

Formalised Cohabitation: A
critical and comparative study of
an element of English Law in a
normative regime

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Abstract

This thesis examines the insights which may be gained from analysis of the potential for establishing a normative regime in English law for cohabitants, who now form a substantial constituency as an established alternative family unit, headed by apparently committed cohabiting couples, who are neither married nor in registered civil partnerships. The thesis critically analyses the 2006-7 work of the Law Commission in London, the apparent government reluctance to take this further despite Scottish implementation of a similar relationship generated compensation scheme on breakdown of such relationships, and the experience of other jurisdictions which have provided dedicated legislation for such families.

The thesis also includes the results of some empirical fieldwork in qualitative studies with practitioners in a small number of key jurisdictions, including some comparative analysis of these experiences, and presents a theory which addresses the practical adverse impact of the lack of such a normative scheme in England and Wales.

The thesis makes an original contribution to the debate on this area of English Family Law by providing a theoretical basis for legislation likely to be acceptable within the current modernisation of Family Justice in the recently established Family Court. It aims to meet both the drivers of that modernisation and most of the historic arguments against formally recognising (and discretely addressing the needs of) the substantial and continually growing cohabitant community. It makes further original contribution in analysing experience in the key jurisdictions which have introduced cohabitant legislation, both within our own geographical neighbourhood of the UK and EU and within the common law states of the Commonwealth, which were originally British settlements importing English law with them. Another original contribution is provided by an analysis of how such legislation could fit within the English legal system to provide a pragmatic solution to the escalating numbers of such families who now form a significant group expecting to find clarity in legal provision for their circumstances.

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Chapter 1: Formalised cohabitation as an element of English Law?

Introduction

This chapter sets out the proposed scope of the thesis, and its aims, which are:

- (i) to examine the so far unsuccessful attempts to introduce normative legislation into English Law, so as to give legal recognition to the contemporary trend towards cohabitation by couples of same or opposite sexes who are neither married nor in registered civil partnerships, but who have apparently made such a choice as a direct alternative to marriage or civil partnership, whether or not they have children;
- (ii) to analyse apparent obstacles to introducing such legislation;
- (iii) to investigate the apparent success of schemes in other jurisdictions having potential relevance to the likely requirements of an English Law scheme; and
- (iv) to propose legislation which, on the basis of the evidence thus gathered, might have a better chance of enactment than on previous attempts.

Chapter 1 critically analyses the background to the continuing absence of any formalised legislative regime for such informally cohabiting couples and their children, if any, and then reviews the scope for providing a discrete scheme to meet the needs of such couples and families, whether as an amendment to existing legislation, or as independent statutory provision for this new family structure.

By '**cohabitation**' is meant living together in a relationship which includes sharing a household or households in a manner which replicates a married or registered civil partnership relationship but without having entered the formalities associated with the legal status of those relationships, and with no associated pre-qualifying period¹.

¹ As with the establishment of domicile, sometimes regarded as an equally elusive concept, there is no particular reason for a qualifying period once the fact of cohabitation is apparent, although legislation might conveniently include conditions for recognition of the fact, as in New Zealand law which operates a checklist: see Chapter 8, which to some extent replicates that proposed in the English case of *Kimber v Kimber* [2000] FLR 383.

By '**couples**' in this context is meant same or opposite sex couples living together in an intimate relationship, whether or not their relationship or household includes children.

By '**normative regime**' is meant formal legislative provision defining at least minimum rights attaching to such cohabitation, the word 'normative' being usually interpreted as rule governed conduct, a central feature of law which inevitably has a normative dimension 'lying at the heart of any comprehensive legal-theoretical project'.²

The prime aim of the chapter is critically to examine the more recent background in which an established trend towards increasing numbers of informally constituted families has apparently been determinedly ignored by government policy, despite claims that 'the family' is important to social cohesion: a strangely illogical stance in the face of strong indications of urgent legislative demand. More specifically, a 2009 projection of increasing numbers towards 2030 – which was originally responsible for generating a research interest for this thesis - has already been overtaken by events, since rising numbers of such families have now shown that those 2009 projections are likely to be exceeded at a much earlier date, since the November 2015 estimated figure is now already 3.2m³.

While there is a long history of a lack of English legislation for cohabitants' rights, such governmental inaction seems particularly illogical in the context of other relevant post-2009 indicators, which include the modernisation of Family Law currently being undertaken in the new Family Court, the widening of the scope of Family Law in the introduction of same-sex marriage - a key equality issue which significantly highlights the continued neglect of any cohabitants' rights reform - and the austerity generated cuts in public services which have fallen heavily on the delivery of Family justice. Moreover while all such potential Family litigation is now steered towards Non- Court Dispute Resolution, this has disproportionately impacted upon cohabitants' disputes which, lacking their own regime, fall within the

² Stefano Bertea and George Pavlakos, *New Essays on the Normativity of Law*, Hart, 2011. Preface and Introduction, p1.

³ Announcement, Office for National Statistics, 5 November 2015.

much more expensive and complex Chancery Trusts' jurisdiction, which has always been entirely unsuitable to their context.

This first chapter's secondary aim is therefore to examine the main obstacles to introducing legislation, with the ultimate objective of considering whether if the English legal system is realistically unable to continue to address the contemporary factual position of cohabitants within existing English law without such legislation, how a realistic alternative might be achieved. In this context it is clear that evaluation of whether the various historic obstacles can be overcome (as to which the stubborn background initially appears determinedly negative) achieving success might be an uphill task, but one that cannot in logic be avoided.

The tertiary aim - while taking note of all that has gone before, and selecting for recycling anything of remaining contemporary value – is to take a fresh look at the wider field of cohabitants' rights so as to identify whether, and if so how, this new contemporary family form could – and realistically it seems now should - be recognised in a discrete regime in English law.

Chapter 2 then sets out the methodology adopted. In view of the type and scale of the comparative investigations required, this was inevitably a combination of library-based and empirical research, the latter through some interviews. These were set up with key academics and practitioners in those jurisdictions from which valuable insights might be learned from their practical experience within their own new systems, so as to inform a potentially successful English scheme.

Clearly, despite the contemporary availability of much international literature on line, it was recognised that servicing even this restricted methodology would be a challenge since, of the most useful comparator jurisdictions, only Scotland in the United Kingdom and whichever was chosen from the civil law jurisdictions in the European Union were within easy travelling and time zone distances.

On the other hand, the two leading jurisdictions which must claim most success so far in establishing cohabitants' rights legislation are Australia and New Zealand, which are each 11, 000 miles from the UK, and almost 12 hours in time zone

difference, making asynchronous communication essential in the first instance . On the other hand such is the ongoing relevance of these two common law jurisdictions to much English law that many of their academics and practitioners can often be found bringing their input 'from the bottom of the world' to the conference circuits of the UK and Europe, where it was thus possible for some very helpful face to face exchanges to take place.

Chapter 3 presents a selective literature review: selective because the cohabitants' rights debate has now continued for so long that some contributions, particularly earlier work, is no longer of key interest: however this applies by no means to all, and indeed much previous work is valuable and still insightful.

Chapter 4 evaluates some of the findings that are still useful from the 2006-7 work of the Law Commission, which did not really deserve the abrupt rejection it has received from two successive governments. Much of its content has clearly been under appreciated even if not instantly acceptable as it stood.

