The Law Commission

Consultation Paper No 179 (Overview)

COHABITATION: THE FINANCIAL CONSEQUENCES OF RELATIONSHIP BREAKDOWN

A Consultation Paper (Overview)

The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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This overview consultation paper, completed on 4 May 2006, is circulated for comment and criticism only. It does not represent the final views of the Law Commission.

For those who are interested in a fuller discussion of the law and the Law Commission's proposals, our full consultation paper is accessible from our website (http://www.lawcom.gov.uk/cohabitation.htm), or you can order a hard copy from TSO (http://www.tso.co.uk).

The Law Commission would be grateful for comments on its proposals before 30 September 2006. Comments may be sent either –

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It would be helpful if, where possible, comments sent by post could also be sent on disk or by email to the above address, in any commonly used format.

All responses will be treated as public documents in accordance with the Freedom of Information Act 2000, and may be made available to third parties.

This overview consultation paper is available free of charge on our website at:
http://www.lawcom.gov.uk/cohabitation.htm

THE LAW COMMISSION

COHABITATION: THE FINANCIAL CONSEQUENCES OF RELATIONSHIP BREAKDOWN

CONTENTS

PART 1
INTRODUCTION

WHY WE ARE UNDERTAKING THIS PROJECT

1.1 During the passage of the Civil Partnership Act 2004 through Parliament, members of the House of Lords questioned the lack of legal remedies for couples who live together but either do not marry or (in the case of same-sex couples) register a new civil partnership. They were concerned about the continuing absence of any coherent scheme of remedies to relieve the potential financial hardship suffered by cohabitants on the termination of their relationships. The Minister who at that time had responsibility for the area, Lord Filkin, asked the Law Commission to review the law and to suggest possible reforms.

TERMS OF REFERENCE

1.2 Our formal terms of reference are set out in the Law Commission's Ninth Programme of Law Reform as follows:

> The project will focus on the financial hardship suffered by cohabitants or their children on the termination of the relationship by breakdown or death. It will only consider opposite-sex or same-sex couples in clearly defined relationships. Particular attention will be given to:
>
> (1) Capital provision where there is a dependent child or children;
>
> (2) Capital and income provision on relationship breakdown;
>
> (3) Intestate succession and family provision on death; and
>
> (4) The Inheritance (Provision for Family and Dependants) Act 1975.
>
> The project will also consider the place of cohabitation contracts and the extent to which cohabitants should be free to make and to enforce agreements concerning their respective liabilities to provide and to maintain following separation.

1.3 The terms of reference therefore require us to consider remedies on separation and on death. There is an important difference between the current legal treatment of cohabitants in these two circumstances. When a cohabiting relationship of at least two years' duration is ended by death, the surviving cohabitant currently has access to a specific statutory remedy for financial provision from the estate of the deceased cohabitant. Although the current law does not entirely ignore cohabitants who separate, there is no equivalent scheme specifically designed to provide financial relief between cohabitants whose relationships end by separation. The main focus of this project is therefore on whether a new scheme providing remedies on separation should be introduced.

1.4 It is important to read the paper with this emphasis in mind. When we ask in Part 2 whether reform is necessary and when we discuss the possible adoption of a "new scheme" in this Part and in Part 3, we are considering the position on

separation. We address possible reform of the existing remedies on death separately in Part 5.

THE LAW COMMISSION AND THIS PAPER

1.5 The Law Commission is an independent statutory body which has the duty of keeping the law of England and Wales under review and making proposals for its reform. It does not have power to make changes to the law. That is a matter for Parliament.

1.6 We know that this subject excites strong views. There are those who believe that if couples wish to have the full protection of the law they should contract into the forms of relationship sanctioned by society and the State: marriage or civil partnership. According to this view, to provide remedies for those who choose not to do so is to undermine the importance of marriage (in particular) as the cornerstone around which society is built. Equally, there are those who believe that access to adequate legal remedies to redress unfairness should not depend upon the legal status of a relationship; cohabitants should be put in the same position as spouses and civil partners. There are many whose views fall somewhere between these two positions.

1.7 The issues considered in this paper will not simply go away. Parliament and the Government are keen that the subject is discussed. This consultation process is designed to find out whether consultees think that any new scheme should be created, and if so, to whom it should apply and what remedies it should provide.

1.8 The Law Commission always proceeds by developing provisional proposals that it tests through consultation papers such as this. It is important to emphasise that this is no more than a consultation paper. It asks questions and invites views on a number of provisional proposals. We do not at this stage make any recommendations for reform of the law. We want to receive views from as wide a cross-section of people as possible. This will enable us to decide upon the final set of proposals, and to provide, in our final report, an accurate assessment of reactions to the general principle of providing new remedies for cohabiting couples on separation.

1.9 We are publishing two versions of the consultation paper. This paper is an overview, summarising the main issues under consideration. We are also publishing a longer paper (which we refer to in this document as "the full consultation paper"). This examines the issues in greater detail than we have in this overview and asks some more questions relating to those issues. It also asks further consultation questions on issues not contained in this paper. The full consultation paper is available from our website at http://www.lawcom.gov.uk/cohabitation.htm.

1.10 The consultation process is open to all who wish to participate. It lasts from the date of publication of both this overview paper and the full consultation paper until 30 September 2006. We invite readers to write to us with their views.

1.11 Following consultation, we shall analyse the responses received and consider what specific recommendations we should make. We shall then publish a final report containing an account of the consultation, explaining the policy we are

proposing, and setting out any recommendations for reform. We intend to publish our final report by August 2007.

WHO WILL WE BE CONSIDERING?

1.12 This project concerns what are commonly referred to as "couples", either opposite-sex or same-sex, who live together in intimate relationships.

1.13 Although, as we discuss at paragraph 1.26 and following below, this group does not include all those who may share a home, it still comprises a highly diverse range of relationships. At one extreme there are young couples who move in together to save rent, but who keep their finances entirely separate and have no longer term joint plans. At the other, there are established partners who have lived together for decades, bringing up children and intending to stay together forever. There are many different sorts of relationship in between.

1.14 We recognise that many consultees' views on reform will depend on what type of couple we are talking about. We particularly invite the views of consultees about which relationships should fall within any new scheme.

1.15 It is important to be clear from the outset that we do not consider that all cohabiting couples falling within our terms of reference should have access to remedies merely because their relationship comes to an end. Simply having been in a cohabiting relationship should not be sufficient to give rise to a claim.

1.16 We think that a new scheme should enable those couples who did not wish to be subject to it to be able to "opt out" of it by agreement. The availability of new remedies would in any event need to be controlled by means of two filters:

(1) *Eligibility to apply:* We believe that many consultees will take the view that only some cohabitants should be able to apply for financial relief on separation. This could be achieved by limiting the availability of any new remedies to cohabiting couples who satisfy certain qualifying conditions. The scheme would set out which sorts of couple were eligible and those that fell outside the defined category would be excluded from the scheme. For example, it would be possible to restrict eligibility to those couples who have a child, or to those couples who have lived together for a certain length of time.

(2) *The basis on which awards would be made:* However, just being eligible to apply for financial relief on separation should not automatically mean that the applicant is given anything. As we explain in Part 3, we do not consider that cohabiting couples should be entitled to a share of each other's assets at the end of their relationship irrespective of the extent to which they shared their lives during the relationship. Rather, we think that a new scheme should only provide eligible applicants with a remedy on separation if they can show that the effects of the contributions and associated economic sacrifices they made during the relationship would otherwise be unfairly shared on separation. In many cases, neither party would be able to establish this and no claim would therefore be tenable.

1.17 These two filters would work in tandem. In order to produce a remedy, both (1) and (2) would have to be satisfied with the result that only parties who were

eligible to apply and who proved the necessary contributions or sacrifices could obtain anything by way of financial relief. These issues are discussed in more detail in the following Parts.

1.18 This paper does not seek to provide a definitive answer to the question "which sorts of cohabiting couples should be eligible to apply under any new scheme?" It does, however, set out a possible scheme that could provide a remedy for cohabiting couples on separation. That scheme would, we believe, be capable of being adapted to whichever category of cohabiting relationships Parliament may consider appropriate. We therefore test the scheme against the whole range of cohabitants falling within our terms of reference, present the results that would be produced and invite consultees to give their views.

WHAT WOULD A NEW SCHEME ON SEPARATION TRY TO ACHIEVE?

1.19 As we explain in Part 2, the law that currently applies when a cohabiting couple separates is unsatisfactory. There are specific statutory remedies available in certain limited circumstances. When those do not apply, the general law of contract, property and trusts determines the outcome. In particular, the court has no general power to make orders when cohabitants separate to deal specifically with the financial consequences of relationship breakdown.

1.20 The scheme provisionally proposed in Part 3 would give the court the ability to exercise its discretion to examine the contributions and sacrifices made by each party during the course of the relationship. It would seek to share the benefits and losses created by the relationship and experienced on separation, more fairly between the couple than the current law is able to do.

1.21 We wish to make it clear at the outset that we have provisionally rejected the suggestion made by some commentators that the law applying to married couples in terms of financial relief on divorce should be extended to cohabiting couples on separation. As we explain at paragraphs 3.60 to 3.64 below, we consider that there is a difference between relationships in which the couple have made a public and legal commitment to each other and relationships in which they have not. Consultees are given the opportunity to comment on this view later in the paper.

ISSUES NOT COVERED BY THE PROJECT

1.22 The current project is not a comprehensive review of all the law as it applies to cohabiting couples. It is specifically confined to the financial consequences of the termination of cohabiting relationships, whether by separation or by death. A number of issues are specifically excluded from consideration. As the Law Commission's Ninth Programme of Law Reform makes clear, the project does not concern:

(1) parental responsibility for children;

(2) next of kin rights; or

(3) insolvency, tax and social security.

1.23 The operation of the child support legislation and the role of the Child Support Agency are also outside the scope of this project.

1.24 It is particularly important to emphasise that the Law Commission has not been asked to consider the way that the State generally deals with or recognises cohabitants. As will become clear, we are not proposing the creation of a new status of cohabitant conferring a broad range of rights and privileges. We are concentrating on whether, and if so, on what basis, cohabiting couples should be able to claim financial remedies from each other following the termination of their relationship.

1.25 We will not be able to deal with consultation responses on any issues that fall outside the scope of the project.

GROUPS NOT COVERED BY THE PROJECT

1.26 The Ninth Programme makes clear that the project should not consider all those who live in the same home. It excludes:

(1) relationships between blood relatives or caring relationships; and

(2) commercial relationships (such as landlord and tenant or lodger).

1.27 We are aware that some would argue that the law relating to these other categories of "home-sharers" may also be in need of reform. We express no view on the merits of such arguments. As these groups are outside our terms of reference, we will not deal with them during the course of this project. Arguments for wider changes to the law should not prevent us from considering reform for those within our current remit.

SUMMARY

1.28 The legal treatment of cohabitants is an extremely difficult area. It involves significant questions of social policy and engenders strong responses. It is complex in terms of law and social impact. Broad questions of social policy remain a matter for Parliament. As a law reform body, the Law Commission is best qualified to address any technical deficiencies of the law and to recommend ways in which reform could be effected. We hope that this paper will inform the debate on the public policy questions relating to cohabiting couples and that our consultation will put Parliament in a position to make the necessary decisions about whether (and if so what) reform should take place.

STRUCTURE OF THIS OVERVIEW

1.29 In Part 2, we consider how the law presently works and whether there is a case for reform. In Part 3 we look at the main features of a possible scheme for cohabitants on separation. In Part 4 we put forward examples and see how a new scheme could work in practice. Part 5 considers how reform should be carried forward in relation to remedies on death. Part 6 discusses the extent to which cohabitation contracts should be enforceable and the means whereby couples should be able to opt out of a new statutory scheme on separation. Finally, in Part 7, we address connected procedural issues.

PART 2
IS REFORM NECESSARY?

INTRODUCTION

2.1 We begin with a real-life case.

> *Burns v Burns*[1] involved an unmarried couple. In 1961, they set up home together and in the following year they had a child. In 1963, they moved to a house which was purchased in the name of Mr Burns, and they had a second child. Although Mrs Burns assumed her partner's name and they described themselves to their friends and acquaintances as a married couple, they never married. While the children were young, Mrs Burns was principally responsible for their day-to-day upbringing, and she undertook the domestic duties in the household. As the children got older, Mrs Burns trained initially as an instructor in flower arrangement and then as a driving instructor. It was 1975, however, before she was earning any significant income. The parties' relationship broke down and they separated in 1980.
>
> Mr and Mrs Burns lived together as husband and wife for 19 years. They brought up two children. Yet, when Mrs Burns brought a claim following separation, she discovered that she was in a very weak legal position. Her only possible claim was against the house. As a matter of law, this belonged to Mr Burns who was the legal owner. Mrs Burns argued that she had a share in the house under an "implied trust" (that is, she claimed that she was entitled to a share of the value of the property even though she did not have her name on the deeds). She asserted that her contributions by way of domestic work and looking after the children had a value which should be reflected by a share in the ownership of the house.
>
> The Court of Appeal rejected Mrs Burns' argument. It held that, where a house was purchased in the name of one party alone, the only contributions which could give rise to a share were "direct" financial contributions towards the purchase price (such as payment of a deposit or mortgage instalments). Lord Justice May said, "over a very substantial number of years she may have worked just as hard as the man in maintaining the family in the sense of keeping the house, giving birth to and looking after and helping to bring up the children of the union". But this did not in itself confer on Mrs Burns any share of the house.

2.2 It is now over 20 years since Mrs Burns went to court. However, the law has not changed significantly in the interim, and it is likely that if Mrs Burns' case were heard today, the result would be exactly the same as it was in 1984.

[1] [1984] Ch 317.

THE NUMBER OF COHABITING COUPLES

2.3 The rising number of cohabiting couples has rendered the issue of financial remedies on their separation increasingly important. The Civil Partnership Act 2004 reacted to the needs of some of these couples by providing a registration scheme for same-sex partners for whom marriage is not possible. (Same-sex couples who register a civil partnership acquire almost exactly the same rights and obligations as couples who marry.) However, it did not solve the problems faced by opposite-sex couples who do not marry or same-sex couples who do not register their relationships.

2.4 The following is a summary of the headline statistics. More detailed statistics can be found in Part 2 of the full consultation paper.

2.5 The 2001 Census tells us that:

(1) there are now over two million cohabiting couples in England and Wales;

(2) nearly three-quarters of a million of such couples have a dependent child or children; and

(3) there are over one and a quarter million children dependent on a cohabiting couple.

2.6 These figures indicate a very significant increase in the number of cohabitants over the previous ten years. During that period, the number of cohabiting couples increased by 67%, and the number of cohabiting couple households with a dependent child or children doubled.

2.7 Although the marriage rate has declined, and the divorce rate is high, marriage remains the most popular form of partnership. The 2001 Census records over 10 million married couples in England and Wales with over 7.5 million dependent children. At present, roughly five out of six opposite-sex couples are married.

2.8 The 2001 Census records just under 40,000 same-sex couples cohabiting in England and Wales. It only became possible to register civil partnerships in December 2005, and it is therefore too early to say how many of these relationships are likely to be registered.

2.9 Official statistics and research evidence also suggest that:

(1) there has been an increase in the number of cohabiting couples producing children. In 2004, 42% of births were outside marriage, the majority of which were to cohabiting parents;

(2) cohabiting relationships currently tend to be shorter than marriages, but there has been an increase in the median duration of cohabitation over the last 20 years;

(3) cohabitation is now more commonly adopted for a first relationship than marriage;

(4) it is increasingly common for a couple to cohabit before they marry; and

(5) of those who are not married, divorced people are most likely to be cohabiting.

2.10 The Government Actuary's Department has recently predicted that by 2031 there will be 3.8 million cohabiting couples and fewer than 10 million married couples. On this basis, the proportion of couples cohabiting outside marriage would have risen to one in four from its current level of one in six.

2.11 It is anticipated that the number of children dependent on cohabiting couples will also increase, as will the average age of cohabitants and the average duration of such relationships.

2.12 The fact that an increasing number of couples are cohabiting and look likely to cohabit in the future is not, in itself, a reason to reform the law. However, what the figures indisputably indicate is that cohabitation is an increasingly prevalent social phenomenon, and that the issues to which it gives rise are unlikely to go away.

2.13 It therefore seems to be an appropriate time to ask whether the law, as it deals with financial issues between cohabitants on the termination of their relationships, is fit for its purpose or whether it is in need of reform.

THE CURRENT LAW

2.14 We have set out a detailed description of the current law relating to the termination of cohabiting relationships by separation, and criticisms that have been made of that law, in Parts 3 and 4 of the full consultation paper. We summarise the law briefly here.

2.15 It may help to start by making clear what the law does not do. There is a high level of misconception about the legal status of cohabitants, evidenced by the alarming prevalence of the "common law marriage myth". Fifty-six per cent of respondents to the British Social Attitudes Survey conducted in 2000 believed, wrongly, that English law recognises cohabitants as "common law spouses" once they have lived together for some period of time. This misconception was higher still (59%) among cohabitants themselves.

2.16 There is no such thing as "common law marriage". No matter how long they have lived together, cohabitants are not subject to any coherent family law scheme. This is in sharp contrast to the scheme that gives the courts wide-ranging discretionary powers to adjust the property and finances of married couples (and now also civil partners) on the termination of their relationships. As we explain in Part 5 below, there is a statutory remedy available when cohabitants' relationships are terminated by death, but there is no such remedy available where such a relationship ends by separation.

2.17 However, it is equally wrong to think that the current law does nothing to address the effect of separation upon cohabiting couples. Whilst there are no broad discretionary powers to adjust the parties' assets, a variety of statutory and non-statutory rules may be engaged. When a cohabiting couple separate, the courts are therefore obliged to refer to a patchwork of legal rules to determine what, if anything, is to happen to their property. Accordingly, disputes are resolved by

reference in part to the rules of property law and in part to certain context-specific statutory provisions.

2.18 Before considering these rules, we should mention that there is also a degree of misunderstanding about how property is divided when spouses divorce or civil partners dissolve their civil partnership. Many people think that, as soon as a couple gets married, each party is automatically entitled to 50% of the other party's assets if they divorce. The reality is neither so straightforward nor so easy to predict. After considering a list of factors, a court is able to distribute the parties' property and to order periodical payments according to what is fair in all the circumstances. The result may be equal sharing of the parties' property, but in many cases the outcome will be unequal sharing. The parent who has responsibility for caring for any children of the relationship may receive more than a half share. Conversely, the parties may simply leave their relationship with what they brought into it, particularly where the marriage has been short or childless.

