Cohabitation and the Law Commission's Project

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Abstract: In 2004, the U.K. parliament passed the Civil Partnership Act which provides a scheme to enable same-sex couples to obtain formal recognition of their relationships through the registration of a civil partnership. When the Civil Partnership Bill was making its way through parliament, attempts were made in the House of Lords to derail the Bill through amendments seeking to extend the Bill to certain familial relationships of care and support. In order to counter these attempts and to facilitate the removal of the amendments, the government gave the assurance that the matter of the economically vulnerable cohabitant would be referred back to the Law Commission for England and Wales for review. Consequently, in July 2005, the Law Commission commenced its project on cohabitation. This paper seeks to examine models of reform (such as the one proposed by the Law Society of England and Wales in its 2002 Cohabitation report) as well as those introduced in other Commonwealth countries. The aim is to identify some of the crucial questions that the Law Commission will need to give careful consideration to if they are to make recommendations that will provide a more radical approach to this area of the law, rather than adopt the more conservative approach of including cohabitation in 'piggy back' mode on the marriage model.

Keywords: cohabitation, contractual arrangements, Law Commission, property and financial provision, reform

The Law Commission for England and Wales (hereafter 'the Law Commission') commenced its project on cohabitation in July 2005. This was a result of the U.K. government's tactical move during the passage of the Civil Partnership Bill[1] to counter the attempts made to derail the Bill through amendments introduced in the House of Lords. By way of brief background, those amendments sought to extend

[1] The Bill has since been passed as the Civil Partnership Act 2004 and came into force in December 2005.

the Bill to certain long-term non-sexual caring and stable relationships on the ground that, if the Bill was not "a gay marriage Bill but one about removing injustice" (Baroness O'Cathain, H.L. *Hansard*, 24 June 2004, col. 1363), the economic vulnerability of those in caring relationships equally merit attention. The government had, however, consistently maintained throughout the period of the parliamentary debates that the Civil Partnership Bill was not the appropriate place to deal with any relationships other than same-sex partnerships. In order to gain support in the House of Commons for the removal of the Lords' amendments, the government assured the House that the matter of the economically vulnerable cohabitant, opposite-sex and same-sex, would be referred back to the Law Commission for review in its Ninth Programme of Law Reform in 2005 (Jacqui Smith, H.C. *Hansard*, 12 October 2004, col. 179). The government was clearly cautious to limit any review of the law relating to close personal adult relationships to only cohabitants, rather than a wider range of interdependent relationships.

Accordingly, the Law Commission's project on cohabitation focuses on the financial hardship suffered by cohabitants, opposite-sex and same-sex, or their children on the termination of the relationship by separation or death, and not those who are in familial and non-familial relationships of care and support. This includes considering matters such as providing access to a property redistribution regime and to financial provision. The Law Commission had, in its earlier Sharing Homes discussion paper (2002), observed the greater need for the law to provide remedies to home-sharers[2] but had then refrained from making any

[2] The Law Commission's reference to the term 'home-sharers' extends to a wider range of home-sharing relationships and is not limited only to relationships involving cohabitants.

recommendations on possible legal reform.[3] In that year, the Law Society of England and Wales (hereafter 'the Law Society') also published its Cohabitation report (2002), in which it proposed a two-tiered system: a registration scheme for same-sex relationships which would provide registered partners with rights analogous to those for married couples; and a presumptive system which would confer lesser rights and responsibilities to opposite-sex and same-sex cohabitants on their satisfying certain criteria (e.g. a minimum period of cohabitation or the presence of children, and conjugality).

At present, it remains unclear whether, but appears highly probable that, the Law Commission is likely to recommend a presumptive system whereby rights and responsibilities will be ascribed to cohabitants. But it is not certain that the Commission will mirror the approach taken by the Law Society back in 2002 and recommend a presumptive model similar to the Law Society's. It is possible that the Law Commission may look to the models adopted by other Commonwealth countries such as Australia, where legislation has been introduced at sub-national level to deal with the financial and property matters of not only cohabitants but also those in caring relationships (although any recommendations by the Law Commission will not extend to the latter group). Given the possibilities, it remains highly speculative what direction the Law Commission is likely to take and what its recommendations are likely to be. This paper seeks to explore these various possibilities and more specifically to consider the effectiveness of these various models in addressing the economic vulnerability of cohabitants. Moreover, most reform proposals have been based on stretching the marriage model to

[3] For a fuller discussion of the Law Commission's *Sharing Homes* discussion paper, see Wong (2003); Miles (2003); Mee (2004).

cohabitation as a means of extending rights and responsibilities (Bottomley & Wong 2006) but have only limited effect because of the ideologies of law with which the marriage model is imbued with. The paper, therefore, seeks to identify some of the questions that will require careful consideration by the Law Commission in its consultation process in order for more progressive reform to be introduced which will transgress the marriage model as its starting point.