Chapter 5 looks at a topic which the Law Commission did *not* examine in much depth, namely the apparently definitive choice which cohabitants are clearly making away from marriage and towards cohabitation when choosing their form of family structure.

Chapters 6 to 8 are devoted to the selected individual jurisdictions chosen for analysis of the apparent success of the systems they have established.

Chapter 6 critically analyses the 2006 legislation in Scotland, an obvious choice since Scotland is part of the UK, geographically close to England and Wales, and sharing the Supreme Court at Westminster as its final appellate court, although for historical reasons its legal system is not a pure common law one.

Chapter 7 selects and examines Spain as the European Union comparator, this choice having been made for a variety of reasons which are explained in that chapter, including the extent of the crossover of Spanish and English law in Spanish courts because of the large numbers of British expatriates who live in Spain and

periodically litigate there, particularly since the implementation, in both Spanish and English Law, of the 1996 Hague Convention on Applicable Law.

Chapter 8 critically examines the Australian and New Zealand systems, the two jurisdictions which are closest to our common law system, and both long term leaders in jurisprudence of the common law world.

Chapter 9 then draws conclusions and proposes simple statutory reform, together with an exemplar draft in an **Appendix**. There is also a full **Bibliography**, collating an extensive background of reference material, including the painstaking work of longstanding experts who have kept the debate alive which has informed this study.

The recent background: 2009-2015

Beginning with the primary aim of this first chapter, the established trend which has generated this research question was a significant increase in the likely numbers of such families by 2030 as originally predicted by the Parenting and Policy Unit⁴ and since supported by numerous cohabitation figures extrapolated from the Lifestyle Surveys analysed by the Office of National Statistics⁵. However in the intervening six years it seems that figures have galloped so far ahead without noticeable governmental reaction that the first point to note may be that numbers are no longer the driving force they once were.

The 2009 Report

The Unit's Report in September 2009 was based on a figure of two million such families in that year's statistics, but also projected a likely doubling of that base figure in the suggested timescale to 2030, a projection thought even at that time to be likely to be conservative. This was because the comparable figures of 10 years previously, which were thought, in the absence of accurate data, to involve only around one million cohabiting families, had already, by 2011, apparently risen to

⁴ Report of the Parenting and Policy Unit, *British Families Since the 1950s*, NFPPU 2009, *Family Law Newsweek*, Jordan Publishing, September 2009, www.jordanpublishing.co.uk, last accessed 21 September 2011.

⁵ Lifestyle Surveys, ONS, 2012-2015.

2.9 million (up from 2.4 million in 2003). More recently more like 3m was projected, now established in November 2015 to be already 3.2m: thus the 4m figure for 2030 looks likely now to be significantly exceeded, and that that indicates significant growth rather than that the base figures were merely over-estimated - raising an immediate query as to how relevant statistics are at all, now that it seems that an identifiable constituency has been established.

Indeed by 2013, it was suggested by the then latest Office of National Statistics information paper⁶ that concerns about rising numbers of cohabiting families was entirely valid, such as these figures were, since it has always been accepted that the data were always difficult to capture accurately. However, even if data are not 100% reliable, the round figures regularly released must have been concerning to some part of government if any interest was actually being taken in this information: the obvious purpose of collecting such data is for forward planning, of which (surprisingly) there appears still to be none in the legal context, whatever policies may, or may not, be silently feeding into future support for 'the family', of which there seems little indication. Unfortunately 'the family' appears to be a context in which successive governments continue to emphasise that its welfare is of key importance, although this is sometimes difficult to discern alongside, for example, cuts to Family justice, always strenuously opposed by the pan-professional organisations.

In 2009, one could say with only moderate alarm that the year 2030 was a date which was 'now only two decades away', although it remained to be seen whether the 2011 and 2021 censuses together accurately supported this projection (depending on what questions were asked in 2021) since it has always been, and still remains, clear that data continues to be insufficiently comprehensive to map much detail of cohabiting families either fully or accurately.

However, as time slips by and other family units have been catered for in dramatically innovative legislation - while normative discrete legal provision for

⁶ ONS statement, 26 April 2013, explaining the methodology of annually mapping these cohabitation statistics.

cohabitants remains unaddressed - the awkward situation of this solely remaining atypical family unit begins to assume a much more urgent claim on juristic attention.

Thus, before going any further, it seems it must first be asked whether, in anxiously watching the Office of National Statistics for the latest rising numbers, scholarly study should be taking any notice of statistics at all, or whether the attention of jurists would in fact be better fixed elsewhere, on the underlying phenomena, since those might be more relevant to whether, and if so how cohabitants' place in 'the family' should be addressed. In so far as statistics may now be relevant, it can at least be said that a recognisable family format has now in practice been identified where it either did not previously exist or was simply ignored. Thus regardless of figures it seems that in reality there is an urgent need for the law to recognise the existence of this new normative family unit.

This must be especially relevant as other new family forms – such as same-sex marriages - are now not only recognised, but this has been done by specific amendment to statutory provision for more traditional units, such as the once standard opposite sex marriage, which was only half a century ago the sole recognised cradle for procreation and nurturing of the children essential for creating the future population. It is noticeable that the Marriage (Same-Sex Couples) Act 2013 does not create a new *form* of marriage for same-sex couples (in the way that the Civil Partnership Act 2004 created the entirely new registered civil partnership for same-sex couples alone, and from which opposite sex couples remain excluded). Instead Parliament simply amended the Marriage Act 1949 and the Matrimonial Causes Act 1973 to include same-sex couples in the existing law of marriage and divorce, which (for centuries before these provisions became statutory) had only concerned traditional opposite sex matrimony and its dissolution.

Statistics played no part in the legislation of either 2004 or 2013 since numbers availing themselves of such legal provisions have always been small. Both were equality statutes. Thus there seems no reason to pore over statistics in relation to the formal recognition of cohabitation: nor does it appear that numbers have been a driver in any of the existing jurisdictions which recognise cohabitants as a discrete constituency, so are our obvious comparators in the present project.

It is, of course, possible that statistics in fact play *no* part in the formulation of government policy in relation to recognition of cohabitants as a new family form, perhaps because the statistics are considered incomplete, unreliable and thus of no particular significance, so that there are other drivers of government inaction in relation to cohabitants while other groups received priority legislative attention. It is true that cohabitation figures only began to be collected in 1979, as officialdom was apparently slow to recognise the post-WWII evolution of this family form, and perhaps this is a fleeting period in the lifeline of data collection, especially as only in 1986 were figures about men in unmarried relationships added to the existing statistics.

The Law Commission 2006-7

Nevertheless, there was, in the last decade, a realistic opportunity for formal progress in recognising cohabitation as a permanent population phenomenon: the Law Commission's relatively recent work in 2006-7, which did, entirely properly, examine such data as was available. Their reports record the 2006 *Social Trends* figure of 42% of births occurring outside marriage (which rose to 45% by 2012): an oblique comment on both marriage and cohabitation, in a period in which social change has escalated at an astonishing rate⁷. The most recent numbers of dependent children in cohabiting families in 2015⁸ is said to be 2 million, up from 1.4 million in 2003.