Property law – who owns what?

2.19 Most of the reported cases concerning separating cohabitants consider the ownership of particular items of property. The most important item of property is almost invariably the couple's home. In the absence of a coherent family law scheme for cohabitants, the general law governing the ownership of property has a vital role to play on the separation of a cohabiting couple.

2.20 If a couple purchase a house together, they should be advised by the solicitor who deals with the purchase (and be required by the Land Registry) to execute a document known as a declaration of trust. This will specify the shares in which the house is to be held, and therefore, in the event of its sale on their separation, the shares in which the proceeds are to be divided. Save in rare cases (such as, for example, those involving fraud or duress), a declaration of trust executed by both parties will be regarded as conclusive of their respective shares in the property.

2.21 Where the house is in the name of only one of the cohabitants (for example, because it was purchased before they started to live together), it is highly unlikely that a declaration of trust will have been executed. Nevertheless, the person who is not the legal owner may be able to claim a share in the home by establishing the existence of an "implied trust" (that is, either a "resulting trust" or a "constructive trust") or by the operation of "proprietary estoppel". Implied trusts and proprietary estoppel were created and developed by judges hearing contested cases. They are not contained in any Acts of Parliament.

Resulting trusts

HOW DO THEY ARISE?

2.22 If more than one person makes a financial contribution towards the purchase price of property, the contributing parties will receive shares in that property.

HOW ARE THE SHARES QUANTIFIED?

2.23 The ownership of the property will reflect the parties' financial contributions towards the purchase price ("*pro rata*"). If a house is purchased for £200,000, of which £150,000 is contributed by one partner and £50,000 by the other, then by

application of resulting trust principles they will have respective shares of three-quarters and one-quarter.

Constructive trusts

HOW DO THEY ARISE?

2.24 A constructive trust will arise where the parties have a common intention that the property should be shared, and the party claiming a share in the property has acted to his or her detriment in reliance on that common intention.

2.25 There are two types of constructive trust:

(1) express common intention constructive trusts, arising from an express (though informal) agreement between the parties that the ownership of the property will be shared; and

(2) inferred common intention constructive trusts, which arise when one party has contributed financially towards purchasing the property, and the court infers a common intention to share ownership from that contribution.

HOW ARE THE SHARES QUANTIFIED?

2.26 If the parties expressly agreed to share the property (a type (1) constructive trust), and they also agreed the proportions in which they intended to share the property, a court would give effect to that agreement. However, where the parties did not expressly agree their shares (all type (2) and many type (1) constructive trusts), then the court will decide the parties' shares according to what is "fair". The court has a wide discretion when deciding what is fair and the outcomes of cases are not consistent.

Proprietary estoppel

HOW DOES IT ARISE?

2.27 Proprietary estoppel arises where:

(1) A makes a representation or assurance that B has (or will have) an interest in the property;

(2) B relies on that representation or assurance to his or her detriment; and

(3) A seeks to deny B an interest in the property in a way that would result in unconscionable detriment to B.

HOW IS THE CLAIM QUANTIFIED?

2.28 When proprietary estoppel is established, B has an "equity" (in this context, an entitlement) that can be enforced against A. The court will decide what remedy, if any, is necessary to satisfy this equity. The court has a wide discretion and may decide that B should have a share of the property in accordance with his or her expectation. Alternatively, the court may order that B can live in the property for life or that A must compensate B for the loss B has suffered in reliance on the expectation.

Analysis

2.29 This area of the law is very difficult both to explain and to apply. The outcomes of cases will differ depending on whether the case is decided using resulting trust, constructive trust or proprietary estoppel principles.

2.30 One senior judge recently commented on the general law of property and trusts as it applies to determine cohabitants' disputes on separation. He said:

> To the detached observer it may seem like a witch's brew, into which various esoteric ingredients have been stirred over the years, and in which different ideas bubble to the surface at different times. They include implied trust, constructive trust, resulting trust …, proprietary estoppel, unjust enrichment, and so on. These ideas are likely to mean nothing to laymen, and often little more to the lawyers who use them.[2]

2.31 The current law places particular emphasis on "direct financial contributions" to the acquisition of the property. In the absence of any agreement between the parties, a share is likely to be acquired only on proof of financial contributions by way of payment of a capital sum (such as a deposit) or of mortgage instalments. There are therefore two particularly important limitations which may operate arbitrarily on ascertaining the parties' respective shares:

(1) it is currently uncertain whether, and to what extent, "indirect financial contributions" may lead to the acquisition of a share. If, for example, A pays the household bills, thereby enabling B to pay the mortgage, should this enable A to claim a share in the property being purchased by B?

(2) non-financial contributions (such as caring for the children or looking after the house) will not in themselves give rise to a share, even though such contributions have an economic value, and may involve significant economic sacrifice by the party undertaking them.

2.32 Current property law rules are generally agreed to be highly complicated and uncertain. In addition to the technical difficulties they present, the nature of the evidence required to prove the elements of a claim makes it difficult in practice to predict the likely outcome of cases. Most significantly, the rules lead to outcomes which many people would consider to be unfair.

Existing statutory remedies

2.33 Running alongside the general law of property and trusts are a number of statutory remedies that can be used by cohabitants on separation.

Occupation orders under the Family Law Act 1996

2.34 Part 4 of the Family Law Act 1996 allows the court to make "occupation orders" in relation to the dwelling-house in which the cohabitants live (or have lived, or

[2] Lord Justice Carnwath in *Stack v Dowden* [2005] EWCA Civ 857, [2006] 1 FLR 254, at [75].

intended to live). These are essentially short-term remedies, usually only granted where domestic violence has occurred or is threatened.

Tenancy transfer under the Family Law Act 1996

2.35 If the parties rent their home, rather than own it outright, Schedule 7 to the Family Law Act 1996 may be applicable. This enables the court to transfer residential tenancies from one cohabitant to another when they have ceased to cohabit.

Child Support Acts

2.36 The child support legislation is essentially concerned with the provision of income for a child's maintenance during the child's minority, whether or not the parents ever lived together. The Child Support Agency is charged with the responsibility of ensuring that payments are duly made to the parent with care. The amount payable is calculated by reference to a statutory formula. Liability under the child support legislation is incurred only by the child's legal parents. Step-parents and others with whom the child lives or has lived cannot incur liability for child support.

Capital provision and periodical payments under the Children Act 1989

2.37 Schedule 1 to the Children Act 1989 is concerned with capital provision for a child. It permits the court to make lump sum orders, property transfers and settlements for the benefit of a child against either parent of that child. It can provide children with substantial protection, and thereby indirectly operate to benefit the parent or other person caring for them (typically by preserving the home for a child's occupation, together with their parent or other carer).

2.38 However, Schedule 1 has important restrictions which are consistent with its objective to provide financial relief only for the benefit of children and not for their carers:

(1) save in exceptional circumstances (such as where a child is disabled) the court is restricted to meeting the needs of children during their minority or until they complete their education and cannot require a parent to support or to house able-bodied children into adulthood;

(2) the court is extremely unlikely to make an order for the transfer of capital (such as a house) where that capital will not be exhausted in meeting the needs of children during their minority;

(3) typically, an order will provide that a house is to be held for the children's occupation, with their primary carer, until they reach the age of 18 or until they complete their education on the basis that it will then revert to the parent making the provision. Such indirect benefit as was enjoyed by the parent with primary care will thereupon cease;

(4) the court has no power to order periodical payments for the benefit of children except in those rare cases where the Child Support Agency has no jurisdiction; and

(5) in those rare cases where the court can make a periodical payments order, such an order may include "a carer's allowance". But the court has

no power to award periodical payments for the benefit of a parent in his or her own right, even if that parent is inhibited from taking up employment or re-training owing to child-care responsibilities.

2.39 Schedule 1 to the Children Act 1989 appears to be underused. For example, in 2004, only 1024 applications were recorded by HM Courts Service and only 389 orders made. Of course, many cohabitants do not seek legal advice on their separation, but it is possible that some advisers of a cohabitant who is the primary carer for the couple's child following separation either overlook the potential of Schedule 1 or consider it unsuitable for their client's circumstances.

2.40 It may be, for example, that the restrictions set out above provide a deterrent to the use of Schedule 1. In particular, an order requiring that a home be made available for the occupation of the children until their independence has major disadvantages for the primary carer which make that remedy unappealing. The future prospects for that individual may be very uncertain. When the children reach independence, the primary carer will have to leave that home and find other accommodation. If that parent's earning capacity has been impaired as a result of child-care responsibilities, he or she may find it difficult to obtain a new home. The courts do not currently have the power to grant that parent a share in the capital value of the property in recognition of the economic sacrifices made by that individual for the benefit of the family.

2.41 Moreover, whether any order dealing with the occupation of the family home is feasible will depend on whether the combined resources of the parents are sufficient (1) to preserve the family home (particularly if it is mortgaged) for the children and the primary carer, and (2) to enable the non-resident parent to finance alternative housing for him or herself. Although a solution might be to sell the parties' former home and to re-invest the proceeds in two smaller properties, Schedule 1 does not confer power on the court to make an order for the sale of the home in these (or any) circumstances. Existing remedies designed to benefit the children may therefore, in many cases, not be able to achieve this objective.

Summary of criticisms of the current law

2.42 The patchwork comprising the general law of property and trusts and certain specific statutory provisions has given rise to a set of remedies which has been criticised as illogical, uncertain and unfair. In *Burns v Burns*, one judge said that if Mrs Burns compared the outcome of her case with what would have been the result had the couple married, "I think that she can justifiably say that fate has not been kind to her. In my opinion, however, the remedy for any inequality she may have sustained is a matter for Parliament and not for this court".

2.43 We do not consider that Mrs Burns should be treated by the law as if she were married to Mr Burns, for reasons which we shall explain below. However, we do accept that there is a strong argument that the law should be reformed in order to bring about fairer outcomes for cohabitants on separation.

ARGUMENTS FOR AND AGAINST REFORM

Can reform be justified?

2.44 The law does not generally help those who voluntarily put themselves in a position where they suffer financial hardship unless there was a clear agreement, intention, assurance or some other recognised trigger justifying the provision of a remedy. The fact that financial hardship sometimes arises at the end of a relationship may or may not be unfair. Even if it is unfair, it does not necessarily follow that there must be a legal remedy. Society's response to cases such as that of Mrs Burns could be to acknowledge that there was unfairness, but not to seek to remedy it.

2.45 Such a response would reflect various arguments that can be made against reform:

(1) that it would invade the autonomy of those who have deliberately chosen to cohabit, and not to marry;

(2) that it may encourage couples not to marry and thereby undermine the institution of marriage;

(3) that cohabitation does not itself provide sufficient justification to interfere with the parties' property rights on separation; and

(4) that allowing cohabitants to make claims on separation may result in costly, acrimonious and sometimes speculative litigation.

2.46 We consider these arguments briefly here, and in more detail in Part 5 of the full consultation paper. As we have already explained, it is for Parliament to decide broad questions of social policy, but acknowledgement and understanding of the arguments for and against reform is essential for us to make progress on the work that we have been asked to do.

Would reform undermine autonomy?

2.47 It is contended that adults as autonomous individuals should be allowed to conduct their lives with the minimum of state interference. Those holding such a view might criticise as paternalistic any proposal to amend the law to provide a remedy to those who have chosen not to marry. Couples have the basic right to decide whether or not to marry and whether or not to live together. Why should society not expect cohabitants to take responsibility for their own actions?

2.48 Taking responsibility presupposes an adequate degree of knowledge and awareness of the consequences of one's actions and choices. Concerns about cohabitants' knowledge of the consequences of cohabitation have led the Government to fund the "Living Together Campaign" which aims to draw attention to the differing legal consequences of marriage, civil partnership and cohabitation (see http://www.advicenow.org.uk/go/livingtogether/index.html). Some may argue that educating the public about the lack of legal protection for cohabiting couples will provide individuals with the benefit of an informed choice. They will then understand that if they want the full protection of the law, they should marry or register a civil partnership. If they do not wish to do so, they may regulate their relationship in agreed terms (for example by entering into a cohabitation contract

or by making a declaration of trust). If they decide not to formalise their relationship in any of these ways, that is a matter for them.

2.49 However, we doubt that public education can provide a complete answer to the problems of cohabiting couples. It takes the agreement of both parties to marry or to form a civil partnership, or to agree the terms of a cohabitation contract or a declaration of trust. Even if both parties are aware of the consequences of not formalising their relationship, where one is willing to accept those consequences, there may be nothing that the other can do.

What impact might reform have on marriage and cohabitation?

2.50 Marriage is important. Many people are concerned that to give increased legal recognition to cohabitants might serve to undermine the institution of marriage. They believe that the problems currently experienced by cohabitants on separation would be capable of solution by encouraging such couples to marry (if opposite-sex) or to register civil partnerships (if same-sex). At the same time, they fear that to introduce financial relief between cohabitants on separation might encourage some couples not to marry or register civil partnerships when they would otherwise have done so.

2.51 It is hard to assess what impact the incentive structure created by the current law governing parties' property and finances when relationships end might have on couples' decisions about whether or not to marry. Let us return to the case of Mr and Mrs Burns. From Mrs Burns' perspective, it would have been better if they had got married. It is currently in the interests of someone in the position of Mrs Burns, who is likely to be in the economically weaker position in the event of relationship breakdown, to marry. Marriage offers such individuals financial protection in the event of divorce. Cohabitation is a bad option, because the remedies available on separation at the end of a cohabiting relationship are currently so limited. However, the reverse is true for someone in Mr Burns' position. Marriage presently entails potential liability for such individuals should the relationship break down. Cohabitation does not. In this sense, it appears to be in the interests of someone like Mr Burns, who will be in the economically stronger position in the event of separation, to refuse to marry and insist on cohabitation.

2.52 We do not consider that introducing some degree of financial relief between particular categories of separating cohabiting couples would encourage couples to cohabit rather than marry. First, as we explained at paragraph 1.24, we are not proposing the introduction of a wide-ranging package of rights for all cohabiting couples which would be of clear benefit to both parties. We are considering the provision of access to financial remedies between some cohabitants in limited circumstances. As we explained in Part 1, simply cohabiting would not automatically entitle either party to anything, and the relief that would be granted to those who qualified for it would be more limited in its scope than that available on divorce.

2.53 Secondly, the introduction of some measure of financial relief might reduce a current disincentive to marriage. Individuals in Mr Burns' position would no longer be able to avoid all financial responsibility towards their partners simply by living together rather than getting married.

2.54 In any case, a discussion of marriage and cohabitation in these terms could be said to attach too much weight to law as a factor determining individuals' decisions about their personal relationships. Arguments based on financial incentives created by the law provide only a partial explanation of how people really make decisions about their lives. They assume that we organise our intimate relationships in direct response to the influence of the potential legal consequences of our actions. Evidence suggests that this is not the case. Many couples equate "marriage" with "weddings" and will delay marrying until they can afford their "big day". Research has also found that the behaviour of people in relationships is significantly determined by factors such as their social circumstances, and personal and emotional considerations. This suggests that, regardless of whether any legal reform for cohabitants of the sort that we are proposing were introduced, those couples who currently marry for religious, family or other reasons would continue to do so.

2.55 Finally, it is worth considering how the promotion of marriage can best be achieved. We agree that marriage is an important social institution. But it can be argued that the objective of promoting marriage does not require us to refuse any remedy to individuals in the situation of Mrs Burns. The institution of marriage, and individual marriages, can be supported without perpetuating the financial hardship experienced by some of those whose non-marital relationships end.

Are remedies for cohabitants justifiable?

2.56 Our terms of reference require us to address the financial hardship suffered by cohabitants or their children on the termination of their relationship. It may be asked what is so special about couples living together in intimate relationships that the law should provide them with a remedy. Where parties have formalised their relationship through marriage or civil partnership, they can be taken to have given a clear indication, both publicly and to each other, that they wish to bring their relationship within the law governing those institutions. Where the parties have not formalised their relationship, different justifications must be found for providing relief.

2.57 This is a difficult question, not least because of the diversity of cohabiting relationships to which we referred at paragraph 1.13. Some cohabitants are "fully committed": their relationship may to all outward appearances be the same as that of a married couple, but they have not married, for example, for ideological reasons, or because they are unwilling or unable to incur the perceived expense of a wedding. Other couples' commitment is "contingent"; for example, one or both parties may not view the relationship as necessarily likely to last, or they may be treating cohabitation as a form of trial marriage. Others again may merely be living together as a matter of convenience, with no particular commitment to each other.

2.58 We think that there is a strong case for remedies to be made available between couples who live together with children (we discuss what might be meant by "living together with children" in paragraphs 3.40 to 3.44). There are two main reasons for this.

2.59 First, where couples live together with one or more children in a family they tend to adapt their individual roles within the relationship to provide appropriate support for the children and for each other. The most common example of this is

when one partner gives up full-time paid work to care for a young child in reliance on the other partner's financial contributions to the household. There is evidence that cohabiting parents are likely to adopt money management practices similar to those of many spouses. Where there has been a joint decision by the cohabiting couple to react to the demands of family life in this way, it seems wrong that in the event of the parents' separation the financial "gains" and "losses" should simply lie as they fall.

2.60 Secondly, where there are children, there is a recognisable public interest in their continuing welfare. Separation of a cohabiting couple inevitably impacts on those children who have been part of their parents' shared household. Although Schedule 1 to the Children Act 1989 seeks to protect children whether or not their parents were married, it has important practical limitations. More generally, it can be said that the current law fails to address adequately any financial hardship experienced by the primary carer on separation. This must inevitably affect the quality of life of the children for whom that adult party continues to care.

2.61 It could be argued that the concerns just described extend beyond cohabitants with children to all parents, whether or not they live together. However, we think that there is a particular reason why the law should provide a remedy between cohabiting parents at the end of their relationship. We have explained how couples living together with a child tend to adapt their individual roles. Such adaptations are not just a consequence of parenthood – they are built on the fact that the family is living together as a financially interdependent unit.

2.62 We are therefore provisionally of the view that, where cohabitants have children, there is a strong case that the law should be reformed to provide them with coherent remedies on the termination of their relationship.

