establish economic dependency. Once established, the following factors will be taken into consideration by the court. An order will be made where the court considers it just and equitable to do so. The factors include:

- i) the rights of any spouse;
- ii) the rights and existence of any children of a previous relationship; or any children of the relationship between the applicant and the deceased or of any children treated by them as children of their family;
- iii) the rights of any ex-spouse;
- iv) the nature of the relationship and duration of the cohabitation;
- v) the size and nature of the estate;
- vi) the financial needs, obligations and responsibilities which the applicant has or is likely to have in the foreseeable future;
- vii) the contributions which the applicant made or is likely to make in the foreseeable future to the welfare of the family including any contribution made to the income, earning capacity, property and

- financial resources of the deceased and any contribution made by looking after the home or caring for the family;
- viii) the effect on the earning capacity of the applicant of the familial responsibilities assumed during the period they lived together and in particular the degree to which the future earning capacity of the applicant was impaired by reason of having relinquished or forgone the opportunity of remunerative activity in order to look after the home or care for the family;
 - ix) any physical or mental disability of the applicant;
 - x) any other matter, which in the circumstances of the case the court may consider relevant.

8.36 The Commission recommends no change to the current law regarding private schemes.

8.37 The Commission recommends public service spouses and children schemes be amended to allow for the payment of a survivor's pension to a dependent partner where a person nominates a cohabiting partner as a beneficiary.

8.38 The Commission recommends family law practitioners be required to discuss the possibility of reconciliation and mediation on breakdown of a cohabiting relationship.

8.39 The Commission recommends applications must be brought within 2 years of breakdown of the relationship.

8.40 The Commission recommends that family law proceedings involving cohabitants be subject to the *in camera* rule.

8.41 The Commission recommends that past event be taken into account. The redress model and application to court shall only apply to cohabitants whose relationship has come to an end (whether by death or otherwise) after the commencement of any legislative scheme. Account may be taken of time prior to such commencement in calculating the duration of the cohabitation relationship.

DRAFT COHABITANTS BILL 2006