Since it has to be emphasised that there is, and probably will always remain, some scepticism about the accuracy of these figures owing to the difficulty of collection, the point that is probably much more relevant is that there is still no reliable picture of the *reasons* for such cohabitation: various suggestions made, including by the Law Commission in 2006-7, include the cost of marrying or transitory retreat from other broken relationships, as much as a possibly conscious decision to cohabit rather than marry⁹ but it seems there has been no serious work on this. Also the figures do

⁷Helen Wood, John Eames, Ashley Murray, Mark Harrop, Angharad Palin and David Salter, *Cohabitation Law, Practice and Precedents*, 6th edn, Jordan Publishing, 2015, Preface. And see review by Caitlin Jenkins, *Law Society Gazette*, 21 September 2015.

⁸ ONS statement 5 November 2015.

⁹ See Chapter 5.

not include the (albeit possibly small) numbers of same-sex cohabitants who are not in registered civil partnerships – and which cannot be similarly tracked, unlike same-sex registered civil partnerships which are recorded owing to their registration ceremonies, although there are occasional media claims suggesting that there *are* figures for these relationships, for example, in 2012 there were 69,000 such relationships and in 2013 this rose to 89,000¹⁰.

Looking back, therefore, to the base line date of the current research project in 2009, the first point to note is that in the intervening short period of six years there has appeared to be increasing urgency to address this identified trend in family composition but no action has been taken. Moreover, the rate of statistical escalation suggests that the trend has been growing for some time.

Burns v Burns 1984: Baroness Hale's law reform watershed

One feature of this growing spotlight on cohabitants' rights - which began to register in earnest upon both the academic and public radar as long ago as 1984 with the case of *Burns v Burns*¹¹ - is the interest which has recently been revived by both the actual physical reappearance on the scene of Mrs Valerie Burns, the applicant in that case, and by reference to this very case as the watershed of cohabitants' rights need by Baroness Hale in her key judgment in the Supreme Court Scottish appeal of *Gow v Grant*¹². It is difficult to pick an accurate date for any widely accepted awareness of the cohabitation trend, influences on which have been variously identified as anywhere from WWII to 1960s liberalism, so that that the *Burns* case judgment¹³ is probably as good as any. Indeed, in the *Gow v Grant* judgment in the most recent cohabitant case to reach the UK's final appeal court Baroness Hale puts the case for 1984 more strongly, that is, that it has been '*obvious*' since *Burns* that legislation similar to that of the Family Law (Scotland) Act 2006 is necessary – in effect indicating that there *was already* by 1984 a sufficiently identifiable trend to trigger statutory activity for a notable constituency. It thus does not seem unsurprising that legislation is certainly now, over 30 years later, clearly justified, which indeed this project will go on to show.

¹⁰ E Malnick, *Sharp Rise in Cohabiting Gay Couples*, *The Telegraph*, London, 31 October 2013.

¹¹ [1984] Ch 317.

¹² [2012] UKSC 29.

¹³ [1984] Ch 317.

The *Burns* case has long been the archetypical situation owing to Mrs Valerie Burns' unsuccessful attempt in her trust claim, especially as this unsuitable process remains over 30 years later the only legal remedy available to cohabitants to resolve their post separation asset division problems, and yet it has not led to any obviously needed law reform. Moreover, she is not only still alive to embarrass contemporary Family justice but in 2011 was contacted by Dr Dawn Watkins of the University of Leicester, in connection with her own research project 'Finding the Lost Human Studies of the Law'¹⁴. As a result of this successful search for her, years after the disappointing 1984 proceedings, Mrs Burns participated in a guest lecture with Dr Watkins, delivered to Equity and Trusts final year students in the School of Law¹⁵. At this event it was emphasised that her case would almost certainly be decided in the same way today, namely because there is no help from the Law of Trusts where a cohabitant is unable to establish any interest in the family home under the strict property rules applied in that context. However it should be noted that at least one leading London practitioner does *not* agree that the case would necessarily have the same result if it were heard again now¹⁶.

Many attempts have been made by academic commentators in the years between 1984 and today to draw attention to the plight of separating cohabitants who cannot themselves agree on the practical division of their accumulated assets in a form recognised by English law. Much dedicated work has been done in this field, and with such commitment that a handful of specialists has already over the years assembled a solid corpus of work, on some of which the Law Commission drew in its 2006-7 project¹⁷. This has also been followed up by Parliamentary activists. However no discrete legislation based on any of these initiatives has succeeded, although some private members' Bills¹⁸ have been introduced into Parliament, by Lord Lester of Herne Hill, a Liberal Democrat peer and most recently by Lord Marks

¹⁴ Dawn Watkins, 'Recovering the Lost Human Studies of the Law: Finding Mrs Burns', (2013) 7 *Law and Humanities*, 68-90.

¹⁵ [www2.le.ac.uk/News and Events](http://www2.le.ac.uk/News%20and%20Events), 2011 Archive, 9 December 2011.

¹⁶ See Chapter 9, Conclusions.

¹⁷ Law Commission *The Financial Consequences of Relationship Breakdown, A Consultation Paper*, No 179, London, HMSO (2006); Law Commission *The Financial Consequences of Relationship Breakdown: Final Report*, No 307, London, HMSO (2007).

¹⁸ Cohabitation Bill 2008 and Cohabitation Bill 2009.

of Henley-on-Thames, who practises at the Family Bar as Jonathan Marks QC¹⁹. This latest Bill has recently passed through its second re-reading following the May 2015 dissolution, owing to which its then progress to a date for Committee stage had been lost, although it has now once again been put down to enter Committee stage in the House of Lords. However, this was the first Bill so far to last beyond a second reading, as private members' Bills rarely do unless supported by government.

Besides these disappointing outcomes, it has often appeared that there is no synergy to be found (politically, philosophically, jurisprudentially or doctrinally) with the concept of a discrete legislative regime for cohabitants, let alone for recognition of their apparent social status as a valid form of family function. Little notice appears to have been taken by government of the work of any specialist researchers who might have been supposed to be working on this topic for public benefit, including following the strong support of Baroness Hale of Richmond²⁰ in her judgment in the Supreme Court case of *Gow v Grant*²¹, which provided a unique opportunity for a particularly strong comment, since this the first appeal under the now established Scottish cohabitants' legislation to reach that court, in which the judgment not only endorsed the Family Law (Scotland) Act 2006 in positive terms but also stated '...English and Welsh cohabitants deserve no less'²².

Lord Marks' continued attempts to achieve a basis for such statutory intervention in England and Wales therefore appear daunting, to say the least, as his tenacious Bill must yet survive debate in both Houses, although some hope of that may be supported by the recent dramatic acceleration of English law in accepting atypical families, owing to the fact that, since Lord Lester's failed Bills, those new family units now involve both transsexuals²³ and full gay rights²⁴.

¹⁹ Cohabitants Rights Bill, 2013, since relisted in 2014-2015, see www.parliament.uk.

²⁰ Former Family law academic, Professor of English Law at Kings College London and Law Commissioner, now Deputy President of the Supreme Court. Ideally positioned to comment on potential law reform, as previous judgments in cohabitant cases have adversely done in relation to the lost opportunities for reform of the law, thus occasioning the need for the Lords Justices to adapt the common law. See *Kernott v Jones* [2011] UKSC 53, especially *per* Lord Wilson [78]. .

²¹ [2012] UKSC 29, see especially *per* Hale, DP, [44]-[56] on the 5 lessons to be learned from the Family Law (Scotland) 2006 scheme in relation to which this appeal was decided.

²² [Ibid, 56].

²³ Gender Recognition Act 2004.

²⁴ Civil Partnership 2004 *and* Marriage (Same-Sex Couples) Act 2014.