2.63 What, then, about cohabiting couples who do not have children? The public interest dimension is not so self-evident in such cases. Where a couple are not raising children together, there is not the same prompt for adjustment of the parties' roles, and any hardship created by the law as it currently applies will only affect the couple themselves. Should society not expect such cohabitants to bear the consequences of any failure to protect their own interests?

2.64 This may be a popular argument. However, consultees may not consider the cases of all childless cohabitants to be undeserving. There might be sympathy for cohabitants without children who have demonstrated their commitment to each other, for example, by living together for a long time. Where cohabitants have merged their assets and become financially interdependent as a result of mutual trust and commitment built up over a long relationship, consultees may feel that a remedy should be available on separation.

2.65 Some consultees might want to go further than this and argue that all couples who live together in an intimate relationship should have access to any new scheme. The basis for such a view could be that (unlike couples who do not live together and other, non-intimate home-sharers) the relationship of cohabiting couples entails a certain emotional intimacy and intensity, often accompanied by the parties sharing a view of their relationship as a joint venture in life. The resulting interdependence which flows from that relationship may justify access to flexible remedies in the event of termination of the relationship.

2.66 However, we anticipate that consultees may be wary of any suggestion that all cohabiting couples without children should be included in any new scheme. We sense that there may be particular disquiet about any suggestion that a scheme should be available to couples who have lived together for a relatively short period. Such concerns might be addressed by restricting eligibility to those who have lived together for a certain length of time.

What would be the practical implications of reform?

2.67 There is one other important concern that we should address: the implications in terms of costs, together with the practical impact, of any reform of the law.

2.68 This project is concerned with remedies between couples who have lived together. It does not touch on the financial interaction of cohabitants and the State, for example, via taxation.

2.69 Some consultees may nevertheless be concerned that any new scheme could give rise to a large number of complicated claims, flooding the courts at a great cost to the taxpayer. We do not think that a new scheme would have to be costly or burdensome in that way.

2.70 The extent to which a new scheme would give rise to claims would depend entirely on its scope. As this paper explains, a new scheme could be set up so as to weed out trivial or malicious claims and only provide remedies where they were really needed. Any new scheme should also be as simple as possible, creating the minimum of costs for the courts and for users.

2.71 The extent to which the costs of the scheme should be borne by the users or the taxpayer is a matter for Government. There is no reason, in theory, why the scheme could not be made self-financing by setting court fees at a level which covered costs. Equally it is not inevitable that the introduction of a new scheme would add to the legal aid bill. It would be up to the Legal Services Commission, bearing in mind the other demands on the legal aid fund, to consider whether, as a matter of policy, applicants and respondents should be eligible for legal aid.

2.72 Finally, it cannot be ignored that the current law creates costs of its own. Litigation about implied trusts and proprietary estoppel are extremely complicated. Cases take up significant amounts of court time and some litigants are currently funded by legal aid.

2.73 We discuss issues of procedure further in Part 7.

CONCLUSION

2.74 The question of whether or not there should be reform for cohabitants, and if so, for which sort of cohabitants, is a complicated one. We believe that there should be some reform of the current law. We feel that there are strong arguments that reform should apply to cohabitants with children. Whether it should also apply to any cohabitants without children is a more difficult question, essentially of social policy, on which we invite consultees' views.

2.75 The rest of this paper discusses a possible scheme of remedies that could be applied on the separation of cohabitants. The scheme has the potential to apply

to all cohabiting couples, but it does not have to do so. In Part 3 we consider the framework of the scheme and how access to its remedies may be controlled (by means of the basis on which awards are to be made and by restricting eligibility to apply for relief). In Part 4 we consider various practical examples in order to illustrate how the scheme could be applied in individual cases.

2.76 This discussion will, we hope, help consultees work through the social policy issues underlying the question of whether there should be reform. However, we emphasise again that whether particular types of cohabitant should be included in the scheme at all and, if so, on what basis, remains an entirely open question. If consultees think that there should be a scheme but are concerned that the law should allow some claims but not others, we would ask them to write to us explaining why they have formed that view and how they would define the types of relationship for which new remedies would be justified.

CONSULTATION

2.77 We consider that, in cases where the couple have children, the current law governing the resolution of cohabitants' financial and property disputes on separation is uncertain and capable of producing unfair outcomes, and that reform for this category of case is justified. We provisionally propose that new statutory remedies should be devised to deal with such cases. Do consultees agree?

2.78 We invite the views of consultees on whether reform may also be warranted in any cases involving cohabitants without children.

PART 3
FINANCIAL RELIEF ON SEPARATION: A PROPOSED NEW SCHEME

INTRODUCTION

3.1 This Part sets out the framework of a possible new scheme of remedies for eligible cohabiting couples whose relationship ends by separation.

3.2 It deals with a number of key questions:

(1) Should the scheme only apply to couples who have specifically "opted in" by some means (such as registration), or should it be automatically available to all eligible couples, subject to the parties exercising a right to opt out?

(2) How should the term "cohabitant" be defined?

(3) Should there be further eligibility requirements and, if so, how should they be framed?

(4) Why shouldn't relevant matrimonial law just be extended to cohabitants?

(5) Should the scheme be based on the application of "fixed" rules or on a "flexible" discretion?

(6) What should be the basis for providing financial relief under a new scheme, and how should awards be calculated?

3.3 In Part 4, we go on to show how the scheme would work by reference to a number of examples.

3.4 This area of law is a complex one, and reform raises a number of technical and theoretical issues. Inevitably, a paper of this length and nature can only deal with the issues at a fairly general level and there are a number of matters that we do not examine here. Readers wishing to read a fuller discussion of the material addressed in this Part should refer to the full consultation paper.

3.5 We ask a number of consultation questions throughout this Part. Consultees will appreciate that a number of the issues they raise are interrelated, and may therefore wish to read the whole Part before answering any of them.

OPT-IN OR OPT-OUT?

3.6 If Parliament were to decide as a matter of social policy that it wished to introduce laws enabling the courts to make orders for financial relief between cohabitants on separation, there are essentially two types of scheme that could be adopted:

(1) A scheme under which couples could sign up to a new set of remedies. Remedies would only be available between those who had expressly consented to the application of the scheme. We call this an "opt-in scheme".

(2) A scheme providing a set of remedies that could be invoked by those cohabitants who were "eligible" under the scheme, but which would not apply if and to the extent that the parties had made their own arrangements or had agreed that they would opt out of it. We call this an "opt-out scheme".

Opt-in schemes

3.7 Opt-in schemes are usually dependent on the parties having formally registered their relationship. There is much to be said in favour of opt-in schemes. They provide certainty, in that it is immediately clear who falls within the scheme and who falls outside it. They enable couples to decide for themselves whether or not they want to be subject to the scheme. They allow couples to retain their autonomy. There is no risk of legal regulation being imposed on the parties against their wishes.

3.8 However, we do not consider an opt-in scheme to be the best mechanism to alleviate the hardship faced by cohabiting couples in the very cases where assistance is most needed. Economically vulnerable individuals who did not opt in would fail to gain protection.

Opt-out schemes

3.9 We consider that the better approach would be for eligible cohabitants to be automatically entitled to apply for remedies under the scheme, without having had to opt in beforehand. This would ensure (by contrast with an opt-in scheme) that proper protection was available to those individuals most likely to require financial relief on separation. Inactivity or inertia would not leave the more vulnerable party unprotected in the event of separation.

3.10 In formulating a scheme of this sort it would be necessary to establish:

(1) which cohabitants should be "eligible" and so fall within the scope of the scheme. We consider this further below; and

(2) whether it ought to be possible for couples who did not want their relationship to be subject to the scheme to avoid it by agreement.

3.11 In answer to the second point, a scheme that applied to all eligible couples without providing any opportunity to opt out would fail to respect the autonomy of the individuals involved. If couples had no opportunity to opt out, then those who did not want to be subject to the scheme would have no way of making a binding agreement to that effect. There are many reasons why couples might want to be able to make such agreements about their finances and property and so prevent either party later applying to court. For instance, the cohabitants might each have children by previous relationships and wish to ensure that their property is preserved for the ultimate benefit of those children, rather than be subject to a possible claim by their partner. We therefore prefer a scheme which is available by default to eligible cohabitants, but which allows couples who do not wish their relationship to have the financial implications we are contemplating to opt out of the scheme.

3.12 While provision of a right to opt out is important to preserve the parties' freedom, any opt-out must be subject to proper safeguards in order to ensure that it is not abused. We discuss such safeguards further in Part 6 below.

3.13 We provisionally reject the view that any new remedies providing financial relief on separation should attach to a new legal status to which cohabiting couples can "opt in" by registration. Do consultees agree?

3.14 We provisionally propose that any new statutory scheme providing financial relief on separation should be available only between "eligible cohabitants", unless the parties have agreed that neither shall apply for those remedies by way of an "opt-out agreement". Do consultees agree?

DEFINING "COHABITANTS" FOR THE PURPOSES OF A NEW SCHEME

3.15 Any new scheme would have to deal with the fundamental question of how to define a cohabitant. Only couples in an intimate relationship fall within the scope of this project, and we have commented in Part 1 on the wide range of people who potentially fall within that category. We have also explained in Part 2 that we do not think that all cohabitants falling within our terms of reference should necessarily have access to a remedy under any new scheme. Before discussing how any such restrictions might operate, this section considers the basic definition of "cohabitant".

3.16 Whatever definition is preferred, opposite-sex and same-sex couples must be subject to the same regime. Most existing legislation applying to cohabitants now includes same-sex couples, following developments in the law concerning discrimination on grounds of sexual orientation. All couples are now able either to formalise their relationship in marriage (opposite-sex) or civil partnership (same-sex). Those that do not are recognised by relevant legislation as cohabitants, irrespective of whether they are opposite- or same-sex. In this project, when we refer to cohabitants, we therefore refer to both opposite-sex and same-sex couples.

Basic elements of the definition

3.17 As the full consultation paper explains, aspects of English law have applied to cohabitants in various contexts for many years. However, no consistent legal definition of cohabitation has been developed.

3.18 One current definition of cohabitant is contained in section 1(3) of the Fatal Accidents Act 1976, which permits a claim for compensation to be made in respect of a death unlawfully caused by a third party. Such a claim may be made by any person who:

(1) was living with the deceased in the same household immediately before the date of the death;

(2) had been living with the deceased in the same household for at least two years before that date; and

(3) was living during the whole of that period as the husband or wife or civil partner of the deceased.

3.19 There are three components to this definition: a shared household ("living … in the same household"), a minimum duration requirement ("living … for at least two years"), and a marriage analogy ("living … as the husband or wife or civil partner of the deceased"). For the moment, we shall concentrate on the first and the third components. We shall return to the minimum duration requirement, and other means of limiting eligibility, at paragraphs 3.37 to 3.54 below.

Marriage analogy

3.20 It is very common for legislation to require that the couple live together "as if" they were husband and wife as a condition of eligibility for whatever that legislation provides. (Since the Civil Partnership Act, a civil partnership analogy has been added to cater for same-sex couples.) It is therefore something with which courts are familiar, but there are two possible objections to its use.

3.21 First, some couples who have deliberately chosen not to marry for social or ideological reasons consider the marriage analogy inappropriate. It could be said that the definition does rather miss the point that the couple have not married, despite being free to do so.

3.22 Secondly, there is some evidence that use of the analogy may be in part responsible for fostering the common law marriage myth (see paragraph 2.15 above). If people who live together outside marriage are sometimes viewed as "living as if they are husband and wife", then it is not entirely surprising that they may believe, albeit erroneously, that they are treated as spouses for all legal purposes.

3.23 It may therefore be preferable to use some other expression to describe cohabitants. For example, "cohabiting couple" might be felt to be adequate. Other recent legislation defines a couple as "two people (whether of opposite sexes or the same sex) living as partners in an enduring family relationship".

3.24 We invite the views of consultees on whether any legislative definition of those eligible to apply as cohabitants for financial relief on separation should be expressed by analogy to marriage and civil partnership, or in other terms.

Shared household

3.25 The phrase "cohabiting couple" suggests a couple who live together. One obvious requirement for eligibility under a new scheme is that a couple must have shared a joint household.

3.26 The concept of a household is well known to the law. A household is different from a house. A house may be shared, but the people within it might operate entirely separate households. What matters for the purposes of identifying a household is the degree of domestic interaction between the parties.

3.27 In our view, a shared household requirement is, for the most part, a relatively easy test to apply. There would be some borderline cases where a close evaluation of the facts would be necessary, but borderline cases would exist whatever test were used.

Identifying couples with shared households

3.28 In determining whether the parties were living together as a couple and sharing a joint household we consider that it might be useful to have a checklist of factors for the court to take into account. Such checklists have been devised by judges from time to time when asking themselves whether two persons are cohabiting, and it might be useful for statute to provide one. Not all features would need to be present for the couple to be eligible, but a checklist might assist the court, and the parties, in deciding on which side of the line their relationship fell.

3.29 An example of a checklist is that used by the Department for Work and Pensions in deciding whether couples are "living together as husband and wife" for social security purposes. This considers:

(1) whether the parties are members of the same household;

(2) the stability of the relationship;

(3) whether and to what extent the parties are financially interdependent;

(4) whether the parties have a sexual relationship;

(5) whether there are any children of the relationship; and

(6) whether the parties are acknowledged publicly as husband and wife.

3.30 We provisionally propose that any legislative definition of those eligible to apply should expressly require that the parties shared a joint household. Do consultees agree?

3.31 We provisionally propose that any legislative definition of those eligible to apply should include an express, non-exhaustive checklist of factors to which the court would have regard in determining whether a couple were cohabiting. Do consultees agree?

3.32 We invite the views of consultees on the factors that they consider should be included in such a statutory checklist.

Further eligibility requirements to filter claims

3.33 We have just discussed the basic eligibility requirement: the definition of cohabitant. But as we explained in Part 2, a new scheme could be set up in such a way as to minimise the chances of applications being brought by cohabitants considered undeserving of a remedy by using a number of filters. The basic definition could be supplemented by further requirements designed to act as filters. For example, the law could apply only to couples who had had a child together or, as in the Fatal Accidents Act definition quoted at paragraph 3.18, who had lived together for a specified period of time.

3.34 Before we consider those eligibility conditions in more detail, we must refer to one other crucial aspect of the operation of any new scheme: the principles that would provide a basis for the remedies. These principles would provide a further filter to screen out undeserving claims: even if they had been living in an eligible relationship with the respondent, applicants who could not demonstrate that they

satisfied the preconditions necessary for a remedy to be provided would not receive anything.

3.35 Inevitably, the choice of appropriate eligibility requirements is very closely related to the basis on which remedies would be granted. One type of scheme might be suitable for a narrow range of cohabitants; another scheme might be suitable for a rather wider range of cohabitants.

3.36 It is important to bear this in mind when reading the discussion that follows. Readers may wish to revisit this section once they have finished this Part and seen the shape of the scheme that we are provisionally proposing. There will be an opportunity to test views about eligibility requirements when we explore a series of factual examples in Part 4.

Commitment

3.37 Some people say that they think there should be remedies for cohabitants only when they have demonstrated "commitment" to each other. This could be seen, to some extent, to mirror the remedy on divorce or dissolution, which can in part be justified by the mutual commitment implicit in the couple's entry into marriage or civil partnership.

3.38 However, in the absence of any formal mutual declaration, commitment is very difficult to measure. Whilst it might be desirable to ensure that only individuals who had been in a committed relationship could claim a remedy under a new scheme, it would not be practical to introduce a subjective test such as "was this couple committed?" in order to decide who was eligible and who was not. We must therefore look for evidence of commitment.

3.39 We see two possible proxies for evidence of commitment: the presence of children and the fact that a relationship has endured for a certain length of time.

COHABITANTS WITH CHILDREN

3.40 We discussed in Part 2 a number of arguments in favour of providing a remedy to cohabitants with children: principally, that they should share the economic burden created by parenthood, and that the current lack of remedies for the primary carer may indirectly disadvantage the children living with that parent. In our view the presence of that child should in itself be enough to make a cohabitant eligible under a new scheme irrespective of the length of the parties' cohabitation.

3.41 If having children were a key requirement of eligibility to make a claim for financial relief, it would be necessary to be clear which children should count for this purpose.

3.42 In our view, where the cohabitants are the parents of the child as a matter of law (this includes, for example, couples who have adopted a child) they should be automatically eligible to apply under a new scheme. This should remain the case even if at the time of separation:

(1) the child had not yet been born; or

(2) the child had reached adulthood or had left home.

3.43 In the first case, the earning capacity of the parent who will primarily be caring for the child might be restricted as a result of future child-care responsibilities. In the second case, the child no longer requires the care of either parent, but whichever parent had been the primary carer may, for example, have decreased his or her future earning capacity and pension entitlement as a result of having given up full-time paid employment in order to care for the child and look after the home. The fact that such individuals are no longer caring for their children does not alter the fact that their unpaid work for the family may have worsened their financial position at the point of separation. In both cases, it seems appropriate that such individuals should be eligible to apply for financial relief under a new scheme.

3.44 More difficult are cases involving other "children of the family", that is to say, children who are not the children of both parties, but who have been raised by the couple together as if they were. For example, one party might have a child from a previous relationship. It might be desirable to allow claims for financial relief in relation to the economic consequences for the cohabitants of the care provided for such children. But it is a separate question whether the presence of such children should mean that the couple instantly become eligible to apply under a new scheme in the event of separation, however short the relationship may have been.

MINIMUM DURATION REQUIREMENT

3.45 As we have seen, some existing statutes include a minimum duration requirement as part of their eligibility conditions. Some do not. For instance, application for an order transferring a residential tenancy between cohabitants who have separated (under Schedule 7 to the Family Law Act 1996) may be made whatever the length of the relationship. This is also the case in relation to remedies for domestic violence, means-testing for welfare benefits, calculation of child support and succession to certain tenancies on death.

3.46 As we have just explained, where the cohabitants are the parents of a child (and perhaps where they have raised other children together), there would be no need also to impose a minimum duration requirement. We use the expression "cohabitants without children" below to refer to whichever cases would not be automatically eligible by virtue of the presence of relevant children.

3.47 Where there is not a child, some consultees may consider that no remedy is appropriate in any circumstances. Others may think that cohabitants should be eligible to apply for a remedy on separation only if they lived together for a certain period of time. The scheme could reflect this by including a further eligibility requirement for couples without children: that the parties' cohabitation must have been of a specified minimum duration.