CRITERIA FOR INCLUSION AS A QUALIFYING RELATIONSHIP

The criteria used for defining a qualifying cohabitation in most presumptive models have tended to use the marriage model as the starting point. This is not unsurprising since the genesis of most of these models have invariably been the extension of some of the rights and privileges enjoyed by married couples to opposite-sex cohabitants. As the Australian experience demonstrates, most of the sub-national legislation was initially passed to provide opposite-sex cohabitants with access to a property redistribution regime at the breakdown of their relationships (see, for instance, the New South Wales De Facto Relationships Act 1984[4] and Tasmania's De Facto Relationships Act 1999[5]). All of the Australian sub-national legislation has at different times been amended to extend to same-sex couples as well, and some has even been extended to familial and non-familial relationships of care and support (e.g. Property (Relationships) Act 1984 (New

[4] This statute was amended by the Property (Relationships) Legislation Amendment Act 1999 and renamed the Property (Relationships) Act 1984.

[5] The 1999 Act was subsequently repealed and replaced by the Relationships Act 2003.

South Wales); Domestic Relationships Act 1994 (Australian Capital Territory); Relationships Act 2003 (Tasmania)). For the purposes of this paper, I will focus only on the criteria used in defining qualifying relationships between cohabitants (which in the case of the Australian statutes are referred to as "de facto relationships").

What is evident in the Australian context is that the definition adopted by the statutes, when they were applicable only to opposite-sex cohabitation, was one based on the marriage model. For instance, both the 1984 New South Wales and 1999 Tasmania de facto legislation previously defined de facto partners as being a man and a woman who live together as man and wife and are not married to each other. However, in a move to extend the legislation to same-sex couples, a gender-neutral definition was adopted to replace this 'marriage-like' definition. Thus de facto partners are re-defined as two persons who live together as a couple (Property (Relationships) Act 1984, s.4(1)) or have a relationship as a couple (Relationships Act 2003, s.4(1)) and are not married or related to each other.

The adoption of a gender-neutral definition of cohabitants raises various concerns for different groups. Firstly, this de-sexing of intimate opposite-sex and same-sex couple relationships suggests that, while status remains the gateway to accessing the law, the objective of the statutes is to provide not formal recognition of such status but recognition of the fact that economic vulnerability can result as a consequence of interdependency which close intimate relationships may engender. It gives a framework for dealing with financial and property matters of the parties, arising out of this interdependency, at the end of the relationship. This argument is clearly one which other groups, particularly those in relationships of care and support, have latched on to. To some extent, similar arguments were

relied upon in the U.K. by the proponents of the amendments made to the Civil Partnership Bill in the House of Lords. They also pave the way, at least in the Australian context, for the further extension of the de facto legislation to a wider range of close personal relationships, but ones which do not necessarily carry with them the presence of a sexual relationship between the parties.

In Australia, the adoption of a gender-neutral definition of qualifying cohabiting relationships, however, proved problematic for some gay and lesbian activists. In particular, the Gay and Lesbian Rights Lobby in New South Wales, in an emphatic response to government proposals in 1999 to amend the then de facto legislation, made it very clear that a totally gender-neutral definition such as that adopted in the Australian Capital Territory (Domestic Relationships Act 1994, s.3) should be avoided.[6] The adoption of a gender-neutral definition, which focuses on interdependency as the basis for recognising a relationship, no doubt has the potential for allowing a wider range of close personal relationships to piggy back on that definition to access the law. This approach also has the potential to destabilise the notion of heterosexuality and the hetero-nuclear family (Millbank & Sant 2000). Millbank and Morgan (2001), however, argue that legal reform which makes no reference to the parties' sexual relations is less radical because, in de-sexing cohabiting relationships, it renders the sexuality of the parties invisible. Same-sex relationships are therefore 'normalised' as domestic/interdependent/property relationships.[7] A major drawback for same-sex couples is that no recognition is

[6] The Domestic Relationships Act 1994 provides a general definition of domestic relationships which include de facto relationships as well as caring relationships. Unlike the Property (Relationships) Act 1984 and the Relationships Act 2003, the 1994 Act does not make a distinction between either of these relationships.

[7] See also Barker (2006) in this issue.

given to the (sexual) celebration of their intimate relationships as the law renders lesbian and gay subjecthood and sexuality invisible (Millbank & Morgan 2001, p. 315).

Notwithstanding a purported move away from the marriage model in definitional terms, the Australian statutes evince a kind of 'retreat' to that model. The courts may take into consideration a list of non-exhaustive factors in determining whether a de facto relationship exists (Property (Relationships) Act 1984, s.4(2); Relationships Act 2003, s.4(3)).[8] The factors specified include: the duration of the parties' relationship; the nature and extent of a common residence; whether or not a sexual relationship exists; the care and support of children; and the reputation and public aspects of the relationship. As Millbank and Sant (2000) explain, this list is problematic because it has its origins and history in heterosexual de facto law which is based on a comparison with marriage. Some of the listed factors are therefore not relevant to same-sex relationships and might have a negative impact on establishing the existence of a de facto relationship. Further, as the presence of a sexual relationship is one of the relevant factors, conjugality is re-introduced by the back door in determining whether a particular relationship qualifies.