The Historical Background: 1984-2009

Obstacles to reform

Having established the apparent irrelevance of statistics to any drive for legislated cohabitants' rights, there is still now much background to this topic (which might almost be termed, in psychologists' language, 'baggage') which must be rehearsed before a successful pathway forward is likely to be identified through the apparent obstacles to achieving legislative reform.

As so much has already been disregarded by officialdom that was originally thought, at various stages of the debate, to be compelling, much of the past history is now out of date, so that perhaps the shortest summary of most of that work will therefore suffice. However, the fact that there now does appear to be a valid cohabitation constituency whose interests should be served must inevitably place new perspectives on contemporary consideration of the extensive historical background. Thus some preliminary consideration of the impact of three most likely contemporary drivers seems necessary so as to identify the optimum direction of future treatment of this new family format. This is particularly so in relation to the second aim of this chapter, which is to assess and evaluate the obstacles to legislative reform. Although there is certainly a case for saying these might simply be summarised as government apathy it is worth specifically addressing some points the government seems to have overlooked when declining to do anything either to further the Law Commission work or to consider seriously the Scottish achievement.

Three points

- (a) If 'numbers' are irrelevant and a completely fresh approach is required to secure attention to the necessity for reform, what might be contemporary practical drivers?*
- (b) Is there a human rights issue that is being ignored?*
- (c) Is there any relevance of harmonisation of law in the European Union?*

(a) The contemporary practical drivers for legislative reform?

As numbers have done little or nothing for cohabitants' rights - though they may have helped to raise some awareness at earlier stages of the emergence of the new family form - it is difficult to see what, if anything, might create belated panic in government circles so as, for example, to secure support for Lord Marks' Bill, but as Cabinet absorption is focussed on the economy the following may be relevant.

Strain on the welfare benefits budget?

A possible catalyst might include the impact on already significant benefits liability amongst the poorer classes to which many cohabitants belong, although this seems unlikely, since the adverse impact of the LASPO 2012²⁵ reforms has not secured any amelioration in legal aid cuts although it has been made clear that those cuts are in fact creating greater expense in the administration of justice than is being saved from the legal aid budget²⁶.

Births out of wedlock?

Nor does it seem that an increase in the numbers of births out of wedlock would have the effect it did following WWII when divorce reform was then expedited following such concern, although Baroness Hale, for example, refers in her seminal judgments in the Supreme Court not only to *Burns* in 1984, but also to extra-marital birth data, as have (early) researchers on cohabitation. In this respect time has moved on, as it seems the government now does not like to differentiate between married and unmarried families as a secure background in which to bring up children for fear of appearing to be discriminatory, as a result of which both Labour (1997-2010) and the subsequent coalition (2010-2015) hastily retreated from an earlier assurance that marriage was best: not least since any discrimination sits awkwardly with the general consolidation of anti-discrimination in the Equality Act 2010

Any ideologies at all which might promote reform? – or is the government simply irremediably apathetic in this context?

²⁵ Legal Aid, Sentencing and Punishment of Offenders Act 2012, www.legislation.gov.uk, which made stringent cuts to legal aid availability in Family cases from April 2013.

²⁶ See *Lindner v Rawlins*, [2015] EWCA Civ 51 *per* Black LJ, [32], condemning the false economy of legal aid cuts in which a husband acting in person had unsurprisingly misunderstood the law causing the Court of Appeal to be obliged to undertake legal research normally presented by advocates and for which the judiciary has insufficient resources.

There are, of course, analogies which indicate that not only are numbers alone *not* the most valid defining factor recognising a change sufficient to dictate a need for reform, but that there are other relevant ideologies of which from time to time governments take note: for example, numbers of transsexuals affected by the pre-*Goodwin*²⁷ jurisprudence were small, but the significant impact on those affected was significant, so important in itself. The resultant Gender Recognition Act 2004 achieved a life change for those able to rely on its provisions to secure recognition in their acquired gender for all purposes (some cases no doubt following personal disappointment generated by the powerful dissenting judgments in the earlier cases in the European Court of Human Rights before the *Goodwin* decision).

Similarly there have been routinely only about 6,000 civil partnerships a year, yet the government chose to fast track the Marriage (Same-Sex Couples) Act 2013 and to implement it promptly on 29 March 2014, though the s 9 transfer into full marriage for the then existing registered civil partners was not provided until 10 December 2014.

Curiously, however, 15,000 same sex marriages have since been recorded in the ensuing 18 months²⁸, dwarfing the previous average of 6,000 civil partnerships per annum, so it seems the much trumpeted 'equality' statute, the Marriage (Same Sex Couples) Act 2013, was a popular move that coincidentally turned out to be justified by numerical take-up as well. Nevertheless, this 15,000 figure is genuinely surprising since anecdotally when the statute was passed many civil partners declared their intention of *not* wishing to upgrade their relationship to full marriage, yet clearly have done so. This suggests that significant numbers really were waiting for full marriage instead of engaging with the interim status of civil partnership despite the government's repeated reminders that the Civil Partnership Act bestowed precisely the same benefits as marriage except for the label.

Nevertheless, since this 15,000 figure is supported by official records, by analogy there is no logic in denying cohabitants legal recognition of their apparently much larger, and faster increasing, numbers by dismissing what is often seen as the most

²⁷ *Goodwin v UK* [2002] 2 FLR 577, ECtHR No 28957 95 (11 July 2002).

²⁸ *The Guardian*, London, 20 October 2015.

important issue in their lack of an articulated legal regime for their situation - their claims to fairer financial and property provision on relationship breakdown. One must therefore ask what then can be the reason for the government's *not* supporting Lord Marks' current Cohabitants' Rights Bill, which would make the difference between its being enacted and very likely suffering the same fate as previous such Bills. It would also certainly be a cost effective way of giving in to one of the demands of the latest lobbying by the Family lawyers' pan-professional organisations for reform²⁹, simultaneously providing a distraction from other current Cabinet problems and also requiring no significant expenditure since the Bill is already in Parliament. Moreover, it is not even promoted by an Opposition peer but by a member of the Liberal Democrat party (formerly in coalition with the government but now of little political significance). It seems really difficult to comprehend that there is some supervening governmental ideology which requires this opportunity to be ignored as is obviously the case!

It is of course the case that previously one of the grounds historically relied on for *not* providing cohabitants' rights reform is that their numbers have not yet reached a critical mass. *If* that be the case, which on the basis of figures presently available is not currently known, statistics are not driving any decisions in relation to this potential reform, there is other evidence that this is probably an 'old chestnut'. For instance, it seems that the tone of both the Law Commission's 2006-7 reports and the government's dismissive 2011 announcement that they would not action those 2007 recommendations (which proposed a regime not dissimilar to that of the Scottish Act) simply depended on a perceived sense of lack of urgency, preoccupation with other matters, a desire not to do anything that appeared to be influenced by Scotland's reforms, and a dismissive attitude towards the law and the legal profession in general. There have, of course, now been two recent Lord Chancellor appointments of Ministers with *no* legal qualifications or background whatever, a very good Junior Minister in the Coalition Government of 2010-15 has now left the House of Commons and the plain fact appears to be that the government presents as taking no interest in any aspect of the Law as such, unless required for enactment of some previously articulated policy.

²⁹ The Resolution Manifesto of Autumn 2015 also asks, *inter alia*, for No Fault Divorce, better advice services *in lieu* of legal aid, as well as Cohabitants' Rights.