3.48 A minimum duration requirement for couples without children would have at least two functions:

(1) at the level of principle, to isolate those cases which might be thought to merit access to a particular type of remedy; and

(2) at the level of pragmatism, to bar large numbers of (potentially less deserving) cases from coming to court at all.

3.49 It can be argued that whether a minimum duration requirement is necessary depends on the basis on which any financial relief would be granted. We shall consider below whether or not a minimum duration requirement might be considered necessary, as a matter of principle, for the specific scheme that we are provisionally proposing.

3.50 But in pragmatic terms, although a minimum duration rule might seem arbitrary (and attract litigation in marginal cases about the dates on which the relationship commenced and ended) it might provide a useful, clear-cut mechanism for barring trivial or unmeritorious claims. The claims of those who were not eligible under the scheme would continue to be decided under the general law, described in Part 2.

3.51 If a minimum duration requirement were to be imposed, it would be necessary to decide upon the appropriate period, the relevance of any breaks in the continuity of cohabitation, and whether there may be circumstances (other than those already considered in relation to children) in which such a requirement should not apply. These issues are discussed in more detail in the full consultation paper.

3.52 We consider that cohabitants who are by law the parents of a child born before, during or following their cohabitation ought to be automatically eligible to apply for remedies under any new scheme on separation. Do consultees agree?

3.53 We invite the views of consultees on whether cohabitants with a child, who is not the child by law of both parties ought to be eligible regardless of the length of their relationship and, if so, in what circumstances.

3.54 We invite the views of consultees on:

(1) whether parties who do not have a relevant child should have lived together as cohabitants for a specified minimum duration before they are eligible to apply for financial relief on separation ("a minimum duration requirement");

(2) how any such minimum duration requirement should be selected; and

(3) how long any such minimum duration requirement should be.

FINANCIAL RELIEF UNDER A NEW SCHEME: INTRODUCTION

3.55 Eligibility to apply is only the first stage of the filtering process. The right to bring a claim is not by any means a guarantee that a court would make any order.

3.56 We now turn our attention to the basis on which the court would decide what, if any, remedy to grant between couples who were eligible to apply for financial relief. The principles discussed below would require applicants to demonstrate that certain economic consequences had flowed from their cohabitation, as a result of which some remedy should be granted. As we have explained, these principles would provide a second filter to limit the cases in which claims could successfully be made.

3.57 We also discuss below a possible third filter, which would require the court to consider whether the unfairness identified by the applicant's claim was sufficiently serious to merit an award.

3.58 Although much of the discussion which follows uses expressions such as "applicant" and "respondent" and talks about what a court would do in a given case, we do not consider that it should or would be necessary for cohabitants to resolve their financial disputes on separation by means of contested litigation. We would hope that the majority of cases could be settled by private negotiation, with the assistance, where appropriate, of mediation or some other method of dispute resolution.

3.59 Before we discuss a number of possible bases for claims, we need first to address a specific suggestion for reform in this area.

Why shouldn't matrimonial law be extended to cohabitants?

3.60 We are aware that a number of commentators argue that Part II of the Matrimonial Causes Act 1973 (the law of "ancillary relief"), which applies to spouses and civil partners on the dissolution of their relationships, should simply be extended so as to apply to those cohabiting couples who satisfy certain eligibility requirements.

3.61 Such a reform would follow the example of other jurisdictions (such as New Zealand and certain Australian states) which have responded to the problems faced by cohabitants on separation by extending all or part of the scheme applicable to spouses on divorce to qualifying cohabiting relationships. It would have the advantages that the judges would already be familiar with the practical operation of the legislation and that they would be assisted by current practice in ancillary relief in deciding upon appropriate outcomes.

3.62 However, there are difficulties with such an approach:

(1) it is legitimate to ask whether the principles applicable to divorcing spouses should apply to relationships where parties have made no positive decision to opt in to that specific scheme of protection; and

(2) it might be argued that to subject divorcing spouses and separating cohabitants to the same legal regime does not pay sufficient respect to marriage as an institution.

3.63 But perhaps the most important question for us to address here is whether the Matrimonial Causes Act 1973 regime is appropriate in relation to cohabiting couples. The idea of marriage as an "equal partnership" often, though by no means always, results in courts ordering an equal sharing of assets on divorce, particularly after a long marriage. The divorce jurisdiction also places considerable emphasis on the parties' "needs", which in many cases will justify an unequal division of the assets. As we explain below, we do not currently believe that "need" is in itself an appropriate basis for financial relief between cohabitants on separation. Nor do we consider that a partnership approach would be suitable for cohabitants. If this is right, it would be better to devise a separate set of principles specifically for couples who have not undertaken the commitment of marriage.

3.64 We provisionally reject the view that the substantive law governing financial relief between spouses on divorce (Part II of the Matrimonial Causes Act 1973) should be extended to cohabitants on separation. Do consultees agree?

3.65 However, whether or not it would be appropriate to apply the substantive law of ancillary relief to cohabiting couples on separation, there is a strong case for putting the types of orders available on divorce at the disposal of a court providing financial relief between cohabitants. Many of these orders (such as property adjustment orders, orders for sale, and lump sum orders) are relatively standard means of enforcing liability in the courts. Giving the court power to make similar orders when dealing with cohabitants would meet one of the major criticisms of the general law as it applies to cohabitants, namely the restricted range of remedies that the courts currently have at their disposal.

3.66 We provisionally propose that in granting financial relief to cohabitants on separation, the courts should have available to them the following menu of orders:

(1) periodical payments, secured and unsecured;

(2) lump sum payments, including by instalment;

(3) property adjustment;

(4) property settlement;

(5) orders for sale;

(6) pension sharing; and

(7) interim payments ordered on account pending a full trial or final settlement.

Do consultees agree?

Fixed rules or flexible discretion?

3.67 Before we look further at the specific basis on which we think remedies should be available between cohabitants, we need to explain in general terms the way in which we consider that such cases should be approached.

3.68 Any reform of the law in this area should seek to achieve a balance between fairness and certainty. Mechanisms for the award of financial relief can be placed between the two extremes of fixed rules (providing certainty) and flexible discretion (providing fairness).

3.69 Certainty of outcome is important not only for those who litigate their disputes but also for the far larger numbers of couples who seek to settle their cases privately. Lack of clarity and unpredictability of outcome makes the task of legal advisers difficult and the burden on those who do not engage such advisers particularly heavy. It makes it more likely that lawyers will be instructed (resulting in costs being incurred), and that parties with undeserving claims may nevertheless "have a go" in an attempt to obtain something rather than nothing.

3.70 This may make a system based on fixed rules appear attractive. However, the certainty which a rule-based system confers may come at significant cost:

(1) If the rules attempt to deal with the full variety of circumstances to which they might have to be applied, they are likely to become too complicated. Not only will this render them considerably less transparent, they may also attract a high rate of error in their application.

(2) If the rules are too simple, although they will in consequence be readily comprehensible to non-lawyers, they are likely to lead to unfairness in those individual cases that depart from the norm on which the rule was based.

(3) Unless it were complex, a rule-based system could not operate as effectively as a “filter” on unmeritorious claims: any eligible relationship would attract financial relief in accordance with the rule, and so the eligibility criteria would have to do most of the work in excluding cases for which the outcome prescribed by the rule would be considered inappropriate.

3.71 We consider the choice between rules and discretion to be a relatively easy one. With the exception of the child support system, English family law tends to adopt discretionary rather than rule-based schemes. In particular, our system of financial relief on divorce is based on a statutory discretion, rather than more rigid regimes of "community of property" such as those found in many other European jurisdictions. The fact that there is no such system for spouses may suggest that a system of fixed shares would be even less appropriate for cohabitants. Discretion brings with it a greater capacity to accommodate the facts of individual cases. This has the additional, important, advantage that it makes the mere fact that the applicant is eligible to apply less significant in determining the outcome of the case than it would otherwise be.

3.72 Excessive reliance on discretion may be open to criticism on the grounds that it necessarily entails a loss of certainty. However, the uncertainty associated with discretion can be limited by underpinning the exercise of the judge's discretion with a firm foundation of principles, expressly stated on the face of the legislation creating a new scheme.

3.73 The governing principles should be transparent and readily comprehensible in order to promote greater certainty of outcome. This is necessary if the law is to be sufficiently clear to help parties to reach their own agreements regarding the division of property on separation without the need for litigation or legal advice. This is also necessary to prevent risk-averse applicants being driven to accept unfairly low settlements and, conversely, to prevent undeserving claims succeeding because risk-averse respondents cannot be sure that it is prudent to defend the claim.

3.74 The governing principles of a new scheme should indicate clearly what it is that the courts are being expected to achieve by the exercise of judicial discretion in each case. They should provide both:

(1) a rational justification for the grant of relief; and

(2) a guide to the quantification and nature of relief to be granted.

3.75 We provisionally reject the view that any new scheme should take effect by reference to fixed rules for property division. Instead, we provisionally propose that the courts should exercise a discretion structured by principles which determine the basis on which relief, if any, is to be granted on separation. Do consultees agree?

POSSIBLE BASES FOR A CLAIM UNDER THE SCHEME

3.76 There are several sorts of scheme that could be adopted, based on a variety of principles. Many of the options are reflected in the schemes adopted by other jurisdictions for cohabitants, and in suggestions made by commentators. One approach would be for applicants to prove that they were in need and that their partner could afford to provide for them. Another approach would be to assume that once cohabitants had proved their eligibility to make a claim, any assets that were the "fruits" of the couple's partnership should be divided equally between the parties on separation. A third would base an award on an examination of the economic advantages and disadvantages affecting each party on separation as a result of the contributions that they had made to the relationship.

A scheme making awards based exclusively on the parties' needs

3.77 Dealing with the parties' needs at the end of a relationship is clearly an important pragmatic motivation of the court when it considers what relief is appropriate on divorce. "Needs" can be understood objectively: we all have basic needs. But the divorce courts also use the concept of "need" relative to the standard of living enjoyed by the spouses during the marriage. Whether or not that should be the case as between divorcing spouses, we question whether need should itself, in either sense, form the basis of a new scheme for financial relief between separating cohabitants.

3.78 Where parties are married, the formal commitment that they have entered into may be taken as good evidence that they have assumed mutual responsibilities to support each other in case of need. They are subject to legal duties to support each other during marriage, and it may often be justifiable to extend this beyond the end of their relationship in the form of needs-based remedies on separation.

3.79 Cohabitants currently have no legal obligation of mutual support either during or after their relationship. Even in long relationships, there may be no clear basis for concluding that the parties have assumed that sort of responsibility towards each other. For example, one party might be "in need" as a result of long-term illness, or simply as a result of being unemployed. Whether or not a spouse might be required to support the other following divorce in such circumstances, we consider that it is hard to justify needs-based liability of that sort between cohabitants on separation. The mere fact that one cohabitant is in financial need at the end of the relationship, whatever the cause of that need may be, does not justify requiring the other party to alleviate that need.

Equal division of "partnership" assets

3.80 There might appear to be considerable merit in an approach which quantifies financial relief by simply dividing all of the parties' assets, or some distinct part of

them (such as assets acquired during the course of the relationship). The scheme could provide for equal shares, or the size of the shares might depend on the length of the relationship. For the purposes of this discussion we focus on equal sharing. This sort of approach avoids the necessity, inherent in some other schemes, to seek to place a specific value on the parties' various contributions to their relationship, and to share the property accordingly.

3.81 We have already rejected the adoption of fixed rules for property division, so any partnership approach would have to take effect as a principle guiding the court's discretion. However, we are concerned that this sort of principle, even as a starting point which could be departed from where the facts of particular cases merited it, would not provide a suitable basis for a new scheme for cohabitants. The idea of partnership is adopted by the courts as part of their reasoning in determining some claims for ancillary relief on divorce (as we described at paragraph 2.18). However, even in divorce cases there is no presumption that spouses' property should be divided equally. The fact that there is no such presumption for spouses may suggest that it would be even less appropriate to have such a presumption for cohabitants.

3.82 Cohabiting relationships are so varied that, even if such a principle were confined to couples with children or relationships that had lasted for a long period of time, a principle of equal sharing might be inappropriate for many apparently eligible relationships. We have already noted the difficulties inherent in defining cohabiting relationships. A scheme based on equal division of partnership assets would have to rely heavily on the ability of the eligibility criteria to screen out cases for which such an outcome would seem unsuitable. If, in seeking to exclude the undeserving, a minimum duration requirement were set too high, many cases in which a remedy of some sort was thought to be merited might be excluded.

3.83 If equal sharing were adopted as a starting point or "presumption" that could be departed from in individual cases where it was not considered appropriate, we would then need to address two further issues. When would equal sharing not be suitable? And on what alternative basis should property be divided or any financial provision ordered in such cases? The first question could be rather difficult to answer and the outcome of any inquiry on that point uncertain. It would seem preferable to have one basis on which to decide all cases. The second question itself indicates a need to resort to other principles to decide such cases, and it may be that those principles would be better for cohabitants than a partnership approach in any event.

3.84 So, although on the face of it a partnership approach appears clear and easy to apply, we are concerned that it might not be suited to large numbers of cohabitants. We do not consider that it can provide a satisfactory basis, certainly on its own, for financial relief between cohabitants on separation.

Our preferred approach: a scheme based on contributions and sacrifices

3.85 We consider that claims between cohabitants should only be possible where applicants can establish that the economic effects of their contributions to the relationship, including the sacrifices entailed in making them, have not been fairly distributed between the parties on separation.

3.86 In the discussion that follows, we identify more precisely the circumstances in which we think such a claim should be possible. In the next Part, we work through some practical examples of cases showing how these principles might be applied. The following is very much an outline sketch of the operation of these concepts; those wishing to read an in-depth examination of the principles and their operation should refer to the full consultation paper.

Contributions

3.87 As we have seen, the current law of implied trusts focuses principally on direct financial contributions to the acquisition of property. For the purposes of a new scheme, we would define "contributions" widely, to include both financial and non-financial contributions to the couple's shared life.

3.88 However, simply to identify the parties' various contributions does not take us very far, since those contributions would have to be valued and translated into an award of financial relief. In some cases, this might be straightforward: where the parties had made financial contributions of equal value, an equal split of the assets on separation might seem to be the obvious result. But in other cases, particularly where there had been a mix of financial and non-financial contributions, matters are less straightforward. Particularly where the couple have children, one party might have made large financial contributions, supporting the family and paying the mortgage, while the other made substantial non-financial contributions, for example by looking after the children and the home. It is difficult to compare and value these two very different types of contribution in a way that could readily translate into an award of financial relief on separation.

3.89 Financial contributions have an obvious economic value. Non-financial contributions may also have a substantial economic value, but it is rather more difficult to settle on an appropriate way of valuing them for these purposes. For example, should the applicant be credited with the equivalent of what a live-in nanny or housekeeper would have been paid? Even though it may be possible to value the applicant's contribution in that way, this approach might be considered demeaning of that individual's important role within the family. It might generate acrimonious disputes about the quality of the work supplied, a matter on which we doubt the courts would find it easy to adjudicate. Questions might also arise about whether the party receiving the benefit would in fact have paid for it had it not been freely available from the applicant. Perhaps most importantly, this approach would neglect the other aspect of those non-financial contributions: the potentially substantial economic sacrifice suffered as a result of making them, for example in terms of the reduced earning capacity of a parent out of paid employment for several years.

3.90 It would also be highly undesirable for the law to encourage competition between the parties, each attempting to obtain a larger share of the assets than the other on separation by seeking to demonstrate (in exhaustive, itemised detail) that, on balance, they had made more contributions than the other over many years of a long relationship. This sort of inquiry would, in our view, be a grossly disproportionate exercise and an expensive, unproductive use of parties', lawyers' and (where litigated) the court's time.

Twin principles: economic advantage and economic disadvantage

3.91 We consider that the best way to avoid most of the difficulties that could otherwise be encountered in attempting to value contributions would be to focus on the economic position of the parties at the point of separation. The focus should be on whether either party's economic position at that point (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").

3.92 These principles are similar to those that have recently been adopted by the Scottish Parliament in its new scheme for financial relief between cohabitants on separation in the Family Law (Scotland) Act 2006.

RESTRICTIONS ON CLAIMS

3.93 We do not think that it would be appropriate or desirable to set up the scheme in a way which allowed applicants to make claims in relation to all the historic financial and other support that they provided for their partner during the relationship. Nor should claims be possible in relation to past earnings lost during the time that they lived together as a result of giving up paid employment, for example, to care for children.

3.94 Our scheme would not, for example, generally allow parties to claim in relation to:

(1) housekeeping money provided and spent during the relationship;

(2) rent-free accommodation provided during the relationship;

(3) past earnings lost as a result of working unpaid in the home during the relationship; or

(4) past earnings lost as a result of caring for children during the relationship.

3.95 We think that these issues should be regarded as "water under the bridge". We are keen to avoid parties engaging in a full replay of their relationship when they come to settle their claims on separation. In many cases, such claims would in any event simply cancel each other out, and we do not think that it would be fair for parties to be permitted effectively to disown arrangements that they agreed to at the time when those arrangements had no lasting economic effects.

3.96 We consider that the focus should instead be on the "pluses" and "minuses" held by each party at the point of separation, compared with where they were at the start of the relationship

3.97 Claims in respect of (1) and (2) in paragraph 3.94 should therefore only be possible if the respondent has retained some financial benefit following the parties' separation as a result of those contributions. Claims in respect of (3) and

(4) should only be possible if, as a result of working unpaid in the home or looking after children, the applicant experiences economic disadvantage on separation, for example because he or she now finds it hard to get paid employment.

3.98 To some extent, a focus on the economic position of each party at the point of separation would necessarily involve looking backwards, to see how the relevant gains and losses arose, and to some extent would entail a degree of hypothetical inquiry (for example, about what the earning capacity of the applicant might have been had he or she not given up work to look after the children). But it would avoid the need for a comprehensive "accounting" for the entire relationship.

THE NATURE OF THE COURT'S TASK

3.99 It should be emphasised that, although the claim would be based on finding relevant economic advantage or disadvantage, we do not consider that courts should quantify awards by applying a strict, compensatory approach suitable to claims made under the laws of tort or contract. It would be a claim for the exercise of judicial discretion in order to obtain some redress for the economic impact of the relationship and its termination. The role of the principles would not be to supply a mathematical formula which would determine the order to be made. Rather, the principles would structure the judicial discretion. They would make clear to the court what the applicant would have to prove (and what sorts of evidence might be relevant) in order to bring a claim. They would provide some ceiling to a claim on separation and indicate the ingredients of a broadly fair outcome on separation.