Relatedly, the question of inclusion also hinges on whether a cohabitation requirement is absolutely necessary. Here, we see differences in approach in the Australian context. While most sub-national statutes do impose a cohabitation

[8] Both statutes provide that, in deciding whether two persons are in a de facto relationship, the courts may take into account any one or more of the factors listed. But a finding of one or more of the listed factors is not necessary, and the courts may also take into account other matters which may seem appropriate in the circumstances of the case.

requirement,[9] some have begun to challenge the need for cohabitation as a precursor to interdependency. Consequently, statutes such as the Domestic Relationships Act 1994 and the Relationships Act 2003 have omitted the cohabitation requirement for a couple's relationship to qualify. A key argument against the cohabitation requirement is that it renders a definition under-inclusive. Interdependence arises because of the structural aspects of a relationship (e.g. the (sexual) division of labour, arrangements relating to the economic activity or inactivity of the parties, the allocation and control of family income, etc.). As such, interdependence can equally arise in non-cohabiting relationships and cohabitation should not be used as an essential indicator of interdependence for the purposes of inclusion. This leads Millbank and Sant (2000, p. 208) to argue in favour of the broader 'relational' interdependence approach adopted in statutes like the Domestic Relationships Act 1994 which does not impose a cohabitation requirement.

However, in the U.K. (judging from the Law Society's 2002 report as well as the Law Commission's statements on their web site relating to their project on cohabitation), it would seem that a narrower approach to reform is being envisaged. In its 2002 report, the Law Society recommended that some level of protection ought to be extended to opposite-sex and same-sex cohabitants through an ascription model. It also considered the question of whether the term 'cohabitation' ought to be extended to other cohabiting non-sexual interdependent relationships. This was, however, rejected on the ground that drafting a sufficiently inclusive definition to capture the more varied nature of such relationships would

[9] A minimum two-year cohabitation period is required unless there is a child to the relationship, in which case a shorter period of cohabitation is permissible.

be too difficult. The Law Society then stuck to the narrower project of looking at only couple-based cohabiting relationships, without addressing the broader question of whether reform should also be extended to non-cohabiting couples facing similar financial difficulties.

The Law Society's choice of definition for a qualifying relationship is somewhat narrower than that currently adopted by the Australian statutes for de facto partners. Given the Law Society's focus was only on cohabiting couples, the need for a cohabitation requirement was taken as a given and was not in any sense challenged by the Law Society. The Law Society then proceeded to consider the different definitions of cohabitation currently adopted in various legal sources in the U.K. such as statutes and by the Department of Work and Pensions. In a rather unimaginative move, it then proceeded to recommend what is by now a familiar definition of cohabitation, very much wedded to the marriage model: that is, cohabitation is a relationship between "two persons (either opposite or same sex) living together in the same household in a relationship analogous to that of husband and wife" (2002, at para. 55).[10] This resort to a marriage-like definition of cohabitation for both opposite-sex and same-sex cohabitation is problematic. The marriage-like approach taken in the Law Society model is further reinforced by the recommendation of a non-exhaustive list of factors to guide the courts in determining whether a cohabiting relationship qualifies (Law Society 2002, p. 13). The very first factor on the list is whether or not the parties have a sexual relationship. Other factors include whether the parties demonstrate traits of a married couple, for example: holding joint accounts; the provision of financial

[10] The minimum period of cohabitation required under the Law Society's model is similar to that in the Australian statutes, i.e. two years unless there is a child of the parties.

support; the sharing of a household; and whether the parties socialise together and/or are known as a couple.

What we see is a stretching of the marriage model to accommodate the inclusion of other close personal relationships (Bottomley & Wong 2006). This assumes that the marriage model itself is unproblematic and is indeed a satisfactory template. The basis for inclusion of other types of close personal relationships such as opposite-sex and same-sex cohabitation must thus be based on similarity or sameness. As has been argued elsewhere (Bottomley & Wong 2006), the 'logic of semblance' has a serious limiting effect as it provides little space for more radical reform to be thought through in this area, and the potential for extending such reform to a wider group of relationships will involve the (un)necessary stretching of the marriage model even further.

BASIS FOR PROPERTY REDISTRIBUTION

The next issue which the Law Commission will need to grapple with is the basis upon which financial and property matters of cohabitants are to be resolved at the end of their relationships. Here, we see the possibility of adopting an approach based upon either property law or family law or, indeed, a combination of both. In its 2002 discussion paper, the Law Commission had considered a property law approach where rights over the shared home would be determined solely by contributions made, financial and non-financial. Such rights would arise as from the time the scheme takes hold (e.g. by making relevant contributions), and would take effect and be binding on third parties like any other beneficial interests in property.

However, the Law Commission rejected making any proposals for such a statutory scheme on the grounds that the scheme would provide insufficient flexibility for taking into account the various contributions made within a diverse range of home-sharing relationships. This conclusion is unsurprising given that, as acknowledged by the Law Commission itself, a key problem with that putative scheme was the lack of consideration being given to 'intention' as a prerequisite for acquiring a beneficial interest in the property.[11]

A family law approach, on the other hand, has the advantage of being more responsive to the nuanced nature of close personal relationships. The approach is remedial in nature in that the courts are given discretion to decide what awards and orders ought to be granted. Courts are able to give fuller consideration to the actual needs of the parties when deciding what remedies are most appropriate in each case. It would allow the courts to adopt what John Dewar (1998) describes as a "functional approach" towards identifying what particular property rights over the shared home would benefit the claimants; this need not be an award of a share in beneficial ownership but might instead be a monetary or an occupational award.