Impact on the economy?

This would clearly be a potent driver if it could be established that legislating quickly and easily to provide cohabitants' rights could show up in some balance sheet or other. In fact that is precisely what could happen if Lord Marks' Bill – or perhaps, better, a simpler one, taking less Parliamentary time and offering less opportunity for pages of contentious Hansard debate in both Houses – could be relied upon.

Accordingly, while there is no lack of literature on this property angle (both doctrinal and practical) and on other aspects of cohabitants' legal and practical situation, there is obviously no will for legislation while the present government is in power and engaged with migration and the EU membership.

This is unfortunate since The first detailed attempt to address the property issues was that of Mee³⁰. Subsequently, the leading researcher and commentator has been Anne Barlow³¹ whose contributions, alone and with others,³² including with the later Law Commissioner Elizabeth Cooke³³, have proposed workable solutions for formal recognition of cohabitants which have been completely ignored, while successive governments have legislated for every other family constituency .

This is the more concerning, following government commitment to addressing excessive legal aid costs by implementing the 'LASPO' cuts mentioned above, which have not only removed legal aid from almost all family proceedings, but also severely restricted it in all cases including those property claims which must still be

³⁰ John Mee, *Property Rights of Cohabitants*, Hart, 1999, based on his earlier doctoral research.

³¹ Anne Barlow, *Cohabitants and the Law*, 3rd edn, Tottel Publishing, 2001, one of two early monographs used in Family Law courses, the other being Martin Parry's *The Law Relating to Cohabitation*, 3rd edn, Sweet & Maxwell, 1993.

³² Anne Barlow, S Duncan, G James and S Park, 'Just A Piece of Paper? Marriage and Cohabitation' in A Park, J Curtice, K Thomson, L Jarvis and C Bromley (eds) in *British Social Attitudes: Public Policy, social ties. The 18th Report*. Sage, 2001; Anne Barlow, S Duncan, G James and S Park, *Cohabitation, Marriage and the Law: social change and legal reform in the 21st century*, Hart, 2005; Anne Barlow, C Burgoyne and J Smithson, *The Living Together Campaign: An Investigation of the impact on legally aware cohabitants*, Ministry of Justice, 2007, available at www.justice.gov.uk, last accessed 3 November 2013.

³³ Anne Barlow, Elizabeth Cooke, Therese Callus, *Community of Property: A Regime for England and Wales?* Policy Press, 2006.

tried in the Chancery Division, despite Lord Justice Jackson's recommendation in his Final Report on Civil Justice Costs³⁴ that legal aid should *not* be cut further.

In this respect, in theory there has been some benefit for *cohabitants* as they are not 'family' for the purpose of the Children and Families Act 2014 s 10, which requires statutory attendance at a Mediation Information and Assessment Meeting (MIAM) before commencing any *family* proceedings is allowed. This is, of course, *because* cohabitants, in not being family members at all, are only *civil* litigators who are obliged to take their property claims to the Chancery Division of the High Court or the Chancery lists of the county courts under the Civil Procedure Rules (CPR), *not* in the new unified Family Court under the Family Procedure Rules (FPR) 2010, although the 2014 cohabitants' financial case of *Seagrove v Sullivan*³⁵ has managed to cross into the Family Court through consolidation with a child issues case already there.

However the expense of Chancery litigation is such that it is clearly not a genuine silver lining that this type of case misses the MIAMs embargo on proceedings without prior attempted mediation. No sensible cohabitant would choose Chancery litigation over either mediation or self-determination of some sort, owing to the notorious expense, delay, stress and uncertain outcome of any such case. This is hardly a benefit of denial of membership of any recognised 'family' unit, although it has been posited by the practitioner David Burrows, that there is probably no reason why such cases should not in future even *begin* in the Family Court, rather than waiting for transfer³⁶. Whether or not he is right about this, the matter may soon be

³⁴ Jackson, LJ, Review of Civil Litigation Costs, Interim Report, 2009, available at www.judiciary.gov.uk; Jackson, LJ, Review of Civil Litigation Costs, 2009-2010, Final Report, 2010, available at www.judiciary.gov.uk.

³⁵ [2014] EWHC 1410 (Fam).

³⁶ Burrows, solicitor Mediator-Arbitrator, New Law Journal columnist and Family Law commentator, has long considered that in fact the Family Procedure Rules 2010 *can* be read in such a way that there is actually nothing to *stop* an application by a cohabitant under TOLATA 1996 from being started in the new unified Family Court, rather than in the Chancery jurisdiction of the High Court or county court, since TOLATA refers to 'a Court' which has always been interpreted as an application to the High Court, Chancery Division (especially as the rest of the statute refers to clear Chancery matters). He further concludes that there is nothing in the statute or elsewhere preventing a TOLATA case being started in the Family Court.

In support, it should be mentioned that the Family Court has not only occasionally dealt with ancillary issues of a cohabitation nature when determining core matters in relation to children (which indisputably go to the Family Court or High Court Family Division) but that this happens more frequently than is perhaps realised, such as in the recent case of *Seagrove v Sullivan* [2014] EWHC

overtaken by events, since the relevant allocation rules are in any case now likely to be updated in the present Chancery Modernisation Review ‘to ensure that those procedures are appropriate for current times’ (as mentioned by the Chancellor, Sir Terence Etherton, in his Preface to the 2013 Chancery Guide³⁷).

Summary

Sadly the conclusion of this section appears to be that there probably are *no* immediately obvious ideological drivers which might now encourage the government to support legislative reform for cohabitants, since even if there is no interest in cohabitants as such, the government has not responded to legislative opportunities which would have had obvious political and economic benefits in supporting allegedly urgent austerity aims, particularly in cutting welfare benefits, legal aid and civil litigation budgets.

Accordingly it does seem that even if there were suddenly 20m cohabitants it would be unlikely to engage government attention, so that other drivers must be found since any cohabitant population explosion is obviously seen only as a *supporting* rather than driving factor. The 15,000 recorded same sex marriages figure (in any case *ex post facto*) appears entirely coincidental to the decision to enact the Marriage (Same Sex Couples) Act 2013, the driver for which was probably a combination of the policy behind the Equality Act 2010 and the *Wilkinson v Kitzinger*³⁸ decision. This case, involving two women married in a province of Canada, was obviously considered of some importance, since the judgment was given by the President of the Family Division, and made clear the cross border complexities of English law’s inability to recognise an overseas same sex marriage except as a civil partnership.

While the impact of *Goodwin* clearly indicates that the *theory behind the statistics* can establish a practical trend, in turn demanding analysis of absence of juristic

1410 (Fam) which concerned a dispute about the half share of a house which came to the Family Court owing to its association with a dispute about how much time one of the children of the family should spend with his father: in other words this was a consolidated hearing under both the Children Act 1989 and TOLATA 1996, locating that consolidation in the Family Court not the Chancery jurisdiction.

³⁷ Sir Terence Etherton, *Chancery Guide*, 13th edn, Ministry of Justice, Preface.

³⁸ [2006] EWHC 2022 (Fam).

recognition of the family format involved, it looks as though the government is also only concerned about this if dislike of an English law stance might have some international impact such as embarrassing the UK in the ECtHR (as in *Goodwin*) or discouraging foreign tourist trade particularly from moneyed parts of the Commonwealth such as Canada.

Accordingly unless there is a role for human rights it is difficult to see how to move forward.