3.100 Proof of some relevant economic advantage or disadvantage would be necessary to trigger the claim. But in most cases, it would be neither possible nor practical to calculate the precise economic impact of contributions made by the parties to the relationship, and it would be disproportionate in terms of costs to attempt to do so. Rather than be bound by an exact calculation of those elements, the court would be asked to "take account of" the economic advantage and disadvantage in broad terms, in assessing what, if any, financial relief it would be fair to grant.

ECONOMIC ADVANTAGE: RETAINED BENEFIT

3.101 In the absence of an express agreement to share ownership, it is not currently clear whether only those who make a direct financial contribution towards the acquisition of property will acquire a share. In our view, to confine remedies to those who have made such contributions to property retained by the other party is too narrow. It should be possible for eligible cohabitants to make a claim based on the principle of economic advantage wherever it can be shown that:

(1) the respondent has been enabled to retain an economic benefit (a gain in capital, income or earning capacity) at the point of separation; and

(2) that gain had been caused, at least in part, by contributions made by the applicant.

3.102 As we discuss in the full consultation paper, there are various ways in which the value of the benefit retained by the respondent as a result of the applicant's contribution could be measured. It could be the amount of the applicant's expenditure or a proportion of the value of the benefit retained. But as we shall

explain in paragraph 3.121 and following below, any financial relief granted would not always reflect the full value of the retained benefit.

3.103 It is necessary to consider how different sorts of contribution would be taken into account. In many cases, there will be direct or indirect financial contributions of some sort to the acquisition of a capital asset. For example, an applicant might have paid some of the respondent's mortgage instalments or paid for an extension to the respondent's property (a direct financial contribution). Alternatively the applicant might have paid household bills or child-care costs and so enabled the respondent to pay the mortgage on their property.

3.104 Other cases might not involve financial contributions reflected in the acquisition of a capital asset. Financial contributions might instead have assisted in the acquisition of an earning capacity and income; for example, the applicant might have paid the respondent's fees for some professional training which enabled the respondent to acquire particularly well-paid employment.

3.105 It might also in some cases be possible to demonstrate that non-financial contributions made by the applicant had enabled the respondent to acquire property or some other economic benefit. For example, an applicant might have worked without pay in the respondent's business or done a substantial amount of physical labour to improve a house belonging to the other party.

3.106 Any claim of economic advantage would require proof that the applicant had significantly contributed, directly or indirectly, to an identifiable benefit retained by the respondent on separation. Contributions that did not give rise to such benefits would not give rise to any claim under this principle. This requirement would be likely to make it easier to succeed in a claim where the applicant's contributions were financial rather than non-financial contributions. For example, an applicant might seek to establish that non-financial support provided over the years had enabled the respondent to advance further in his or her career than would otherwise have been possible. Whilst not impossible, such a claim would usually be difficult to establish. In such circumstances the better way of recognising the applicant's contribution would be through the next principle: economic disadvantage.

3.107 But where a non-financial contribution clearly has made a tangible impact on the respondent's economic position (as in the cases of unpaid work in the business or improving the respondent's property), there seems to be a strong case for allowing a claim of economic advantage to be made. We would therefore not favour drawing what would seem to be an arbitrary line by only allowing economic advantage arguments to be made in relation to financial contributions.

3.108 Confining claims to cases of retained benefit would leave applicants vulnerable to the possibility that respondents would not retain any benefit at the end of the relationship in respect of which a claim could be made. This may be because of misfortune or a preference to expend money freed up by the applicant's contributions on ephemeral items rather than capital assets. But we do not consider that any unfairness inherent in such situations is sufficiently grave to warrant a remedy, for the reasons we explained above (paragraph 3.95).

3.109 Special "anti-avoidance" rules (similar to those currently applying in divorce cases) would deal with deliberate attempts to frustrate the applicant's claim by

the disposal of assets on separation. Such rules would enable the courts either to prevent the respondent from disposing of assets in the first place or to recover such property after the event.

ECONOMIC DISADVANTAGE

3.110 Our preferred scheme would not limit itself to contributions which conferred an economic advantage on the respondent, retained at the point of separation. It would also attach a value to sacrifices which gave rise to a continuing economic disadvantage following separation. This is crucial to ensuring that a new scheme deals properly with the economic impact of relationships, for example, the consequences of the child-care obligations experienced by applicants in the position of Mrs Burns. The key example of economic disadvantage is where one party takes on the role of primary carer for the children of the relationship. Relevant sacrifices and costs in such a case would include:

(1) any loss of earning capacity and opportunity to accumulate capital (including, in particular, pension savings) sustained by the applicant as a result of undertaking child-care or other domestic tasks rather than paid employment during the relationship; and

(2) continuing losses of that sort and loss of future income arising from continuing child-care responsibilities following separation, or the costs of any professional child-care necessary to enable the applicant to work following separation.

3.111 A claim for economic disadvantage should only be available where the sacrifice sustained by the applicant was the product of the parties' life together and has arisen from decisions and choices jointly made. In such cases, it ought not to be possible for one party to disclaim responsibility for those choices on separation, leaving the other to bear the economic burden alone: such economic burdens should be shared. It follows that:

(1) applicants should not be able to succeed in a claim if they had decided to make the sacrifices without the explicit or implicit approval of the other party. Responsibility should only be imposed when the sacrifices had been made as the result of a joint decision of the parties and not a unilateral decision by one of them, for example, to give up work;

(2) where there was a joint decision, responsibility should not be imposed exclusively on respondents, but should be borne equally by the parties; and

(3) applicants should be required to do what they can to minimise the economic disadvantage that they experience by taking steps that are reasonably available to them to enhance their earning capacity and obtain employment as soon as possible after separation.

3.112 The objective of the award would not be to put the applicant in the same economic position as the respondent. One party might always have had a greater earning capacity than the other. The difference in the economic positions of such parties is not the unfair product of their respective contributions to the relationship, but a simple fact of life. Just as we see no reason why the mere fact

that one party has financial needs at the end of the relationship (whatever caused them) should give rise to a claim, nor do we consider that an applicant who happens to have a lower earning capacity should be entitled to seek full equality with the respondent in such circumstances. Instead, the court should aim for a fair apportionment of those economic sacrifices in fact made by the parties as a result of the relationship. So where, and to the extent that, the applicant's income, capital savings (in particular pension) and earning capacity have been impaired by contributions to the relationship, a claim should be possible.

3.113 Conversely, we consider that equality between the parties should operate as a limit, or a ceiling, to the size of awards. If the applicant gave up a much better-paid job than the respondent's in order to care for the family and is unable to return to that level of work, it would not be fair for the respondent to have to put the applicant back into a stronger position than the respondent, leaving the respondent worse-off. The best that such an applicant should be able to achieve is the same standard of living as that enjoyed by the respondent following separation.

3.114 The question of child-care costs is less straightforward, as it is not entirely clear whether these costs should be regarded exclusively as an aspect of child maintenance. If they should, then the respondent's payment of child support may be felt to cover his or her contribution to the costs of child-care and it would be inappropriate for court orders for the benefit of the applicant to be made in relation to them. The existing power for the court to make carer-allowance awards under Schedule 1 to the Children Act 1989, as part of an award made for the benefit of the child, only arises in rare cases where the child support legislation does not apply. Moreover, many respondents who are already paying child support would be unable to afford to make any additional regular payments, and the applicant will often be eligible for tax credits which cover most of the costs of child-care. On the other hand, since some applicants may need professional child-care to be able to engage in paid employment, there is an argument for viewing the costs of child-care as a key part of minimising the economic disadvantage that such an applicant might otherwise suffer if unable to work full-time. If so, further payments to cover such costs might in some (perhaps rare) cases reasonably be made the subject of a court order for the benefit of the applicant, where the respondent could afford to do so and to the extent that the costs were not covered by tax credit entitlements.

3.115 We make no provisional proposal on this point, but seek consultees' views on whether it would be desirable to include payments specifically intended to contribute towards child-care costs as a component of a new scheme.

A third filter: substantial or manifest unfairness?

3.116 Under our proposed scheme no award would be necessary unless it could be shown that, taking account of economic advantage conferred and disadvantage sustained, the parties' respective financial positions at the point of separation were unfair, and that some adjustment between them would therefore be appropriate. However, it might be helpful to add a final filter to claims, the purpose of which would be to make clear that legal intervention resulting in the award of financial relief would only be appropriate if and where it would be substantially or (more strongly) manifestly unfair not to provide a remedy. Such a

threshold might usefully provide a further deterrent to hopeless claims being launched.

3.117 We envisage that in most cases, the chief factor of fairness for these purposes would be the size of the claim. If the value of the retained benefit or economic disadvantage were small, it might often be disproportionate to pursue the claim. But value is relative, and what may be a trifling sum for a well-off applicant might be of great practical value to someone less economically secure.

3.118 An assessment of fairness might also depend on the parties' relative responsibility for benefits retained or sacrifices made and other wider circumstances of the case. It would be possible, and in our view desirable, for at least some of these wider circumstances to be expressly identified by a new scheme in any event, as factors for the court to take into account in exercising its discretion (see paragraph 3.120 and following). Often, these sorts of factors would render it unfair or otherwise inappropriate to make an award, rather than not to do so.

3.119 Consultees are invited to tell us whether they think that a minimum duration requirement and a substantial or manifest unfairness filter are both necessary to exclude trivial or undeserving claims, or whether one of those filters alone might provide a sufficient safeguard.

Quantifying and formulating an appropriate order for financial relief

3.120 In some cases, one party would be able to claim both an economic advantage conferred and an economic disadvantage sustained; the other party might also have a claim in relation to some benefit retained by the first party. Deciding which party ought to transfer assets to the other, and what the value, in round terms, of any order should be, would necessarily involve working out the net advantage and disadvantage between the parties. In some cases, it might also be appropriate to bring into account transfers of assets made during the relationship which might be regarded effectively as compensation or reparation provided in advance.

3.121 In most cases, given the extent of the assets available and the needs of the respondent and any children, the court would in any event be limited in what it could fairly and reasonably achieve. The precise value of the economic advantage and disadvantage claim would not, therefore, determine the exact amount of the relief ordered. In particular, in deciding upon the form and amount of relief, it would be necessary for the court to take account of:

(1) the available resources;

(2) the financial needs, obligations and responsibilities that the respondent (the party from whom any transfer would have to be made) has or is likely to have in the foreseeable future. This may include obligations towards children whom the respondent may be legally obliged or otherwise reasonably expected to support; and

(3) the need for the respondent to acquire suitable accommodation.

3.122 As we have already explained, we do not consider that the award of financial relief between cohabitants can be justified on the basis of the applicant's future needs. However, the needs of both parties and of any children living with either of them should be taken into account in deciding whether and, if so, what particular assets to transfer to the applicant in order to satisfy a claim that had been established and quantified under the economic advantage and disadvantage principles. For example, if the successful applicant and any children of the couple had a particular need for accommodation, it might be appropriate to make an order specifically designed to secure suitable housing for them. In the full consultation paper, we discuss how existing claims for the benefit of the children under Schedule 1 to the Children Act 1989 would interact with claims between the cohabitants under a new scheme.

3.123 In many cases, the available assets would not be sufficient to meet the applicant's claim in full, or even to cater for the basic needs of both parties and any relevant children. We imagine that, in such cases, a typical order would involve sharing the available capital in whatever proportions the court considered fair in light of the economic advantage and disadvantage principles, especially given the parties' respective earning capacities. Particularly where the respondent already had child support obligations leaving little free income for periodical payments, it is likely that a "clean break" order would be made.

The clean break principle

3.124 The clean break principle is a feature of matrimonial law. It does not apply to payments for the benefit of children. The principle requires the court to consider whether it would be appropriate to make orders which involve terminating the financial obligations between the parties as soon after separation as is just and reasonable.

3.125 We believe that the principle should form part of a new scheme of remedies between cohabitants. The aim is to avoid parties being economically tied together long after they have separated, so orders for long-term or indefinite periodical payments would be avoided wherever possible. Instead, financial relief would preferably be made by way of transfers of property and lump sums.

Disregarding misconduct

3.126 We do not consider it appropriate that "fault" or misconduct generally should play a significant part in any new scheme for financial relief between cohabitants on separation.

3.127 It is generally accepted that conduct is irrelevant to financial provision on divorce, save in extreme cases. There are very good reasons for this. Blame is rarely attributable to just one of the parties, so an identification of guilty and innocent parties for the purposes of financial provision will often be problematic. Moreover, generally inviting evidence and argument about conduct may only exacerbate the tensions that inevitably surround the break-up of many personal relationships, to the likely detriment of any children and the adult parties themselves. Recent research findings indicate that 96% of family law solicitors agree that conduct should not be taken into account when deciding financial settlements on divorce.

3.128 However, we do accept that there may be cases where one party's behaviour is such that it would be manifestly unfair to ignore it when considering financial relief. Financial and litigation misconduct bears directly on the court's ability to grant financial relief. It might, for example, involve dissipating assets available to meet the other party's claims, or causing the other party to incur unnecessary legal costs in seeking to assert a reasonable claim for relief or to defend an unreasonable claim. In many cases, the court will be able to deal with the relevant misconduct via anti-avoidance measures or costs orders. However, where that is not possible, it should be possible for the court to take account of misconduct in determining what award to make.

3.129 There may also be rare cases involving other types of conduct which it would be inequitable to ignore in determining what financial relief, if any, would be fair. For example, there may sometimes be cases in which it would be appropriate for the court to take account of severe domestic violence in making a decision about financial relief (as it does in some divorce cases), in particular where the abuse has affected the applicant's economic security.

The implications of our preferred scheme for eligibility criteria

3.130 We have already discussed eligibility criteria above. One issue that we left for later discussion was whether, as a matter of principle, a minimum duration requirement would be appropriate for cohabitants without children, given the basis on which we suggest claims would have to be made.

3.131 In so far as it would be necessary for an applicant to establish economic advantage or economic disadvantage before the court would grant a remedy, it could be said that our favoured scheme of financial relief would be self-limiting: that is to say, even if the applicant were eligible, no claim would be possible where the applicant had not made relevant contributions or relevant sacrifices. This can be contrasted with the equal sharing or partnership approach, which we have provisionally rejected. Certainly if that approach involved automatically sharing a given pool of property equally wherever the couple satisfied the eligibility criteria, it would be appropriate to require relationships to be of a particular duration before they qualified for such automatic provision.

3.132 The new Scottish legislation, which introduces a scheme for separating cohabitants based on the principles of economic advantage and economic disadvantage, contains no minimum duration requirement precisely because the remedy is considered to be self-limiting in its nature. It is certainly the case that many shorter relationships would be unlikely to engage the scheme at all as an applicant would be unable to prove the relevant advantage or disadvantage. It could be said that it is not the relative shortness of the relationship, but the nature of the contributions made by the parties to it, which is significant in depriving the applicant of a claim. The Scottish view was that a minimum duration requirement would be not only otiose but also undesirable, for (as the Scottish Law Commission put it) "relevant events, such as contributions to the purchase or improvement of a home, or the giving up of employment in the interests of the other partner, would often occur at or near the beginning of the cohabitation".

3.133 On the other hand, if a party to a short relationship had made a substantial financial contribution to the acquisition of property, it would often be recoverable under the law of trusts in any event. If a job had been given up, it might be easier

to find another job quickly if the relationship had only been short. Additionally, it can still be argued, as a matter of principle, that even claims based on economic advantage and disadvantage ought only to be available between couples who can be taken to have demonstrated a certain level of commitment to each other by the passage of time.

3.134 Moreover, from a pragmatic perspective, it may be thought that excluding the possibility of such claims would be the lesser evil, compared with creating a scheme which encouraged applications between the many short-term cohabitants who perhaps ought to be encouraged simply to go their separate ways without making what would often be insubstantial claims against each other when their relationship ends.

CONCLUDING OBSERVATIONS AND CONSULTATION QUESTIONS

3.135 It is difficult to find a scheme which is both entirely straightforward to apply and at the same time suitable for the diversity of cohabiting relationships. Inevitably, compromises have to be made between achieving complete certainty and fairness of outcome. We consider that the principles of economic advantage and disadvantage, as described above, provide the right basis for claims between cohabitants on separation. While those core principles seem to us to be the right ones, various complex questions inevitably arise in working out such a scheme in practice. We consider some of these in greater detail in the full consultation paper.

3.136 We bring together below a series of consultation questions relating to the possible scheme which we have outlined above. We think that it is important that the theory can be seen to work in practice. Therefore, in the next Part, we put forward suggestions as to how the scheme proposed in this Part might work in particular situations. Consultees might find it useful to consider the examples before responding to the questions below. We welcome consultees' views on the proposed scheme and how they would approach some of the difficult cases that may arise.

3.137 We invite the views of consultees on the principles which should justify and quantify awards of financial relief between cohabitants on separation.

3.138 We consider that the mere fact that one party has financial or other material needs should not in itself justify the grant of financial relief from the other party on separation. Do consultees agree?

3.139 We consider that, in determining whether to grant relief and, if so, what the relief should be, 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").

Do consultees agree?

3.140 We invite the views of consultees on the factors to which the court should have regard when considering the justification for, and quantum of, any financial relief to be granted in accordance with the principles of economic advantage and economic disadvantage.

3.141 We invite the views of consultees on whether a new scheme for financial relief between cohabitants should include a power to make awards in appropriate cases to assist the party with whom any relevant children will principally live following separation with the costs of child-care.

3.142 We invite the views of consultees on whether awards should only be made where it would be substantially or manifestly unfair not to do so.

3.143 We consider that parties' conduct should not be taken into account in considering claims for financial relief on separation, save where that conduct relates to litigation or financial misconduct, or where it would otherwise be inequitable to disregard it. Do consultees agree?

3.144 We consider that, having determined that some remedy is justified and calculated its quantum in accordance with the principles outlined above, the court should have regard, in particular, to the following factors when deciding what order(s) to make:

(1) the needs of both parties and any children living with them; and

(2) the extent and nature of the financial resources which each party has or is likely to have in the foreseeable future.

Do consultees agree?

3.145 We invite the views of consultees on the weight to be attached to the clean break principle between cohabitants. In particular, how should the clean break principle relate to the operation of the substantive principles otherwise determining the award that should be made?

PART 4
FINANCIAL RELIEF ON SEPARATION: HOW WOULD IT WORK?