But more importantly, when dealing with issues of cohabitation, the choice between a property law and a family law approach is not always clear cut. This choice in part depends upon the objective of reform. If it is merely a question of property rights, clearly a property law approach is to be preferred. However, in most cohabitation cases, the issue of property rights is only one of many issues that require resolution at the end of the relationship, in which case a family law

[11] The 'intention' requirement has, however, proved highly problematic in the family property context, especially in the area of trusts law. For a fuller discussion on the weaknesses of an intention-based approach to resolving property disputes, see Gardner (1993); Clarke (1998); Glover & Todd (1996).

approach, arguably, offers greater potential (Miles 2003). Yet, the family law route is not without its problems.

The approach taken in the Australian statutes is more in line with a family law approach, in that access for couples is status-based (i.e. as de facto partners) and the courts have powers to make at their discretion property adjustment orders (and limited financial orders) at the end of a relationship.[12] But the statutes adopt different bases upon which a court may exercise its discretion in making a property adjustment order. The Property (Relationships) Act 1984 adopts a mixed family/property law approach in that the exercise of discretion is based solely on what seems "just and equitable" to the court. But the question of what is "just and equitable" must be decided on a property law contributions-based method, i.e. having regard only to the contributions referred to paragraphs (a) and (b) of s.20. These include financial and non-financial contributions made towards the acquisition, conservation or improvement of the property and contributions as a homemaker and parent. On the other hand, the Domestic Relationships Act 1994 and the Relationships Act 2003 take a more family law orientated approach. The court's discretion under these statutes is not limited to taking into account only those types of financial and non-financial contributions; there is wider scope to

[12] It should be noted that the Australian sub-national statutes deal only with property issues. Divorce and matrimonial proceedings, on the other hand, are dealt with under the Federal jurisdiction: see the Family Law Act 1975, which is similar to the U.K. Matrimonial Causes Act 1973 (as amended). Distinctions, therefore, remain between the sub-national statutes and the Family Law Act 1975 in respect of the orders that may be made and the factors to be taken into account. The only Australian state where there has been a wholesale transplantation of the Family Law Act 1975 into state de facto legislation is Western Australia: see the Family Court Act 1997.

consider other factors such as the financial resources and needs of the parties (Domestic Relationships Act 1994, s.15; Relationships Act 2003, ss.40 & 47(2)).

The Law Society similarly adopts an approach that is located within the family law tradition. Under its putative model, access to the law for cohabitants is status-based, with remedies to be awarded at the courts' discretion. The model allows financial and non-financial contributions (including contributions as a homemaker) to be taken into account in determining whether capital provision should be made at the termination of the relationship, which could be either a property adjustment order or a lump sum payment. But the Law Society draws a distinction between this approach and that for ancillary relief on divorce. Unlike divorce, the basis upon which capital provision is to be made to a cohabitant does not take into account matters such as the financial resources of the parties and/or their present and future needs. Instead, capital provision may only be made on the basis of a "fair account … of any economic advantage derived by either party from the contributions of the other, and of any economic disadvantages suffered by either party in the interest of the other or of the family" (2002, p. 61). This principle is lifted from s.9(1)(b) of the Family Law (Scotland) Act 1985. There are, however, key differences between the Law Society model and the 1985 Act in terms of the application of the 'fair account' principle, which are discussed in more detail below.

At first glance, the alternative approaches to property redistribution taken in the Australian statutes, as well as in the Law Society model, appear to offer more to cohabitants than hitherto available under common law and equitable doctrines. This is especially the case in relation to the law's treatment of non-financial contributions. As the threshold for making a property adjustment order under the Australian statutes is that it must be "just and equitable" to do so, the provision of

contributions, financial and non-financial, potentially calls for a restitutionary remedy.[13] A similar logic is also found in the Law Society's 'fair account' approach towards property adjustment. In these cases, the issues that arise are: whether the claimant has made relevant contributions which benefit either the other party to the relationship or his/her property; whether the claimant has received in return any countervailing benefits from the other party; and whether, in the light of the first two considerations, there is any value (enrichment) remaining in the other party's hands that calls for a reversal.