(b) Is there a human rights issue?

It seems that this aspect was not much considered until it could no longer be ignored that Christine Goodwin's litigation, which finally progressed the transsexuals' case towards full gender recognition, was squarely within the framework of the Convention on Human Rights, which had by 2002 been imported into English law by the Human Rights Act 1998. This was not the case when the previous key ECHR transsexual recognition cases of *Rees v UK*³⁹, *Cossey v UK*⁴⁰ and *Sheffield & Horsham v UK*⁴¹ were before the ECtHR which persisted in allowing generous margins of appreciation.

Nevertheless, a latent human rights issue may also exist in the cohabitation context, which should not therefore be brushed aside. This is because the core mischief of a projected increase in numbers of families based on cohabiting relationships is that where there is inadequate financial provision in the existing law for the weaker party financially on the breakdown of such relationships, the state will almost certainly have to provide in the form of welfare benefits. There are currently alarming projections about the extent to which the welfare benefits budget is likely to be exceeded by 2017 alone, thus threatening the government's strategy for returning the UK to solvency following the economic downturn and resultant austerity measures which have been in place since 2010. Moreover the latest news, depressing even alongside the good news of an expanding economy, is of further

³⁹ [1986] EHRR 56.

⁴⁰ [1993] 2 FCR 97.

⁴¹ [1998] 17 EHRR 163.

billions of cuts going forward from the current Budget, which logically must impact on the human fallout of broken partnering relationships, particularly cohabitation.

This very result has for many years clearly illustrated what has happened in the absence of a specific legal regime for such relationships, since in 2010 the Institute for Fiscal Studies produced a report on outcomes for women and children respectively leaving marriage and cohabitation, which concluded, unsurprisingly, that those leaving cohabitation descended faster into poverty than those leaving a married family unit⁴².

The latent human rights issue lies in the fact that the inherent disadvantage of such a result is that currently the imperfect gender equality produces unequal results adversely impacting on women. This is because cohabiting relationship breakdowns tend to impact more significantly on women than on men, since it is women who are more often the carers of dependent children and of the home. They are therefore inevitably more often part time workers or merely homemakers, and the resultant disadvantage suffered is indirect discrimination.

Moreover, while in their 2007 work the Law Commission was against recognising any potential relationship disadvantage to be compensated where a cohabiting couple had no children, this is by no means the last word on this topic. This is because where a cohabiting woman assumes the specialised homemaker role which is not shared by the man, even where there are no children that situation obviously generates a practical disadvantage in employment, which has been recognised for decades in employment literature and indeed in financial provision under the Matrimonial Causes Act 1973 and the Civil Partnership Act 2004, and arguably needs no further restatement.

Summary

This point looks more hopeful as a potential driver for reform. Unlike population explosion issue, which has clearly not been convincing in the face of an apparent government policy of inaction in progressing cohabitants' rights, indirect

⁴²Alissa Goodman, Ellen Greaves, *Cohabitation, marriage and child outcomes*, Institute of Fiscal Studies, IFS Commentary C114, IFS, 2010.

discrimination is now a highly topical element in any argument for a normative legislative scheme. This human rights issue is difficult to ignore, since equality has been a key feature of recent pro-minority policy evidenced by the passage of the 2004 and 2013 statutes in favour of full gender recognition, gay partnership and full marriage rights. The right to equality as a human right is thus a relatively new and developing contemporary argument for including cohabitants in such normative legislation. particularly when also supported by the third of the preliminary issues, harmonisation of international Family Law, especially in the UK's neighbouring territories of the EU.

(c) What is the influence, if any, of harmonisation of law in the European Union?

The spread of European Union harmonisation of national laws in the wide geographical and ideological range of jurisdictions and societies in the enlarged EU has always highlighted the problems of cross border families. In particular, as each such case of family disputes is litigated in the courts of England and Wales under English law, it has seemed more than likely ultimately to bring with it also a portfolio of outcomes:

- (i) the spread of the influence of Human Rights law, together with
- (ii) more cross border migration in accordance with the EU principle of freedom of movement and of professional and employment establishment within the Union, where different treatment of cohabitants creates practical problems, and
- (iii) a questioning of the impact of the historical and political reasons for cohabitation being treated differently from marriage.

In theory this should be a fertile ground for taking forward the entire cohabitants' rights debate, marriage being a relationship where women are less likely to suffer disadvantage on relationship breakdown as there is a regime for financial provision and property adjustment on divorce, specifically set out for them in English law in the Matrimonial Causes Act 1973, and in most European civil law jurisdictions in one form or another of community of property, or a replacement agreement for a different regime. However, in the shadow of an imminent referendum on whether EU membership should continue, this is probably hardly the moment for such ideological discussions!

This current EU membership uncertainty clearly leaves English and Welsh cohabitants at a disadvantage which will probably be prolonged, as a number of European jurisdictions, including those in Eastern Europe, do have not merely married community of property but limited statutory codes applying to cohabitants who also qualify for them: in Western Europe Sweden, Norway, Portugal and Spain, and in Eastern Europe Slovenia, Hungary and Croatia. More jurisdictions have enacted provisions similar to the Civil Partnership Act. In the circumstances it seems odd that English Law has still not tackled this issue more proactively since, as a member state, England and Wales as part of the UK belongs to a European Union where the population demonstrably migrates in connection with individuals' working and private lives. But for the referendum and the consequent political instability the energies of the developing European Family Law conference circuit might have contributed much to such cross border debate and exchange of views.

Although the EU framework concedes that the member states are each at liberty to individualise their detailed treatment of their own Family Law systems, and in the wider common law and civil law world there is even greater diversity of treatment of key Family Law issues, the very mobility of individuals and families consequent on the establishment of relationships following on international employment - and international migration for other reasons - has already led to legal problems in other areas of Family Law which have resulted in a louder call for harmonisation.

For example, the incidence of international child abduction, which is itself a product of different jurisdictional approaches to relocation of the carer parent, has been fuelled by increased mixed marriage and international family mobility. The diverse jurisdictional doctrines and practice associated with relocation itself in turn stoke the trend towards international child abduction when different approaches are taken in different countries and cultures, creating a vicious circle. A perusal of www.reunite.org, the website of the leading specialist charity **reunite international**, makes clear the extent of this problem, even to the non-specialist child lawyer or lay person.

No less than three large international conferences were held between mid- 2009 and the summer of 2010 to attempt to reach consensus in relation to these critical topics of abduction and relocation of children of ruptured adult relationships with some international element.⁴³ No clearer signal could be sent of the importance of resolving issues of family mobility generated by the rupture of parental relationships, whether married or unmarried. In this context, to add a potential further layer of complexity to that already generated by adult mobility within global Family Law systems by ignoring opportunities to create a normative cohabitation regime in English law is certainly not wise if avoidable, especially where cohabitation versus marriage is treated significantly differently from English law in many of those jurisdictions to which international families are likely to travel.

It seems logical that, while it is by no means necessary, let alone desirable, for English law to attempt to match all or most of the European regimes recognising the status of cohabitants, it is actually *illogical* for English law to provide *nothing at all* to recognise this type of family formation, since without any such recognition the cohabiting adults heading the family are merely two single persons, which can cause problems.