INTRODUCTION

4.1 Part 3 outlined how a new system could be designed and how it might work in theory. It explained how the scheme could be tailored so as to allow only those cases that are considered deserving of a remedy to succeed.

4.2 This Part considers how a scheme of financial relief on separation based on the principles discussed in Part 3 might operate in practice by looking at a number of different factual examples. We consider the facts of several different types of case, which may or may not ultimately be covered by a new scheme: that will depend on the answers to our questions about eligibility, as discussed in Parts 2 and 3. In each case, we contrast the outcomes created by the new scheme with the likely results under the current law. Inevitably, we cannot cover all of the possible circumstances that might arise, as individual relationships are so varied. But we have selected examples which we think illustrate some of the key issues.

4.3 If consultees do not like the outcomes suggested, they should let us know why. Consultees' views about individual examples might be affected by various factors, but principally:

(1) the length or other characteristics of the relationship, such as whether there are children: should this relationship be included in the scheme at all, whatever the nature of the claim might be? and

(2) the principles on which the claim is made: is it appropriate to allow a claim to be made in relation to this sort of contribution or sacrifice at all, whatever type of cohabiting relationship it is?

4.4 We would be greatly assisted in analysing consultees' responses if they could, as far as possible, indicate their views about the examples specifically by reference to these two issues. The full consultation paper contains further examples to which consultees might also like to respond.

4.5 Before looking at the examples, we should make two other important points.

4.6 First, our discussion of "what the court may do" should not suggest that we anticipate that parties will be resorting to litigation in every case. We would hope that the majority of cases could be settled by private negotiation, with the assistance, where appropriate, of mediation or some other method of dispute resolution. However, parties to all types of dispute, civil and family, "bargain in the shadow of the law" and so what the court might be expected to do in the event of contested litigation would form the backdrop to private negotiations.

4.7 Secondly, we must stress that our examples can only be broadly indicative. Current family law (including the law governing financial relief on divorce and on the dissolution of civil partnerships) does not generally provide hard and fast rules that can be applied mechanically to individual cases to provide a certain

outcome. Instead, cases are dealt with on their facts relying on the discretion of the court. We have provisionally proposed that this type of approach is the most suitable for any new scheme between cohabitants, with a strong principled basis which would structure the exercise of the court's discretion. It is in the nature of a discretionary regime that the courts are able to take account of the particular features of individual cases in fashioning a fair outcome. Consequently, it would be misleading to suggest precise outcomes in any of the following factual examples. Our purpose here is to indicate in broad terms what we think the outcome would be in each situation.

COHABITANTS WITH CHILDREN

4.8 We have stated above that we consider there to be a strong case for a new scheme on separation where cohabitants have children. We intend to illustrate this by reference to three examples (1, 2 and 3) where the cohabiting relationships are of differing duration. In Example 4, we explore the difficult issue of which children should be relevant for these purposes, in particular, the issue of whether a child who is not the child of both cohabitants should be relevant to a potential claim for financial relief on separation. Example 5 illustrates a case where, despite the presence of children, it may not be appropriate to order any financial relief.

Example 1

> A and B have been living together for fifteen years in a house solely owned by A, bought before the relationship began. They have two children. A and B were originally both working in information technology jobs. A paid the mortgage instalments on the house as they fell due, while B paid other bills; both were contributing to pensions. After the first child was born, they decided that B would work part-time. A had recently been promoted so the household expenses could be met by his earnings. After the second child was born, they decided that B would not go back to work. It was becoming increasingly difficult to fit taking the children to and from child-care around work commitments and they decided that the children would benefit from B staying at home. B has been out of paid employment now for five years, and is not able to return to a job similar to the one she had before. The younger child has just started school on short days. A and B have recently separated, and they have agreed that the children will live principally with B.

4.9 Under the current law, A would be liable to pay child support in relation to the two children at least until they reached 16. Where the Child Support Agency has jurisdiction, the courts are ordinarily unable to make periodical payments orders for the children's benefit. However, B could apply for an order in relation to the parties' home under Schedule 1 to the Children Act 1989 for the benefit of the children, for example requiring A as the owner of the house to allow the children to occupy it until they complete their education. B would benefit indirectly from such an order as she is the children's primary carer. Whether it is practicable for the court to make such an order would depend entirely on whether the parties had sufficient resources both to retain the family home and to pay for alternative

accommodation for A. If they do not, then the court cannot in practice make such an order.

4.10 However, the court currently has no power to require A to make any kind of financial order for B's benefit, either while the children are still with her or after they leave home.

4.11 In the absence of family law remedies, B would currently have to formulate a claim for a share in the house by reference to the law of implied trusts or proprietary estoppel. There was no express "common intention" to share ownership or any assurance that B would acquire such a share, nor has B made a direct financial contribution to the acquisition of the house. It is unclear on the current state of the law whether B's contributions to the household expenses might give rise to a share. It would be costly for her to bring proceedings in order to establish a share, and her prospects of success are far from certain.

4.12 Under our proposed scheme, it would become possible for B to apply to the family court in her own right for financial relief following the parties' separation. B would be required to base her claim on the contributions that she had made to the relationship and to the family, and on any sacrifices associated with those contributions. In assessing the claim, the court would be required to consider the parties' respective financial positions at the point of separation.

4.13 At the point of separation, A remains the owner of the house, has a good income, a healthy earning capacity and adequate pension provision; he is financially secure. B, by contrast, is financially vulnerable. She has no current income, her earning capacity and pension entitlements have been impaired by her time out of the labour market and it is unclear under the current law whether she has any share in the home.

4.14 Let us first consider claims for economic advantage. The parties each made a number of positive contributions during the course of the relationship which are unlikely to have given rise to any retained benefit in the hands of the other party on separation. These include B's substantial domestic contributions (looking after the home and raising the children). Although A has avoided the need to incur the expense of hiring domestic assistance or childcare, it would be difficult for B to establish that her contributions in these areas have enabled A to generate any additional retained wealth. Similarly A would be unlikely to succeed in a claim based on his provision to B of rent-free accommodation during the relationship or his financial support of the family since B gave up work, as these contributions will not usually give rise to lasting gains on separation. A's payment of the mortgage during the relationship will also not give rise to a claim as he owns the house in any event, so he retains the benefit of his own mortgage payments.

4.15 The only claim based on economic advantage which might succeed relates to B's financial contributions to the household expenses while she was working. B would be able to make an economic advantage claim based on these financial contributions to the extent that she could prove that they were necessary to enable A to pay the mortgage. At the point of separation, A would retain the benefit of those payments as the sole owner of the property unless an order for financial relief were made.

4.16 The more substantial part of B's claim would rest on the lasting economic disadvantage that she is likely to have sustained as a result of the contributions that she has made to her shared life with A. B has made a substantial economic sacrifice during the relationship for the sake of the family by giving up her job in order to raise the children. Whilst the relationship was continuing this arrangement might not have appeared particularly disadvantageous to B; the family operated as a unit. A and B were each making important contributions to it and each shared its benefits. However, the economic consequences of that arrangement become a problem for B on separation when her non-financial contributions are no longer matched by A's financial support. These consequences are likely to have a continuing economic impact on B. B is also likely to continue to have to make some sacrifices following separation as a result of the continuing responsibility for the care of the children that will fall to her as primary carer, in so far as she may not be able to return to full-time employment immediately.

4.17 Under our proposed scheme, B would not be able to make any claim against A in respect of past earnings lost during the course of the relationship as a result of her giving up paid work to look after the children; the scheme concentrates on the position of the parties at the end of the relationship.

4.18 However, B is likely to have incurred losses during the relationship which are continuing at the point of separation. The fact that B has been out of the employment market for a number of years may have significant lasting impact on her future earning capacity and perhaps, in the longer-term, her pension entitlements. It is unlikely that B will be unable to work at all. The court would require her to limit her loss so far as possible by seeking suitable employment, and now that the younger child has started school, she can reasonably be expected to return to work (at least part-time). It may be that, given her qualifications, B will be able to return to a relatively good job, but she may not find as well-paid a position as that which she would have held had she not taken a career break. Moreover, if B is to maximise her earning capacity by returning to work full-time following separation, she may require professional child-care when the children are not at school.

4.19 B would therefore be able to make a strong case for financial relief based on:

(1) the ongoing economic disadvantage created by the parties' joint decision that she should give up work;

(2) (if a new scheme included provision relating to this) any ongoing child-care costs (to the extent that B's tax credit entitlements do not cover them and A could afford to contribute towards them); and

(3) (possibly) the financial contributions she made to the household expenses while she was working.

4.20 In exercising its discretion to grant any remedy, the court would consider making orders designed to ensure that the parties more fairly share any benefit retained by A and the disadvantage sustained by B. The particular type of order the court would make would depend on a number of factors such as the extent of the assets available and the needs of both parties for suitable accommodation (in B's case, in particular, with the children). For example, the court might order that the

house be sold and the proceeds of sale divided in proportions broadly reflecting a fair division of the relevant economic advantage and disadvantage. This might enable, or at least help, A and B each to acquire a smaller property which they could afford to maintain and which would be better suited to their respective needs and those of the children. The court might consider whether it should make an order for some limited sharing of A's pension.

4.21 The court might also consider making an order for periodical payments against A. It would take account of the fact that A is already paying child support and may not be able to afford additional periodical payments for B. The desirability of a "clean break" between the parties would militate against requiring A to make such payments long-term.

Example 1A

4.22 Let us now consider how a court might respond if A and B separated at a time when their children had become independent. Fifteen years on, the children have left home. A and B have been living together for 30 years. B has worked only intermittently, and part-time, since the younger child was born. The mortgage has been paid off.

4.23 Under the current law, there would be no child support liability, and there would be no possibility of any provision being made under Schedule 1 to the Children Act 1989, as the children are now adults. B may seek to formulate a claim to a share in the house by reference to the law of implied trusts or proprietary estoppel, but her prospects of success are no clearer than they were in Example 1, 15 years earlier in the relationship.

4.24 Yet the degree of economic imbalance between the parties on separation is, if anything, more extreme. A as the owner of the house, free of mortgage, still has a substantial income and a generous pension entitlement on his retirement. B is still unlikely to be able to establish any share in the house, and although she has a small income from her part-time employment, she has (now in her fifties) little prospect of improving her earning capacity significantly by re-training. Let us also suppose that her pension provision is only very modest, as a result of her employment history.

4.25 Under our proposed scheme, B would be able to present a strong claim for financial relief. Her economic advantage claim based on her indirect financial contributions to the mortgage, though modest in size, would remain as before. Since A was clearly able to cover both mortgage and bills after B gave up work, it would be hard for her to prove the required link between any later contributions that she makes to household running costs and the repayment of the mortgage. But her substantial domestic contributions towards the couple's shared life have given rise to significant economic disadvantage. In determining the quantum of B's claim, the court would take account of the difficulty that she now faces in terms of her future employment prospects and pension-saving capacity in view of her age and the time that she has been absent from the labour market. Since the mortgage is paid off, there might be sufficient capital in the house, in combination with pension-sharing, to enable a clean break to be made, with the effect that A will not be required to make periodical payments to B. The court would therefore be likely to make orders for financial relief, including (if necessary) an order for

the sale of the house and division of the proceeds between A and B, and an order for pension sharing.

Example 2

> C and D have been together for 12 years and have two children. After the birth of each child, D went back to work full-time after maternity leave. They both have well-paid and relatively flexible jobs, with room for home-working, and so have been able to share the tasks of taking the children to and from child-care, school, and holiday activity schemes, and of working at home while looking after the children during holidays. They are joint owners of their home, which is expressly held in equal shares, and each contributed equally to the mortgage repayments. They are now separating, and are planning to share child-care responsibilities.

4.26 Under current law, the express declaration of trust dictates that C and D are entitled to equal shares in the value of the property. Child support is payable by the "non-resident parent", but would be reduced to reflect their shared care arrangements. The parties might be in dispute about whether the family home should be sold immediately or should be retained, at least during the children's minority, so that the children can live there with one of them. That dispute would be addressed by the court principally under Schedule 1 to the Children Act 1989.

4.27 We have explained above how claims would be filtered by two means, namely by "eligibility" requirements and by the principles which form the basis of a claim for financial relief. In this case, there would be little doubt that C and D would be eligible to claim on separation. They have lived together for a considerable time, but, more importantly, they have two children. The presence of the children should, in our view, render the parties eligible to make a claim on separation.

4.28 However, when we examine the nature of the parties' economic relationship, we think it unlikely that the principles we have outlined in Part 3 above would lead the court to make an order for financial relief. We think that such a result would be entirely fair.

4.29 This is because neither party is likely to be able to establish that the other has obtained an economic advantage by the retention of some economic benefit or that they have themselves sustained an economic disadvantage on separation. During the relationship, both parties have continued in full-time employment and contributed equally to paying the mortgage and other household costs on their jointly-owned home. Moreover, both have an earning capacity which is intact on separation and they plan to share their child-care responsibilities following separation. As a result, neither party's economic position is more vulnerable than the other's in consequence of the relationship and its termination.

4.30 The court may be required to resolve any dispute about the future of the parties' home, as discussed above.

Example 3

> E and F had been living together for about three months in E's house when they discovered that F had become pregnant. E was happy to

support the family so F did not return to work after the baby was born and her maternity leave ended. Unfortunately, their relationship foundered soon afterwards, and they are now separating, after less than two years together.

4.31 In this case, the current law would require E to pay child support and F would be able to claim capital orders under Schedule 1 to the Children Act 1989 for the benefit of the child. Whether any such order could be made, in particular regarding the occupation of E's house, would depend on whether the parties could afford to maintain not only that property but also new accommodation for E. F would have no claim against E in her own right: a general promise by E to support F would not give rise to any claim.

4.32 F is in a vulnerable financial position. Although the couple did not live together for very long, the case for F obtaining some relief may be thought to be strong. The birth of the child (and the child's continuing need for care) has a significant effect, at least in the short term, on F's ability to go to work. The court would therefore have to examine the extent of the economic disadvantage sustained by F. In doing so, it would be required to assess the viability of F returning to work. Unlike B in Example 1, F has not been out of employment for very long, and it may be that she can return to at least part-time work fairly soon without any significant effect on her earning capacity in the longer term.

4.33 But each case will depend very much on its own facts. Although it may be reasonable to expect F to take steps to obtain employment and thereby to limit the extent of her future losses, she may need to pay for professional child-care in order to be able to work at all. If a new scheme included provision for child-care payments, there would be a case for E to assist with F's child-care costs in addition to his child support payments, to the extent that the costs of that care are not covered by F's tax credit entitlements, and if E can afford to do so.

4.34 The size of F's claim for economic disadvantage would depend on the court's view of the effect of the relationship on her financial position. If F can return to employment without serious impact on her future earning capacity, then her claim would be considerably smaller than it would be if any return to employment would be at a significantly lower level. If F is able to recover well-paid employment now, she may be able to meet her accommodation costs and necessary child-care costs, alone if necessary, without great difficulty. If not, her claim for financial relief would be that much stronger.

Example 4

4.35 Many cohabiting households are step-families. Example 4 highlights some aspects of the difficult question of how a new scheme should respond to cases involving children who are not the children of both cohabitants. This issue is relevant to two aspects of the scheme. First, should the presence only of "children of the family" who are not children of both cohabitants make that couple eligible under a new scheme? Second, should such children be relevant when considering economic advantage and disadvantage claims, in so far as the relevant benefit or sacrifice is said to have arisen from care provided by one party to those children? If the answer to either or both of those questions is "yes", it will

be necessary to determine which children should be taken into account for those purposes.

> G has a young son, X, from a previous relationship. That relationship ended soon after the couple discovered that G was pregnant, and the father cannot be traced. G and H's relationship began shortly after X was born, and H has always treated X as if he were his own son. When G returned to work after maternity leave, she found it difficult to balance work, home and child-care commitments, and H often helped by looking after X. When X was one year old, H moved in with G and X, and they decided that H would reduce his working hours so that he could look after X before and after nursery (and, later, school) and during holidays. It made most sense financially for H to work less as G's job was less flexible and better paid. G and H have recently separated, and X will remain with G.

4.36 We may loosely refer to children such as X as "children of the family". G is X's legal parent, H is not, but X has been treated by them as a child of their family.

4.37 Any claim that H might want to make on his own behalf under the current law would have to be brought under the general law of implied trusts and estoppel. But it is not at all clear that such a claim would have any prospect of success, in the absence of any relevant agreement or assurance that H would have a share in G's property.

4.38 Under our proposed new scheme, the question arising from these facts is whether H might have a claim against G for economic disadvantage.

4.39 In terms of eligibility to apply at all, we have proposed that cohabiting couples who are, by law, the parents of a child should be eligible to apply for relief, whatever the duration of their relationship. It might be argued that the same should apply to step-family cases, on the supposition that a decision to cohabit where one party has children from a previous relationship is likely to be made carefully on both sides, and that it is therefore appropriate to presume that there is a serious level of commitment between the parties in such cases. Alternatively, it might be felt that a minimum duration requirement should be satisfied before such relationships fell within the scheme.

4.40 The application of the economic advantage and disadvantage principles, relating to care provided for such children, is more difficult. In a case like this, where the non-parent, H, is the one who provided the care and sustained economic disadvantage as a result, there is a strong case to allow the claim to be made. It is clear that H cared for X because of his relationship with G, and would not otherwise have done so. If X will be living with G following the separation, H may now be able to return to full-time work and so minimise the extent of the disadvantage suffered. To the extent that H is unable to do this, there may remain some disadvantage in relation to which G could be expected to provide some relief. This may or may not be realistic in practical terms, as it will be necessary to ensure that G has sufficient resources available to support both herself and X.

4.41 More difficult issues may be felt to arise where the children who live with the couple were from the applicant's previous relationship, but it is the applicant-parent who cared for them during the relationship, rather than the non-parent. Cases where the couple are raising children who are not the children in law of either party also require special consideration. We discuss these issues in the full consultation paper.

Example 5

4.42 It should not be assumed, as we saw in Example 2, that simply because cohabitants have children living with them, an order for financial relief would be appropriate on separation.

> J has recently moved in with K and L, K's child from her previous relationship. K owns the property and works full-time, with the support of good quality, affordable child-care facilities. J has always found it hard to hold down a job and has been unemployed for most of their relationship. K therefore pays the mortgage and the vast majority of the bills, J making small financial contributions occasionally and taking on some of the housework. They are now separating after two years together.