With this subtle shift towards property redistribution models that inherently focus on restitution, there are at least two problems raised which require further consideration. First, the weighing up of contributions made against benefits received for the purposes of a (restitutionary) award may prove problematic at a practical level. The difficulty lies in determining the point at which the contributions, especially purely domestic contributions, actually outweigh the benefits received so as to justify what is 'fair' and what sort of restitutionary award ought to be made. In other words, a property adjustment order may only be made if the contributions manifestly exceed the benefits received. A claimant must therefore show some element of detriment or that her contributions have resulted in the enrichment of the defendant which is unjust. The difficultly of establishing detriment in these cases relates back to a point made earlier about reform using the marriage model as a starting point without problematising marriage as a normative concept. Given the way in which the marriage model is imbued with certain ideologies of law, Diduck (2001), using marital cases as

[13] This is particularly the case with the contributions-based approach adopted in the Property (Relationships) Act 1984; cf. the Domestic Relationships Act 1994 and the Relationships Act 2003, which take a more relational approach towards the resolution of the parties' financial and property matters by permitting needs to be taken into consideration. An award, therefore, does not merely perform a restitutionary function of reversing any imbalance suffered based on contributions alone.

examples,[14] demonstrate how the notion of 'fairness', as a legal construct, is based on gendered assumptions made about the roles which parties to a relationship are expected to undertake. Bailey-Harris (1998) similarly observes that these stereotyped assumptions (especially about women's roles in domestic relationships) have consequently led the courts to treat domestic contributions made by a female claimant as having no, or little, economic value since they are made out of 'love and affection'. However, similar contributions by a man are more likely to be treated as acts of detrimental reliance that are capable of giving rise to an entitlement in the shared home.[15] Furthermore, the appropriate share to be awarded depends on the balancing of contributions made and benefits received. It requires some imbalance which must be remedied through making of an adjustment order. This means that the courts will inevitably have to grapple with the second issue of assessing the value of contributions made.

The use of restitutionary models can be problematic given the difficulties surrounding existing legal constructions of non-financial contributions such as unpaid caregiving.[16] This is particularly evident in trusts cases where no value has been given by the courts to non-financial contributions for the purposes of establishing an intention to acquire a beneficial interest in the shared home. The provision of unpaid caregiving is equally problematic in establishing detrimental reliance in these trusts cases as well as in estoppel cases, where the tendency of

[14] In particular the case of *White v. White* [2000] 2 F.L.R. 981.

[15] See e.g. *Burns v. Burns* [1984] Ch. 317; *Lloyds Bank v. Rosset* [1991] 1 A.C. 197; c.f. *Wayling v. Jones* [1995] 2 F.L.R. 1029. See also Wong (2006a).

[16] I use the term 'unpaid caregiving' to include a wide range of unpaid contributions to the welfare of the other party to the relationship and/or the family constituted by them such as domestic labour, contributions of a homemaker, childcare, care for the other party and/or family members due to age, illness, disability, etc.

the courts is to give weight to such contributions only where they are seen as exceptional.[17] It is argued that these statutory models are unlikely to bring about greater benefits to claimants, especially female claimants, who have provided mostly non-financial contributions.[18] For many feminists, the way in which law currently deals (or does not deal) with unpaid caregiving continues to raise concerns (see, for example, O'Donovan 1985; Neave 1991; Flynn & Lawson 1995; Lawson 1996; Wong 1998; Diduck 2001). The adoption of the 'fair account' approach in the Law Society model is not enough to meet these concerns. With no scope for the parties' needs to be considered in conjunction with their contributions, the model proposed by the Law Society still allows tensions with property law to remain, leading to disputes about whether the contributions made, especially indirect non-financial contributions, are of sufficient value to provide an advantage or a disadvantage which needs to be addressed by making an adjustment order.

The Law Society's restitution-style model also creates an approach that is somewhat different from that currently available to cohabitants seeking to apply for reasonable financial provision from a deceased partner's estate under the Inheritance (Provision for Family and Dependants) Act 1975. On an application by a cohabitant under the 1975 Act,[19] the court must have regard to factors such as

[17] *Ottey v. Grundy* [2003] E.W.C.A. Civ. 716; *Campbell v. Griffin* [2001] E.W.C.A. Civ. 990. See also Bottomley (2006) in this issue.

[18] The limitations of using a restitutionary approach apply not only to statutory models but also to equitable doctrines. For a fuller discussion on the limitations of using equitable doctrines in the family property context, see Wong (1999).

[19] An application may be made by a cohabitant who has cohabited with the deceased in the same household for two years prior to the date when the deceased died: see s.1(1)(ba), (1A) of the 1975 Act. Where the period

the present and future financial resources and needs of the applicant, the obligations and responsibilities of the deceased and the size and nature of the deceased's estate (s.3(1)) as well as the length of the parties' cohabitation, the age of the applicant and the contributions made by the applicant to the welfare of the deceased's family (s.3(2A)). However, unlike the 'fair account' approach proposed in the Law Society's model, the test for determining whether an order for reasonable financial provision should be made is not dependent on any imbalance between the maintenance provided by the deceased and the contributions made by the applicant during the parties' relationship. Rather, the aim is to address the applicant's dependency and an order may therefore be made by the court where the lack of provision is unreasonable and irrespective of any economic disadvantage or advantage on the part of the applicant.