For example, in the context of frequent cross border movement, it must be asked whether such an opposite sex couple living in England and having a holiday home in France could register under the French PACS ('Pacte Civile de Solidarite') system if they, for example, spend regular time in their French home (as many do, and in respect of which they would be restricted by the French inheritance law which imposes compulsory disposition within the family of property held in France?) And what would then be their position in England and Wales when they returned to the UK, where as an opposite sexes couple their PACS status would not be recognised? It would qualify as neither Civil Partnership (which does not include opposite sexes in such partnerships) nor marriage!

⁴³ i.e. (i) at Windsor (International Judicial Conference convened by Thorpe, LJ, Head of International Family Justice, of the High Court in England and Wales: August 2009);(ii) at Washington (ICMEC) March 2010; and (iii) at the Centre for Family Law and Practice in London, July 2010, all three including as speakers Thorpe, LJ and Professor William Duncan, at the time heading the Hague Convention Secretariat in the Netherlands.

This type of family mismatch has been addressed by the Marriage (Same-Sex Couples) Act 2013 for *same-sex marriage* overseas by the repeal in that Act of the anomaly identified in *Wilkinson v Kitzinger*⁴⁴, but it seems that no similar thought has been given to *opposite sex* registered partnerships, such as that of PACS. With no opposite sex equivalent regime English law could surely not recognise PACS, potentially offending large numbers of French couples, just as the Canadian same-sex spouses married in Canada were offended in *Wilkinson v Kitzinger*.

Such an omission in itself seems strange, given that France is probably the EU state with which much of the UK population is likely to be most familiar.

First, it is the closest to travel to from England (whether by Channel Tunnel or any other mode of transport, including from regional airports) so that of all the EU states its coastal and rural locations are as likely a regular holiday destination as any in the UK, especially for short breaks. It is therefore a prime candidate for establishing second homes, giving a measure of stability to family holiday arrangements during school age phases of both married and cohabiting families, and often with a view to later extended pre- and post-retirement occupation by the adults heading the family when children have grown up.

Secondly, despite a substantial British exodus from such property arrangements in the current EU-wide economic downturn, as the UK situation improves economically it is highly likely that early retirement from work may once again become feasible (especially as property in Europe has dropped in value in line with the widespread downturn trend). This has already led to a rise in the numbers returning to the continent when the more expensive period of children's upbringing is over and cheaper French property, more relaxed French bourgeois lifestyle and a variety of better amenities may once again be easily accessed by British pensioners.

It is thus not rash to imagine likely further potential for clashes of legal recognition of status where the affected parties are not married and encounter such international

⁴⁴ [2006] EWHC 2022 (Fam).

differences of treatment within the EU, so that they may move freely but without their family composition and relationships being uniformly recognised in the EU states.

Moreover, in EU Law the Treaty of Lisbon⁴⁵ (2007) protects ‘the family’ and the UK as a member state is a signatory to that treaty which is an important one in the ongoing restatement of the principles of the Union. This is similar to how the Treaty of Rome, which set up the Union to which the UK later acceded, protects both the principle of freedom of movement across internal EU borders and establishment for professions and employment. These factors provide the impetus for the creation of international families who are therefore likely to wish to be able to rely on recognition for their family throughout the European Union.

Summary

Whether or not any future government eventually manages to participate effectively in any pan-European harmonisation of Family law - which at present seems unlikely, owing to the sharply distinctive civil and common law systems involved, and their respective principles - there is a clear practical impact of the lack of harmonisation of equality issues so as to include a common treatment of cohabitating families. This is a human rights issue of indirect discrimination which cannot be ignored in the way in which national jurisdictions may more easily cling to their own perceptions of individual property regimes. *Wilkinson v Kitzinger*⁴⁶ has already shown the difficulties created by distinct approaches to the recognition of adult relationship status, almost certainly one of the prime drivers for the Marriage (Same Sex Couples) Act 2013 especially as it was presented as an equality Act by the government’s relatively newly reconstituted Equality Office.

Accordingly, the contemporary impact of both human rights and European Union harmonisation are now potentially of much greater significance in the cohabitation debate than they were, especially once it is accepted that it is now equally clear that national demand from whatever size of cohabitant constituency is very unlikely to

⁴⁵ Treaty of Lisbon, ‘the Reform Treaty’, available at eur-lex.europa.eu/homepage.html, accessed 24 March 2016.

⁴⁶ [2006] EWHC 2022 (Fam).

move government policy away from issues currently seen in their perspective as of more pressing concern.

However government apathy is not the only obstacle to be overcome. The next step must be to consider what appears to be the long running entrenchment of hostility to recognition of cohabitation as a normative family format, which nevertheless sits oddly with the results of more recent social attitudes surveys. On the other hand, it may be that this formerly entrenched hostility no longer exists, or not to the same extent as previously, since if it did it is hard to see how the Marriage (Same Sex Couples) Act could have been enacted, no matter how much it were presented as an equality issue. Some examination of the up to date position must be analysed.

The English Law context: Equality and Diversity and Marriage versus Cohabitation in English Law

The nub of this problem appears to be the apparently long standing incompatibility in English law of Cohabitation and Marriage, an ideological clash which historically appears to have its roots in the perception of cohabiting relationships as a type of inferior status to that of Marriage. This clearly raises questions which cannot be avoided if the problems created are to be addressed effectively. This issue has been in existence for a long time but it may be that there is now room for a new perspective. There are 2 points: (i) historically it seems there has been a perceived bar to legislating for recognition of cohabitation as an alternative status to marriage (ii) various opportunities have emerged to address this problem, but the government has apparently preferred to keep its head in the sand, indeed it seems taking care not to notice any of them! The issue seems to be that while the practical context is plain for all to see, government policies are focussed in another direction.

The practical context versus government policy

(a) The practical context

It seems unarguable that the current practice of litigating cohabitant disputes in the Chancery Division of the High Court under the Trusts jurisdiction of the Trusts of

Land and Appointment of Trustees Act 1996⁴⁷ is as expensive and inconvenient to both HM Courts and Tribunal Services as to the litigants involved. It would therefore seem that there must be a case for discrete legislation for the identifiable cohabitant constituency, which has been created by a significant section of the public choosing unilaterally to adopt a manifestation of social change which argues for recognition of its function as a new format of family unit. The obvious inadequacy of the present legislation and the onerous recourse to case law when the property incidences of cohabitation breakdown have come before the Supreme Court, as in *Gow v Grant*⁴⁸ already mentioned above, also argue for discrete legislation for this alternative family unit which is clearly being positively chosen by couples not only for their own preferred lifestyle but also in which to bring up children. Since the latter function is a nurturing facility which successive governments have repeatedly declared to be a necessary component in the 'building blocks of society', it is not clear why normative legislation at least addressing the family property issues has not claimed some attention in the reforming cycles of recent years, for example at least in the Family Justice Review of 2011.

The only logical explanation for exclusion of this highly topical cohabitation issue would appear to be that the government is still shy of addressing the question of whether there are still practical reasons for treating married and cohabiting partnerships significantly differently, especially where such partnerships each head families with children. Since the factual establishment of a significant cohabitant constituency and social change generally cannot any longer seriously be questioned, this functionality would appear to indicate that the answer to this question is no longer in the negative, unless some powerful new adverse reason can be identified in the social change involved which suggests that this alternative family format is likely to be only a passing phase. On the contrary the likelihood that cohabitation is part of a wave of overriding social change seems particularly evidenced by government sponsored recent legislation in favour of other atypical family units with much *smaller* numbers than those in cohabiting families. Thus, leaving cohabitants out of the equality driven recognition of these alternative family formats seems odd, especially when in the case of cohabitants there is the close core similarity of

⁴⁷ Commonly called 'TOLATA'.