4.43 Neither party would have a claim against the other under the current law on these facts, and nor do we think they should under any new scheme.

4.44 Even if this couple were eligible to apply (whether by virtue of the presence of L or because of the length of the relationship), this is a case in which we take the firm view that no remedy would or should arise in any event. The second filter, the principles governing the basis on which relief would be granted, would not be satisfied.

4.45 J, the economically weaker party, has conferred no economic advantage on K that K retains on separation. Nor has J sustained any economic disadvantage as a result of contributions to the parties' relationship. J may be in need at the point of separation, but that is simply a consequence of J's long-term unemployment and not something for which K should bear any responsibility, however long their relationship had lasted.

4.46 K might feel aggrieved at having supported J throughout the relationship without any significant economic recompense from J at any point. But the requirement that K prove some retained benefit in J's hands on separation would not be satisfied here and so K would not have a claim either, even assuming that J could afford to meet it. We think this is the right outcome.

COHABITANTS WITHOUT CHILDREN

4.47 We now turn to examples of how our proposed scheme might work if it extended to cohabitants without children.

Example 6

> M and N have been living together for over ten years in a house bought by N before their relationship began. N's elderly mother, O,

became unable to live alone as a result of growing dementia. M and N could not face putting O in residential accommodation, so they decided that O should come to live with them. M and N were both in full-time work, but they decided that M would give up work in order to care for O. After five years, the stress of this situation on M and N's relationship is too much, and they separate. O remains with N.

4.48 Under the current law, M's only conceivable claim would be based on implied trusts or proprietary estoppel, neither of which looks likely to succeed on the facts in the absence of some agreement or assurance that M would acquire a share in N's property, or any financial contribution by M to its acquisition.

4.49 Under our proposed scheme, M's claim would be based on economic disadvantage. M has given up work in order to look after N's dependent relative as a result of which M may sustain economic disadvantage at the point of separation. As in the cases involving children, M would not be able to claim in relation to past earnings losses, but her absence from the workforce over the last five years might cause a loss of earning capacity on separation. Even if M were now able to return to paid employment, there might remain some disadvantage that cannot be recovered, in which case the court would make an order for financial relief in favour of M. The court would take account of the extent of N's resources in deciding what relief to grant M. It may be that, in view of the parties' respective financial circumstances and the continuing need for O to be housed in N's property, a lump sum payment would be appropriate. O's housing need would militate against making an order for sale.

Example 7

P is a self-employed builder. His partner Q inherits a large house from her parents which is all-but derelict. P and Q move in, and P spends a year working on re-building the property. However, as soon as it is fully refurbished the relationship breaks down. P and Q never discussed the ownership of the house.

4.50 Under the current law, P would be restricted to a claim against the house based on implied trusts or proprietary estoppel. However, the parties' failure ever to discuss the issue of the ownership of the house, and P not having financially contributed to its acquisition, are likely to doom such a claim to failure.

4.51 Under our proposed scheme, there is no question of economic disadvantage, but P would be able to argue that as a result of his extensive contributions to the renovation and refurbishment of the property, Q has obtained a substantial benefit in terms of an increase in the value of her property. That is a benefit which Q retains on separation to the exclusion of P. It might be thought to be fair that Q should to some extent share that benefit with P.

Example 8

R and S, who are both in their twenties, have been living together for two years in a flat that they rented together from a private landlord. They have both worked full-time throughout the relationship and have kept their finances separate. They have shared the cooking and

cleaning, and shared the rent and all household bills equally. They are now separating.

4.52 This is an example of a case which many may consider should fall outside a new scheme. Whilst there may be pragmatic reasons why couples such as this should not be eligible to apply to court at all, the scheme would not in any event provide them with a remedy.

4.53 The partners have contributed equally to all their bills, neither has retained any benefit in the property as it is rented, and the relationship has been economically neutral for each of them in terms of earnings and earning capacity. These would appear to be circumstances where the gains and losses, if any, should lie as they fall, and the court would not consider any need to make an order for financial relief on separation.

4.54 It should be noted that under the current law, the court has power under Schedule 7 to the Family Law 1996 to transfer the tenancy between the parties. But there may be no point in making an application for such an order if R and S's lease is an assured shorthold tenancy which confers little by way of security of tenure.

Example 8A

4.55 Alternatively, the same couple might have been living in a property bought by R before the relationship began. Suppose that during the relationship, R had been paying the mortgage and S all the other household bills.

4.56 In this case, there might be potential for an economic advantage claim to be made by S on the basis that R has retained a benefit. S would have to prove that the payment of the household bills enabled R to pay the mortgage and so accrue equity in the property. However, there are reasons to be sceptical about whether such a claim should succeed. First, the amount of equity actually acquired by R's mortgage payments over such a short period is likely to be minimal; this might be a situation where a third filter of "substantial" or "manifest" unfairness would provide a useful role in preventing a relatively low value claim from proceeding. Secondly, if R had been able to pay both mortgage and bills before S moved in, S would find it difficult to show that S's payments had enabled R to pay the mortgage and so contributed to the benefit retained by R. It would be different if there were evidence that before S started paying the bills, R was about to sell the property as a result of being unable to afford the mortgage payments alone.

Example 9

T was very keen on his girlfriend U, with whom he had been conducting a long-distance relationship for some time. He wanted to force the pace. She was not so sure. He gave up his job to move across the country to live with her in the house which her parents had bought for her outright. U had not suggested this, but she did not object. She supported T financially during their relationship. The relationship did not prosper and they split up within a year of T moving in.

4.57 Under the current law, T's only conceivable claim would be based on implied trusts or proprietary estoppel, neither of which looks likely to succeed on the facts in the absence of some agreement or assurance that T would acquire a share in U's property, or any financial contributions by T to its acquisition.

4.58 Although T may have suffered economic disadvantage as a result of giving up his employment and going to live with U, this is a case where it might well be thought that no relief should be awarded under a new scheme.

4.59 It may be argued that, by imposing a minimum duration requirement as a condition of eligibility, the right to bring a claim in such circumstances would be effectively denied. However, that may not be an entirely satisfactory answer. Views about the fairness of such a claim might differ depending on how long the minimum duration requirement would be.

4.60 There is in any event an important reason why T's claim should not succeed on these facts. An applicant should only be able to succeed in a claim of economic disadvantage where it is a consequence of the parties' joint decision. If the court takes the view that T effectively imposed himself and his economic sacrifice upon U, and apparently made no efforts to obtain further employment during the relationship, it would not make any order in favour of T, however long the relationship endured.

Example 10

W and V have been living together since 1975, when he was 30 and she was 28. When they decided to set up home together, V was a primary school teacher and W a surgeon. Only a few months after the couple began to live together, W became a consultant. The couple moved from rented accommodation to a house bought in W's sole name. At the same time, they agreed that V should give up work as W's income was more than sufficient to maintain them both. This arrangement allowed them to spend more time together when W was not working and freed V to look after the house and garden. The parties had hoped to have children but this proved impossible.

W has recently asked V to leave the house as he has become involved with a younger colleague. At the time of separation the house is free of any mortgage. In addition to the house, W has substantial assets in his name. He is nearing retirement when he will enjoy a significant pension income. V has no income, very limited pension entitlements from her contributions while a teacher and few assets.

4.61 Under the current law, V's only conceivable claim would be based on implied trusts or proprietary estoppel, neither of which looks likely to succeed on the facts in the absence of some agreement or assurance that V would acquire a share in W's property, or any financial contribution by V to its acquisition.

4.62 Under our proposed scheme, V would be unlikely to be able to make an economic advantage claim in relation to her domestic contributions to the couple's shared household during the relationship. However, she would be able to make a claim on the grounds of economic disadvantage. She has sustained

significant economic disadvantage as a result of the couple's joint decision that she should give up her career for the sake of their shared life. V has little prospect of obtaining employment at the age of 59, having not worked for many years.

4.63 In determining the quantum of V's claim, the court would take account of the difficulty she now faces in finding employment. The court would also consider her position on reaching the age of retirement given her limited pension entitlements. There are likely to be sufficient assets available to W (especially the house free of mortgage) to make a capital award which, in combination with pension-sharing, would enable a clean break.

CONSULTATION

4.64 We invite the views of consultees on the Examples set out in Part 4. In particular, we invite consultees to indicate in which of the Examples they consider that financial relief should or should not be available, and why.

PART 5
REMEDIES ON DEATH

INTRODUCTION

5.1 In this Part we consider briefly the case for reform of the current law of succession as it applies where the relationship of a cohabiting couple is terminated by death.

5.2 People who are legally “competent” may decide how their property is divided when they die by making a will. If their will fails to dispose of their “estate” (the pool of property they owned on death), either in whole or in part, then they are “intestate” and statutory intestacy rules determine to whom the estate is to pass. However, the court has power to make awards for reasonable financial provision to defined classes of applicant under the Inheritance (Provision for Family and Dependants) Act 1975 ("the 1975 Act"). This means that the court may vary or overturn the dispositions that would otherwise be made in accordance with a will or the intestacy rules.

5.3 A deceased cohabitant may have left a will directing that his or her surviving cohabitant should obtain all, or most, of his or her estate. Certain items of property (such as the family home) might pass automatically to the surviving cohabitant by other means (for example, because they owned it as “joint tenants”) and never form part of the deceased’s estate for the purposes of succession.

5.4 However, surviving cohabitants have no automatic entitlement on the intestacy of their partners. Survivors only have the right to apply to court for a share of the estate by making a claim under the 1975 Act.

5.5 Application may be made under the 1975 Act by (among others) a "dependant" or "cohabitant" of the deceased. A surviving cohabitant might fall within one or both of these categories. A dependant is defined as any person who was being wholly or partly maintained by the deceased immediately before the deceased’s death. To fall within the specific category for cohabitants, the applicant, although not legally the spouse or civil partner of the deceased, must have been living in the same household as the deceased as if he or she were the deceased’s spouse or civil partner during the whole of the two-year period immediately before the deceased’s death. The two-year test applies even if they have a child (though an applicant whose relationship with the deceased had been less than two years might be able to claim as a dependant).

5.6 In either case, the applicant must satisfy the court that the disposition of the estate by the deceased’s will and/or the intestacy rules does not make reasonable financial provision for the applicant. Reasonable financial provision is defined as such financial provision as would be reasonable, in all the circumstances of the case, for the applicant’s maintenance.

5.7 If the court is satisfied that the applicant did not receive reasonable financial provision by the will and/or the intestacy rules, it may exercise its powers to make such provision, having regard to a wide range of considerations set out in the 1975 Act. It may then make orders (similar to those available under the

Matrimonial Causes Act 1973 on divorce) that the applicant should receive periodical payments, a lump sum, or the transfer of property from the deceased's estate.

5.8 It may seem illogical that there is a specific statutory remedy for cohabitants whose relationships are terminated by death, but not for those whose relationships end by separation. We accept that there may be one important difference, in that when a cohabitant dies it may be possible to presume (at least in cases where no will was made) that the deceased would have wanted the survivor to have something. However, that is not the basis on which the 1975 Act operates.

INTESTACY

5.9 If the objective of the intestacy rules is to give effect to the supposed wishes of the deceased regarding the distribution of his or her estate, it could be contended that the deceased's surviving cohabitant should be given a right to a fixed share of the deceased's estate. The simple logic of such a proposal is attractive, but it founders when faced with the serious factual complexities of human relationships.

5.10 Under the current law, fixed rules determine what each relative of the deceased receives from the estate where a person dies intestate. If surviving cohabitants were included in the list of people who take a share of the estate, it would be necessary to establish the cohabitant's priority with respect to the other relatives and to quantify the cohabitant's share. Our view is that a scheme giving cohabitants fixed shares cannot deal effectively with the variety of factual circumstances that might arise when two individuals cohabit. A court-based discretionary scheme would appear preferable.

5.11 If cohabitants were included within the intestacy rules, additional practical problems would arise for those applying the rules. The person with responsibility for distributing the deceased's estate (the administrator or the executor) would have to investigate whether the deceased had been cohabiting before they died, and if so, whether that cohabitant was eligible to obtain a share of the estate. These problems do not tend to occur under the current intestacy rules; recipients can usually be identified because they had an easily ascertainable relationship with the deceased (as either spouse, civil partner, child or certain other categories of blood relative). Consequently, we think that an attempt to include a surviving cohabitant in the list of people who take a fixed share of the deceased's estate when the deceased did not make a will would be fraught with difficulty.

5.12 We therefore believe that it is prudent to leave the intestacy rules alone, and instead to adapt the discretionary jurisdiction under the 1975 Act. This Act's powers can, we think, achieve the necessary flexibility and ensure broad fairness between competing claimants to the deceased's estate.

FAMILY PROVISION

5.13 In our view, it is important to ensure that, as far as possible, there is consistency between the remedies that we are provisionally proposing on separation, and the family provision regime contained in the 1975 Act. If a new scheme on separation were introduced, remedies for cohabitants on death should reflect the nature and

basis of remedies on separation so that, together, they provide a consistent and principled response to the problems faced on the termination of a cohabiting relationship.

5.14 This does not mean that the same factual circumstances should give rise to an identical result irrespective of whether the relationship terminates by separation or by death. There may be very good reasons why a more generous award is appropriate in one case rather than the other. But when a court decides what, if any, provision should be ordered under the 1975 Act to a surviving cohabitant, it should at least be required to have regard to the provision that the applicant might reasonably have expected to receive if the relationship had terminated by separation rather than by death.

5.15 We suggest that a number of reforms to the 1975 Act would be required in order to achieve the consistency between the remedies that we are seeking. We list the most important of those that we provisionally propose in paragraph 5.19 below.

5.16 We are considering one further amendment in relation to cohabitants' claims under the 1975 Act. We have provisionally proposed that it should be open to a cohabiting couple to opt out of the scheme of financial relief applicable on separation. If they can opt out of remedies on separation, should they also be able to opt out of the remedies available on death?

5.17 We can see that, although any right to opt out of a possible claim under the 1975 Act would be unique to cohabitants, the reasons that justify cohabitants being permitted to opt out of the scheme that operates on separation may apply with equal force when the relationship is terminated by death. In Part 6, we refer to Y and Z who wish to opt out of financial relief on separation so that their respective estates go to the children of their earlier relationships. We think that there is a good argument that in such circumstances they should be able to opt out of any new scheme as it applies both on separation and on death. In the event of such an opt-out, Z would be barred from making a claim on Y's death, and Y would be barred from making a claim on Z's death.

CONSULTATION

5.18 We provisionally reject the view that cohabitants should have an automatic entitlement to a share of their deceased cohabitant's estate on intestacy. Do consultees agree?

5.19 We provisionally propose that, if a new scheme for financial relief for cohabitants on separation were enacted, then in relation to the Inheritance (Provision for Family and Dependants) Act 1975:

(1) the definition of cohabitants for the purposes of the 1975 Act should be amended to match the definition used under the new scheme;

(2) the definition of "reasonable financial provision" applied to cohabitants' claims under the 1975 Act should be reviewed to ensure consistency with the new scheme applying on separation;

(3) in determining a cohabitant's claim for provision under the 1975 Act, the court should be required to have regard to the provision that the applicant might have reasonably expected to receive in proceedings for financial relief on separation; and

(4) the court should be entitled, on granting a cohabitant financial relief on separation, to direct that neither cohabitant should subsequently be entitled to make an application under the 1975 Act in the event of the other's death.

Do consultees agree?

5.20 We invite the views of consultees on whether the two-year minimum duration requirement currently applying to claims by cohabitants under the 1975 Act should be amended, particularly in relation to cohabitants with children.

5.21 We invite the views of consultees as to whether cohabitants should be entitled to opt out of the right to claim financial provision under the 1975 Act against their partner's estate (whether as cohabitant or as dependant of their partner) in the event of their partner's death.

PART 6
COHABITATION CONTRACTS AND OPT-OUT AGREEMENTS

INTRODUCTION

6.1 We have provisionally proposed that cohabitants should be free to opt out of a new statutory scheme providing financial relief on separation. In this Part, we consider what should be required for parties to opt out of such a scheme effectively, and what circumstances might render an opt-out agreement ineffective.

6.2 Before outlining how we believe opting out should operate, it may be helpful to give an example of a case in which we think that parties might want to opt out of a new statutory scheme.

> Y and Z were both married previously. Y was divorced and Z was widowed. They both have independent adult children from those marriages. They would like to live together but they do not want to marry: Y's divorce settlement was hard won and they each want to retain their financial independence, partly to protect their children's inheritances. They therefore do not want their cohabitation to give rise to the possibility that either of them might have a claim in the event of separation or death.

6.3 We believe that any provision for opting out of a remedial scheme must be:

(1) sufficiently certain, so that couples who chose to opt out could be sure that a court would uphold their agreement in all but highly exceptional circumstances;

(2) sufficiently protective of vulnerable or weaker parties, so that the court would have the power to overturn opt-out agreements in limited, appropriate circumstances; and

(3) accessible, in the sense of not being unnecessarily burdensome or expensive, so that those with few assets could make effective agreements easily.

QUALIFYING CRITERIA AND GROUNDS FOR REVIEW

6.4 Opting out would deprive the parties of access to remedies which they might otherwise have enjoyed. This has implications for the format that opt-out agreements should take and the formalities that might be required for agreements to be binding. We consider it important that such agreements should be executed in a manner which:

(1) draws both parties' attention to the significance of the step being taken;

(2) provides certainty (as a matter of evidence) that opting out had been effected; and

(3) limits opportunities for the exercise of undue influence on the party who potentially stands to lose as a result of opting out.

6.5 Should any particular formalities or "qualifying criteria" have to be satisfied before opt-out agreements would be effective to exclude the operation of a new statutory scheme and be enforceable in their own terms? Requiring formalities to be complied with could offer some certainty as to what had been agreed. It would give both parties a better opportunity to consider what they were agreeing to and to decide whether or not it was a suitable agreement for both of them.

6.6 Alternatively (or additionally) the parties could be protected by giving the court the power to refuse to enforce an opt-out agreement (even if it satisfied any prescribed qualifying criteria) in light of the circumstances prevailing when one party sought to enforce it ("grounds for review").

6.7 In our view, the more qualifying criteria that were required by the scheme (or are voluntarily taken by the parties), the less opportunity there should be for the courts to overturn it. Parties who had the opportunity to consider an agreement carefully and to take advice should not be permitted later to apply to court to overturn the agreement simply because they have changed their mind. Conversely, the less demanding the qualifying criteria (or the fewer the precautions voluntarily taken by the parties at the outset), the more expansive the grounds for review should be.