One reason why the mere transplantation of the 'fair account' approach found in s.9(1)(b) of the Family Law (Scotland) Act 1985 is not of itself sufficient lies in the fact that that core principle is not a stand-alone principle in the 1985 Act. There is a crucial first principle that has been omitted by the Law Society, which the 'fair account' principle complements. That first core principle provides generally for community of property, that is the fair sharing in the value of assets classified as 'matrimonial property' (Family Law (Scotland) Act 1985, s.9(1)(a)). Matrimonial property includes the shared home if acquired before or after the marriage with the intention that it is to be used as the parties' family home. The 1985 Act further provides that 'fair sharing' means sharing the matrimonial property equally or in such proportions as are justified in the circumstance (s.10(1)). The second (fair

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of cohabitation is less than two years, a cohabitant may satisfy the test of dependency under s.1(1)(e) of the Act.

account) principle only applies where a share in the value of the matrimonial property is insufficient to correct any imbalance that may still exist in terms of the advantages or disadvantages sustained by either of the parties to the relationship. This shifts the focus away from grounding an adjustment order application on contributions alone and provides greater recognition of the parties' relationship as a joint partnership.

The use of a family law approach, therefore, does not necessarily resolve the kind of problems identified above if contributions remain, whether to a greater or lesser extent, an essential aspect of determining entitlements over the shared home. Unless the model embraces a more relational approach, there will be no space within that model for consideration of crucial matters such as the nature of the parties' relationship, the diversity of the arrangements made within the relationship especially in terms of their financial and non-financial contributions, whether these contributions have been made towards the relationship as a joint partnership, etc. The model will remain vulnerable to discrimination, as stereotypical assumptions about the parties are allowed to apply, and to unpredictability about the outcomes in cases. A conservative valuation of these contributions will result in the court either drawing the conclusion that the claimant has suffered no detriment or reducing the share to be awarded to her.

FINANCIAL PROVISION ORDERS

In most of the cohabitation models, a sharp distinction is maintained between marriage and cohabitation. One of the key areas where such distinction is evident

is in the area of financial ancillary relief. All the Australian statutes discussed in this paper have sought to reiterate that, unlike in marriage, there is no duty to maintain a de facto partner, nor has a de facto partner a right to claim maintenance from the other partner (Property (Relationships) Act 1984, s.26; Domestic Relationships Act 1994, s.18; Relationships Act 2003, s.46). The courts are, however, given powers to make limited orders of maintenance but these are mainly for situations where the other partner's earning capacity is constrained by childcare responsibilities and/or she requires re-training in order to get back into the labour market. Thus, in determining whether to make a maintenance order, the courts may consider factors such as the financial resources, income and property of each party, the financial needs and obligations of each party, their responsibilities to support any other person and the physical and mental capacity of each party to take on gainful employment. These factors mirror some but not all the factors which the courts are entitled to take into consideration in marital proceedings.[20] They point mainly to maintenance orders being available only for limited periods (to enable re-training)[21] and where there are minor children living with one of the parties.[22]

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[20] The Matrimonial Causes Act 1973, s.25(2), for example, has a longer list which includes as well factors such as the age of each party to the marriage and the duration of the marriage, the contributions each party has made or is likely to make in the foreseeable future to the family's welfare, and the conduct of each party.

[21] Both the Property (Relationships) Act 1984, s.30(2), and the Domestic Relationships Act 1994, s.22(3), place a maximum duration of three years after the maintenance order is made or four years from the time the relationship has ended, whichever is the shorter period.

[22] In the case of a maintenance order for a child, the maximum duration of such an order should not exceed the period expiring when the child attains the age of 12, or where the child suffers from any mental or physical disability, the age of 16. See Property (Relationships) Act 1984, s.30(1); Domestic Relationships Act 1994, s.22(2).

In the same vein, the Law Society had also recommended that there should not be any general right for maintenance imposed on cohabitants. The view taken was that some interim financial support might be appropriate where the parties have lived to together for a certain length of time (although no indication was given as what length of time would be necessary) and have minor children living with them (2002, para. 111). In such cases, the Law Society has stated that any maintenance awarded should prima facie be designed to enable one to train, or retrain, in order to find more lucrative employment and/or to reflect any loss which, after taking a fair account of the economic advantages and disadvantages of the relationship, cannot be adequately compensated by a capital provision. The Law Society also took the view that, in line with the 'clean break' principle, a maximum duration of four years should be placed on maintenance orders unless there were exceptional circumstances.

What this translates into is a regime for making financial provision to cohabitants that is narrower than that for married couples in matrimonial proceedings. The model being proposed by the Law Society is more closely aligned to the approach taken in New South Wales and the Australian Capital Territory. However, if the overarching objective is to address economic vulnerability, this begs the question whether the Law Commission should consider a broader approach which mirrors more closely the ones provided to married couples and civil partners. In particular, the Law Commission ought to consider whether there should in fact be any time ceilings (whether of three years or fours years) placed on the duration of such maintenance orders. Here, the Law Commission may take its cue from the more relational approach by Tasmania in the Relationships Act 2003.