Qualifying criteria

6.8 There is a range of formalities which new legislation could require to be observed before an opt-out agreement would be binding. There are three requirements that we consider are not unduly onerous or expensive which would offer certainty and confer on the act of opting out a degree of formality, drawing the parties' attention to the significance of what they are doing:

(1) that the agreement is written;

(2) that both parties sign the agreement; and

(3) that the parties' signatures are witnessed.

6.9 There are further possible requirements:

(1) The parties could be required to provide each other with full disclosure of their assets before entering into an opt-out agreement. For example, in the example above, Y and Z would have to disclose to each other the details of their property holdings, savings, pension funds, shares, trust funds and all other assets. Such a requirement could be seen as intrusive, unnecessarily burdensome, and expensive. However, it is important that parties enter into opt-out agreements in possession of all relevant facts.

(2) The parties could be required to obtain independent legal or financial advice before entering into an opt-out agreement. Such a requirement would have to indicate who should give the advice, what it should cover, and how detailed it should be.

6.10 There is also a strong argument for saying that, if cohabitants intend to oust the operation of the proposed scheme, their opt-out agreement should state expressly that that is the case. If the parties are giving up an entitlement that they would otherwise have, it is essential that they should be aware of what they are doing and of what they are losing. Evidence that the parties knowingly intended to opt out of the legislation would best be supplied by an express acknowledgement of that fact on the face of the agreement.

6.11 It may be that, although an agreement does not expressly refer specifically to the relevant legislation, it is quite clear what remedies the parties were intending to exclude. For example, the agreement may provide that no financial relief may be given to either party, save and in so far as the agreement itself allows. More difficult would be cases where provision is made for the division of some of the parties' assets on separation without any reference to the possibility of future claims for financial relief.

Grounds for review

6.12 There will always be cases when the courts must intervene to overturn an agreement, even if this is only when the agreement is set aside on grounds recognised by the general law (such as fraud, duress, undue influence, mistake and so on).

6.13 It is difficult to achieve a proper balance here:

(1) on the one hand, it is important to respect the parties' autonomy. To intervene and to review their agreements too readily may undermine cohabitants' confidence in the integrity of opt-out agreements and reduce the incentive to self-regulate; and

(2) on the other hand, it is important to protect the vulnerable and to take adequate account of the inherent difficulty of providing for future events.

6.14 Events may occur after the making of opt-out agreements which had not been anticipated when the agreement was made. Where an opt-out agreement was made before or during cohabitation (as opposed to an agreement made on separation), it may be that, by the time it comes to be enforced, the parties' circumstances have changed very significantly. In consequence, an agreement that was fair at the time it was made might be grossly unfair when it comes to be enforced owing to events that occurred in that intervening period.

6.15 The circumstances in which an agreement should be susceptible to review are likely to include the birth of a child to the parties, and certain grave and unforeseen (or possibly unforeseeable) changes of circumstances. However, it would be necessary in each case to consider whether the parties' agreement had contemplated the circumstances in question. If an opt-out agreement had catered for such eventualities, it can strongly be argued that it ought not to be possible for one party later to seek to set aside the agreement if those eventualities indeed arose.

6.16 Agreements made in anticipation of, or following, separation of the parties, should be treated differently. In our view, the grounds for review of separation agreements should be extremely limited. They would rarely, if at all, be re-opened

as a result of subsequent events. Unlike agreements made at the outset of cohabitation, agreements reached at the point of separation would be performed shortly after they were made, leaving little opportunity for any supervening event to occur.

The effect of failure to satisfy qualifying criteria or of a successful challenge in light of supervening events

6.17 An opt-out agreement which did not comply with the qualifying criteria or which was successfully challenged in light of supervening events clearly would not bind the court. However, it does not follow that such an agreement would have to be completely ignored.

6.18 If, adopting the example at paragraph 6.2 above, Y had made it clear to Z (as a condition of Z moving in) that Z should have no claim against Y in the event of separation, and Z had implicitly accepted this term by moving in, then it might be argued that Z should not have a claim. Although that "agreement" did not comply with the qualifying criteria (because, for example, the scheme required that agreements must be written, and this agreement was only oral), it might be proper for the court to take it into account when deciding what order, if any, it would be fair to make in all the circumstances.

6.19 However, to allow informal agreements to have any significance in the court's deliberations may undermine much of the certainty that formalities are designed to create. It would invite protracted litigation whereby the parties sought to prove or disprove the existence of an agreement and its terms. If informal agreements were to have any weight, then in our view the higher the level of adherence to the formalities and the greater the level of advice received, the more weight the judge should give to the agreement. It would be one thing to take account of a signed, written, witnessed agreement which failed to satisfy the qualifying criteria only for want of relevant legal advice (if such advice were required for the agreement to be binding), but quite another to encourage evidence of oral agreements to be given.

6.20 Similarly, if one party satisfied the court that certain terms of an opt-out agreement were unfair in light of events that occurred since the agreement was made (by establishing one of the grounds for review), other terms of the agreement might remain relevant. The court could therefore take into account the latter terms of the agreement when ordering financial relief in so far as they reflect the parties' intentions. Alternatively, the court could be required to disregard the agreement in its entirety and to order financial relief as if the agreement had not been made.

Model agreements

6.21 It might be useful for those wishing to opt out to be provided with one or more model agreements. These could assist the parties in complying with any required formalities, in providing some level of general advice, and in encouraging them to consider the pertinent issues by appropriate prompts. Offering a series of standard provisions which couples could use without the need for legal advice might encourage couples to consider how they would deal with potential future situations and suggest terms that might deal with them.

6.22 However, model agreements would not necessarily assist couples in deciding whether an opt-out agreement was suitable for their individual circumstances. Couples using such models without the benefit of advice might find that the agreement they made was not the agreement that one or both of them intended. This could be a significant drawback to the utility of model agreements.

COHABITATION CONTRACTS

6.23 Whether or not a new statutory scheme is introduced for cohabitants, the legal force of cohabitation contracts would benefit from clarification. For many years there was doubt as to whether cohabitation contracts were valid or void on public policy grounds. Although it is now very probably the case that cohabitation contracts are valid in so far as they deal with financial and property aspects of cohabitants' relationships, it would be useful to remove any remaining uncertainty. The removal of any doubt about the enforceability of such contracts might encourage cohabitants to exercise their freedom of choice more often by making agreements, therefore reducing the possibility of future litigation. Agreements can also serve a useful function in setting out how the parties propose to manage their finances and property during their relationship.

CONSULTATION

6.24 We invite the views of consultees on what qualifying criteria, if any, should be necessary for an opt-out agreement to be binding.

6.25 We invite the views of consultees on the question of the significance, if any, to be attached to agreements which did not comply with the qualifying criteria required for agreements to be binding.

6.26 We invite the views of consultees as to what circumstances, if any, should permit the courts to set aside the terms of an otherwise binding opt-out agreement.

6.27 We invite the views of consultees on how the court should proceed where an otherwise binding opt-out agreement has been set aside.

6.28 We invite the views of consultees on the use of model agreements and how they should be drafted.

6.29 We provisionally propose that legislation should provide (for the avoidance of doubt) that, in so far as a cohabitation contract deals with the financial or property relationship of the parties, it is not contrary to public policy. Do consultees agree?

PART 7
PROCEDURE

INTRODUCTION

7.1 There is not space in this overview to cover issues of procedure in any detail. We refer consultees to Part 11 of the full consultation paper for a comprehensive discussion of procedural issues relating to cohabitation cases brought under any new statutory scheme. However, there are two matters we should raise briefly here.

THE PROCESS

7.2 We envisage that proceedings for financial relief on separation will be family proceedings, with the responsibility for rule-making being assigned to the Family Procedure Rule Committee. Cases would be heard for the most part in the county court before district judges, but the High Court would have concurrent jurisdiction. Which court heard a particular case would depend upon its level of complexity and its value.

7.3 We provisionally propose that claims by cohabitants under our proposed scheme for financial relief on separation should be treated as family proceedings, and the promulgation of rules should be referred to the Family Procedure Rule Committee. Do consultees agree?

7.4 Subject to any reforms to the court structure as it applies to family cases, we provisionally propose that claims under a new scheme for financial relief on separation should be heard in the county court or the High Court. Do consultees agree?

LIMITATION PERIOD

7.5 Under the Inheritance (Provision for Family and Dependants) Act 1975, claims for financial provision must be brought against the estate of the deceased within six months of the grant of probate or letters of administration.

7.6 We think that it is important that claims under any new scheme for financial relief on separation should be brought expeditiously. In our view, claims should be brought within one year of the parties' separation. That period should be capable of extension to one year from the date of birth of a child of the cohabitants. Alternatively, it may be that it would be desirable to retain a general discretion to extend the limitation period in exceptional cases to avoid hardship.

7.7 We provisionally propose that claims under a new statutory scheme should be brought within one year of the parties' separation. Do consultees agree?

7.8 We invite the views of consultees as to whether:

(1) the time period for making a claim should be extended to one year from the birth of a child of the cohabitants where, at the time of separation, the applicant is pregnant by the respondent;

(2) there should be a general discretion vested in the court to extend the time period for making a claim in exceptional circumstances.

PART 8
SUMMARY OF PROVISIONAL PROPOSALS AND CONSULTATION QUESTIONS

INTRODUCTION

8.1 We set out below a summary of our provisional proposals and consultation questions on which we are inviting the views of consultees. We would be grateful for comments not only on the issues specifically listed below, but also on any other points raised in this overview. It would be helpful if, when responding, consultees could indicate either the paragraph of this summary to which their response relates, or the paragraph of this overview in which the issue was raised.

PART 2: IS REFORM NECESSARY?

8.2 We consider that, in cases where the couple have children, the current law governing the resolution of cohabitants' financial and property disputes on separation is uncertain and capable of producing unfair outcomes, and that reform for this category of case is justified. We provisionally propose that new statutory remedies should be devised to deal with such cases. Do consultees agree?

[Paragraph 2.77]

8.3 We invite the views of consultees on whether reform may also be warranted in any cases involving cohabitants without children.

[Paragraph 2.78]

PART 3: FINANCIAL RELIEF ON SEPARATION: A PROPOSED NEW SCHEME

8.4 We provisionally reject the view that any new remedies providing financial relief on separation should attach to a new legal status to which cohabiting couples can "opt in" by registration. Do consultees agree?

[Paragraph 3.13]

8.5 We provisionally propose that any new statutory scheme providing financial relief on separation should be available only between "eligible cohabitants", unless the parties have agreed that neither shall apply for those remedies by way of an "opt-out agreement". Do consultees agree?

[Paragraph 3.14]

8.6 We invite the views of consultees on whether any legislative definition of those eligible to apply as cohabitants for financial relief on separation should be expressed by analogy to marriage and civil partnership, or in other terms.

[Paragraph 3.24]

8.7 We provisionally propose that any legislative definition of those eligible to apply should expressly require that the parties shared a joint household. Do consultees agree?

[Paragraph 3.30]

8.8 We provisionally propose that any legislative definition of those eligible to apply should include an express, non-exhaustive checklist of factors to which the court would have regard in determining whether a couple were cohabiting. Do consultees agree?

[Paragraph 3.31]

8.9 We invite the views of consultees on the factors that they consider should be included in such a statutory checklist.

[Paragraph 3.32]

8.10 We consider that cohabitants who are by law the parents of a child born before, during or following their cohabitation ought to be automatically eligible to apply for remedies under any new scheme on separation. Do consultees agree?

[Paragraph 3.52]

8.11 We invite the views of consultees on whether cohabitants with a child who is not the child by law of both parties ought to be eligible regardless of the length of their relationship, and, if so, in what circumstances.

[Paragraph 3.53]

8.12 We invite the views of consultees on:

(1) whether parties who do not have a relevant child should have lived together as cohabitants for a specified minimum duration before they are eligible to apply for financial relief on separation ("a minimum duration requirement");

(2) how any such minimum duration requirement should be selected; and

(3) how long any such minimum duration requirement should be.

[Paragraph 3.54]

8.13 We provisionally reject the view that the substantive law governing financial relief between spouses on divorce (Part II of the Matrimonial Causes Act 1973) should be extended to cohabitants on separation. Do consultees agree?

[Paragraph 3.64]

8.14 We provisionally propose that in granting financial relief to cohabitants on separation, the courts should have available to them the following menu of orders:

(1) periodical payments, secured and unsecured;

(2) lump sum payments, including by instalment;

(3) property adjustment;

(4) property settlement;

(5) orders for sale;

(6) pension sharing; and

(7) interim payments ordered on account pending a full trial or final settlement.

Do consultees agree?

[Paragraph 3.66]

8.15 We provisionally reject the view that any new scheme should take effect by reference to fixed rules for property division. Instead, we provisionally propose that the courts should exercise a discretion structured by principles which determine the basis on which relief, if any, is to be granted on separation. Do consultees agree?

[Paragraph 3.75]

8.16 We invite the views of consultees on the principles which should justify and quantify awards of financial relief between cohabitants on separation.

[Paragraph 3.137]

8.17 We consider that the mere fact that one party has financial or other material needs should not in itself justify the grant of financial relief from the other party on separation. Do consultees agree?

[Paragraph 3.138]

8.18 We consider that, in determining whether to grant relief and, if so, what the relief should be, 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").

Do consultees agree?

[Paragraph 3.139]

8.19 We invite the views of consultees on the factors to which the court should have regard when considering the justification for, and quantum of, any financial relief to be granted in accordance with the principles of economic advantage and economic disadvantage.

[Paragraph 3.140]

8.20 We invite the views of consultees on whether a new scheme for financial relief between cohabitants should include a power to make awards in appropriate cases to assist the party with whom any relevant children will principally live following separation with the costs of child-care.

[Paragraph 3.141]

8.21 We invite the views of consultees on whether awards should only be made where it would be substantially or manifestly unfair not to do so.

[Paragraph 3.142]

8.22 We consider that parties' conduct should not be taken into account in considering claims for financial relief on separation, save where that conduct relates to litigation or financial misconduct, or where it would otherwise be inequitable to disregard it. Do consultees agree?

[Paragraph 3.143]

8.23 We consider that, having determined that some remedy is justified and calculated its quantum in accordance with the principles outlined above, the court should have regard, in particular, to the following factors when deciding what order(s) to make:

(1) the needs of both parties and any children living with them; and

(2) the extent and nature of the financial resources which each party has or is likely to have in the foreseeable future.

Do consultees agree?

[Paragraph 3.144]

8.24 We invite the views of consultees on the weight to be attached to the clean break principle between cohabitants. In particular, how should the clean break principle relate to the operation of the substantive principles otherwise determining the award that should be made?

[Paragraph 3.145]

PART 4: FINANCIAL RELIEF ON SEPARATION: HOW WOULD IT WORK?

8.25 We invite the views of consultees on the Examples set out in Part 4. In particular, we invite consultees to indicate in which of the Examples they consider that financial relief should or should not be available, and why.

[Paragraph 4.64]

PART 5: REMEDIES ON DEATH

8.26 We provisionally reject the view that cohabitants should have an automatic entitlement to a share of their deceased cohabitant's estate on intestacy. Do consultees agree?

[Paragraph 5.18]

8.27 We provisionally propose that, if a new scheme for financial relief for cohabitants on separation were enacted, then in relation to the Inheritance (Provision for Family and Dependants) Act 1975:

(1) the definition of cohabitants for the purposes of the 1975 Act should be amended to match the definition used under the new scheme;

(2) the definition of "reasonable financial provision" applied to cohabitants' claims under the 1975 Act should be reviewed to ensure consistency with the new scheme applying on separation;

(3) in determining a cohabitant's claim for provision under the 1975 Act, the court should be required to have regard to the provision that the applicant might have reasonably expected to receive in proceedings for financial relief on separation; and

(4) the court should be entitled, on granting a cohabitant financial relief on separation, to direct that neither cohabitant should subsequently be entitled to make an application under the 1975 Act in the event of the other's death.

Do consultees agree?

[Paragraph 5.19]

8.28 We invite the views of consultees on whether the two-year minimum duration requirement currently applying to claims by cohabitants under the 1975 Act should be amended, particularly in relation to cohabitants with children.

[Paragraph 5.20]

8.29 We invite the views of consultees as to whether cohabitants should be entitled to opt out of the right to claim financial provision under the 1975 Act against their partner's estate (whether as cohabitant or as dependant of their partner) in the event of their partner's death.

[Paragraph 5.21]

PART 6: COHABITATION CONTRACTS AND OPT-OUT AGREEMENTS

8.30 We invite the views of consultees on what qualifying criteria, if any, should be necessary for an opt-out agreement to be binding.

[Paragraph 6.24]

8.31 We invite the views of consultees on the question of the significance, if any, to be attached to agreements which did not comply with the qualifying criteria required for agreements to be binding.

[Paragraph 6.25]

8.32 We invite the views of consultees as to what circumstances, if any, should permit the courts to set aside the terms of an otherwise binding opt-out agreement.

[Paragraph 6.26]

8.33 We invite the views of consultees on how the court should proceed where an otherwise binding opt-out agreement has been set aside.

[Paragraph 6.27]

8.34 We invite the views of consultees on the use of model agreements and how they should be drafted.

[Paragraph 6.28]

8.35 We provisionally propose that legislation should provide (for the avoidance of doubt) that, in so far as a cohabitation contract deals with the financial or property relationship of the parties, it is not contrary to public policy. Do consultees agree?

[Paragraph 6.29]

PART 7: PROCEDURE

8.36 We provisionally propose that claims by cohabitants under our proposed scheme for financial relief on separation should be treated as family proceedings, and the promulgation of rules should be referred to the Family Procedure Rule Committee. Do consultees agree?

[Paragraph 7.3]

8.37 Subject to any reforms to the court structure as it applies to family cases, we provisionally propose that claims under a new scheme for financial relief on separation should be heard in the county court or the High Court. Do consultees agree?

[Paragraph 7.4]

8.38 We provisionally propose that claims under a new statutory scheme should be brought within one year of the parties' separation. Do consultees agree?

[Paragraph 7.7]

8.39 We invite the views of consultees as to whether:

(1) the time period for making a claim should be extended to one year from the birth of a child of the cohabitants where, at the time of separation, the applicant is pregnant by the respondent;

(2) there should be a general discretion vested in the court to extend the time period for making a claim in exceptional circumstances.

[Paragraph 7.8]