While the 2003 Act states specifically that one de facto partner is not liable to maintain the other partner, the powers given to courts to make maintenance orders are wider than those under the Property (Relationships) Act 1984 and the Domestic Relationships Act 1994. The factors which the courts are entitled to take into consideration under the 2003 Act are also wider than the ones in the latter statutes but are not as extensive as those found in s.75 of the Family Law Act 1975 relating to spousal maintenance. More crucially, the Relationships Act 2003 does place any time ceilings on the duration of maintenance orders made to de facto partners. This, arguably, allows the Relationships Act 2003 to respond more flexibly to the economic difficulties faced by a de facto partner at the termination of the relationship. Thus, the Law Commission will have to consider whether setting restrictions on the duration of financial orders will serve to address the economic vulnerability of the cohabitant in a more effective manner. If they do not, the better route would be to follow that taken by Tasmania, where discretion is left to the courts to determine for how long maintenance orders should run in order to enable a cohabitant to take steps to overcome her economic vulnerability and secure long-term financial independence.

OPTING-OUT PROVISIONS – SPACE FOR CONSIDERING NEW WAYS OF GOVERNING COHABITATION?

Another issue that the Law Commission will need to deal with in its project is whether recommendations should be made for a registration or a presumptive scheme. In its 2002 report, the Law Society favoured a presumptive system as the

fallback default position for all cohabitants, opposite and same sex. While the Law Society recognised that a registration scheme would provide greater certainty for cohabitants, in that they would have to expressly opt into the system in order to enjoy any rights and privileges, it felt that this benefit was outweighed by the drawbacks of registration (2002, paras. 31-35). In particular, one of the key drawbacks was that those who are most unlikely to formalise their relationship would remain so even with a registration system and opposite-sex cohabitants may be disadvantaged by unscrupulous partners who might refuse to register. In addition, it would create a two-tier opposite-sex partnership system.

On the other hand, one of the main concerns of an ascription model is that parties covered by the statute will not have any choice as to whether or not they want their relationships regulated by the law.[23] To counter this, autonomy arguments favour giving cohabitants the choice to opt out of the statutory scheme. This then raises the question of the extent to which cohabitants may be given autonomy to structure their own relationships and make arrangements regarding financial and property matters. In other words, would, and to what extent could, cohabitants be permitted to opt out of the statutory presumptive regime? To what extent would the law recognise and give effect to the private arrangements of cohabitants? The legal effect and validity of contractual arrangements between parties to a close intimate relationship have been subject to legal scrutiny, as can be seen from the cases dealing with pre-nuptial agreements. At present, the position in the U.K. remains that pre-nuptial agreements are not seen as legally binding on the courts. They are persuasive but not enforceable, and are of only

[23] See also Young & Boyd (2006) in this issue on some of the disadvantages, especially fiscal ones, faced by opposite-sex and same-sex cohabitants under the ascription models adopted in Canada.

circumstantial relevance which the courts may take into account when exercising their discretion.[24]

The Australian statutes all provide de facto partners with the choice to contract out by making their own arrangements, whether at the outset of the relationship or at its termination, in relation to financial and property matters. These agreements are, however, enforceable provided that they comply with the law of contract including the procedural safeguards provided in the statutes (Property (Relationships) Act 1984, s.47(1); Domestic Relationships Act 1994, s.33(1); Relationships Act 2003, s.62(1)). Some of the safeguards are: the contract must be in writing and signed by both parties to the agreement; a solicitor's certificate is obtained prior to execution to confirm that independent legal advice has been provided to each party; and the solicitor's certificate is duly endorsed on the agreement. On satisfying these, the courts will give effect to the agreements made by not making orders which would be inconsistent with the terms of the agreement. The agreement may also be revoked at the application to court of one of the de facto partners (Property (Relationships) Act 1984, s.50; Domestic Relationships Act 1994, s.35; Relationships Act 2003, s.64). However, the statutes do provide a fallback for the exercise of the courts' discretion to make orders where, for example, the agreement does not satisfy any one or more of the procedural safeguards, or the circumstances of the parties have so changed since the making of the agreement that it would cause serious injustice if the agreement were to be enforced. In these situations, the courts may vary or set aside any one or more of the provisions in the agreement and/or treat the agreement as being of

[24] See, e.g., *Layton v. Martin* [1986] 2 F.L.R. 227; *M v. M (Prenuptial Agreement)* [2002] 1 F.L.R. 654; *K v. K (Ancillary Relief: Prenuptial Agreement)* [2003] 1 F.L.R. 120.

circumstantial relevance when exercising their discretion (Property (Relationships) Act 1984, ss.47(2) & 49; Domestic Relationships Act 1994, ss.33(2) & 34; Relationships Act 2003, ss.62(2) & 63).

When considering the question of whether cohabitants ought to be given the opportunity to contract out of the putative scheme, the Law Society decided against allowing cohabitation agreements to be binding. This was in part due to the disadvantages which the Law Society felt outweighed the benefits of autonomy and freedom, namely: that such contracts may be open to exploitation of the weaker party in the relationship; and that the circumstances of the parties may be so changed from the time of making the contract that it would not be fair to enforce it at the point of separation. Thus, the recommendation was to keep cohabitation agreements in line with pre-nuptial agreements, and to see the former as providing only evidential value (Law Society 2002, pp. 79-80). While it is conceded that the disadvantages (of allowing contracting out) highlighted by the Law Society are real, the Law Society's reasoning nevertheless demonstrates one of the flaws of stretching the marriage model without problematising the normative value of the model itself. The result is to make cohabitation congruent with that model: "It seems illogical to allow cohabitants to make enforceable cohabitation contracts when married couples cannot make enforceable pre-nuptial contracts" (2002, p. 80). Rather, the Law Society should have turned the argument on its head and asked the question whether the time was ripe for English courts, and parliament, to reconsider the legal effect of pre-nuptial agreements. By adopting an assimilation methodology, the Law Society closes any space for a debate on the potential for not only cohabitants but also married couples to exercise greater private autonomy

through making greater and more effective use of contractual tools to regulate their financial and property matters.

Some potential may lie in the approach taken in the Australian statutes. While one accepts that even the Australian sub-national statutes are not totally foolproof against potential abuse by the stronger party in the relationship, the provisions do allow, to some extent, for this danger to be addressed, by providing a list of procedural safeguards. Protection against potential abuse is also provided for, by reserving to the courts a residual power to vary or set aside any one or more of the provisions in the contract where enforcement would lead to serious injustice. Moreover, states like Tasmania have moved the goalposts even further by allowing de facto partners to take the added step of formalising their relationship (although such formalisation does not in fact confer on them any formal legal status) by registering a deed of relationship (Relationships Act 2003, s.11). Registration of a deed would allow the parties to access the law immediately rather than waiting for the requisite two-year period of cohabitation before the presumptive scheme takes hold. This use of a contractual method of formalising the parties' relationship can be attractive as it provides the parties with the choice not only to opt out (through entering into either a personal relationship agreement or a separation agreement) but also expressly to opt in by drawing up a deed of relationship. It is hoped that the Law Commission would undertake a more robust review of the potential use of cohabitation contracts, and other contractual methods through which cohabitants may give effect to their choice of relationship, which might in turn lead to a re-thinking of the future use and role of pre-nuptial agreements in marriage.

CONCLUSION

There are clearly a series of questions which the Law Commission will have to grapple with in this project of cohabitation. What this article has set out to do is to demonstrate how some of these questions may find answers in the various models of reform proposed in the U.K. by the Law Society as well as those adopted in the comparative examples of the Australian sub-national statutes. These questions can be summarised as follows:

- What definition should we use for defining a qualifying cohabiting relationship? Should the marriage model remain the starting point? Would conjugality be required for inclusion? This requires thinking more clearly about whether conjugality is the nexus of cohabitation and economic vulnerability.
- What rights and responsibilities should be placed on cohabitants? To what extent should these mirror those of married couples and civil partners? The obvious approach of reform is to maintain a distinction between the range of rights and responsibilities of married couples and civil partners, and cohabitants. However, if the policy objective of reform is to address the issue of economic vulnerability, the U.K. government will have to address the question of whether the differential extension of rights in relation to matters such as property redistribution and financial provision, based on marital status, remains justifiable.[25]

[25] This difference in treatment based on martial status may potentially raise human rights challenges under the Human Rights Act 1998. It still remains unclear the extent to which the U.K. courts would recognise marital

- Should property adjustment regimes be more closely aligned to a property law, contributions-based approach or a family law, contributions- and needs-based approach allowing discretion to the courts in awarding remedies? Should the Law Commission consider adopting an approach that is restitutionary in nature? In such cases, careful consideration needs to be given to the extent to which a restitutionary approach, which tends to be backward looking, will be able to address a cohabitant's economic vulnerability which may exist not only at the termination of the relationship but also extend beyond that for a period of time.
- To what extent should financial provision be made available to cohabitants? Should there be time limits on the duration of these orders given that the overarching objective is to provide protection against economic vulnerability? Should the factors for consideration be limited to only the financial resources of and/or contributions made by each party? Or should courts be allowed to take into account a wider range of factors? How far should these factors mirror those listed in the Matrimonial Causes Act 1973 and the Civil Partnership Act 2004?
- Should reform provide cohabitants with the choice to opt out? What contractual methods may be included in the presumptive scheme to enable parties to exercise greater autonomy over the regulation of their relationships? Should greater legal recognition be given to cohabitation contracts? Should these contracts still be confined to having only evidential value? Or is it time to allow such contracts to have binding effect? Principles of autonomy and freedom of choice of the individual will clearly lead to calls for allowing cohabitants to have

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status as a ground of discrimination in the way that the Canadian courts have under their Charter of Rights and Freedoms 1982. For a fuller discussion of these issues, see Wong (2006b).

the choice of opting out of a presumptive scheme. The question is how provisions for opting out are to be structured and, more importantly, whether such private arrangements will be given full binding effect.

- Last but not least, the Law Commission will also need to address the issue of potential exploitation, particularly if opting out provisions were to be made available in their recommendations. In that case, what safeguards should reform provide in order to protect, as far as practicable, more vulnerable parties from exploitation? Would the sort of procedural safeguards provided in the Australian statutes be adequate?

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