⁴⁸ [2012] UKSC 20, *per* Hale DP, [56].

function between cohabiting and married families, clearly evidenced by the extra marital birth figures mentioned at the beginning of this chapter.

This arguably advances three significant answers in favour of legislating to provide at least some basic regime in English law for recognition of cohabitants as a valid family unit. Despite apparent government apathy in this context it must be queried whether there is no pressure on the legislator not to entrench stereotypes – and therefore to act to prevent such a result – especially given the accepted Equality and Diversity culture, which has been inculcated into English Law both by EU law which majors in following equality and diversity driven conventions and by the ECHR jurisprudence?

It is appreciated that this is a complex question involving both public law and policy and practical application of the law to a defined situation which has been brought about by social change: but the tentative answer, following the Equality Act 2010, is that there *must* be some such pressure in view of UK membership of the EU, UK signature to the Lisbon Treaty (in force since 2009) and the government's advance of equality policies which were articulated as the reason for the enactment of the Marriage (Same-Sex Couples) Act 2013. Moreover the 2013 Act is a statute which finally leaves *opposite sex* couples the *only* intimate adult partnership with no recourse to an alternative to marriage or single status: whereas unregistered *same-sex* couples can choose between civil partnership, marriage or retaining their formal single status with, in practice, a shared lifestyle.

Clearly, there is some emerging feeling that this is unfair or impractical or both, since besides Lord Marks' Bill, another private member's Bill, this time amending the Civil Partnership Act, seeking to add opposite-sex registered civil partnership to that regime, was before the pre-May 2015 session of Parliament, has since been reintroduced and was due for its Second Reading in March 2016..

In this connection, while the ECtHR has in the past stated in the case of *X, Y and Z v UK*⁴⁹ - a case decided before *Goodwin* changed the ECtHR direction - that there was no protection for family life with a transsexual, it appears that there is *no* case where the Court has ever made such a statement in connection with cohabitants, nor is there any apparent distinction excluding cohabitants from the core principle of protection of the family in any international instrument. For example, Article 23 of the International Covenant on Civil and Political Rights 1966 merely states that

‘The family is the natural and fundamental group unit of society and is entitled to protection by society and the State’.

Article 10 of the International Covenant on Economic, Social and Cultural Rights 1966 also states that

‘The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children’.

In no Convention or Treaty so far found has an unmarried partnership heading a family been expressly excluded. Further, Article 13 (General Rule of Interpretation) of the Vienna Convention on the Law of Treaties provides in paragraph 1 that

‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’.

Accordingly, and particularly since no Western non-Islamic jurisdiction actually prohibits such cohabitation - although some American states did as recently as 25 years ago⁵⁰ - it is difficult to see how the status of ‘parents’ heading a family, whether within natural, step- or other social parenting, should not be accorded the protection of the family envisaged by these and any other conventions. Such

⁴⁹[1997] 24 EHRR 143.

⁵⁰ Craig Rotherham, ‘The Contribution Interest in Quasi Matrimonial Disputes’ (1991) 4 *Canterbury Law Review*, p407, 418-419.

provisions are routinely drafted in wide terms within the continental civil law tradition, which adopts that style precisely so that these documents may be interpreted as living instruments according to prevailing social and other circumstances. If the adults who are part of the family are protected, it is difficult to see how they themselves and their relationship do not also attract such protection.

However, there is more to add in this respect: a relatively new slim volume *Making Family Law* by MacLean⁵¹ details in its short length a mine of information on the influences behind the eventual emergence of any legislation into Parliament. The book is sub-titled *A Socio Legal Account of Legislative Process in England and Wales, 1985 to 2010*, which aptly describes the content: the flyleaf introduction alone indicates immediately that

‘..the legislative process is complex, encompassing a variety of aims and outcomes. Some norms and rules are embodied in law because we are simply expected by government to follow them. Others are there for entirely different reasons. A legislator may wish to send messages about what constitutes desirable behaviour, to demonstrate government’s ability to deal with a local and short term issue, or to distract the electorate from other crises...’

and adds that the book

‘offers a rare insight into the real processes by which lawmakers attempt to influence (or fail to influence) human behaviour’...’it reveals a quite different picture from that of the rational lawmaker imagined in textbooks’.

Given this frank introduction by an experienced researcher and academic adviser to successive government departments ‘responsible for family law-making’ in England and Wales, and drawing on her ‘long standing involvement in, and knowledge of, the processes of law-making’, this key work provides valuable signposts to legislative success.

⁵¹ Mavis MacLean with Jacek Kursewski, *Making Family Law*, Hart, 2011.

Perusing the historical and analytical content, including the section 'Case Studies in the Reform of English Family Law, 1829-2010'⁵², the reader can only wonder that the Law Commission were as successful as they were in their 2006-7 work.

Before even reading the whole of Maclean's introduction⁵³, the suspicion quickly dawns that perhaps the Law Commission's proposed cohabitants' rights reforms were not so much a law reform project intended to have a practical result, but a political *process* to be gone through for show, and in fact never meant to reach Parliament at all. Even allowing for the restrictions within which the Law Commission works – since being a creature of statute and in theory independent of government, it must in 2006 when the Commission's work began, have had the support of some government department before it could accept the brief to investigate potential law reform - a question remains as to why *none* of the recommended reforms have ever been implemented, further discussed or at least critically examined.

While under the rules mentioned, there must have been an expectation that some government department would at some stage have progressed the Commission's recommendations, it is strange that *both* the Labour government in power following the 2007 Final Report and *both* the succeeding coalition *and* the current Conservative governments have been so clearly against doing so. Instead there has been a complete wall of silence, not only because of the abrupt and unlikely reasons given for this inaction on behalf of the first two governments, but also when the 2010-2015 coalition government immediately adopted other equality measures but did not intimate any change at all to the apparently wholly negative attitude to cohabitation legislation, indeed remaining totally silent on the matter when some comment was clearly required.

While policy, it seems, is at the root of every such decision, sustained government inaction on this obviously topical and pressing issue is so highly visible as to be impossible to miss except by an alien from another planet without any telecommunication facilities!

⁵² Ibid p15.

⁵³ Ibid pp 1-19.

At the very least it is already established that there is both a human rights issue in the continued lack of a normative regime for cohabitants' rights on their relationship breakdown and potential economic benefits in both welfare and legal aid/court costs' budgets. It is therefore difficult to see either why formal policy decisions *have actually been* taken by two governments *not* to implement either the Law Commission's 2007 recommendations or possibly something similar or simpler, and *nothing at all has been said* by a third when advancing other intimate family relationship equality legislation.

Although the reason given before 2010 was the lack of practical experience of the Scottish legislation and was just credible, since at the time the Scottish system had been in force only for a short time, it appears to have had little enduring validity later, when the inaction of the coalition itself took the recommendations no further, when there was published research (actually already effected in 2010), nor most recently, when Baroness Hale of Richmond, Deputy-President of the Supreme Court, formally approved the practical application of the legislation in her *Gow v Grant* judgment. Admittedly, she therein identifies potential improvements, as now would some Scottish practitioners. (See further Chapter 6 where Scotland's experience is evaluated).

(b) The Present Policy Response in England and Wales: the Law Commission's 2007 scheme

Despite general awareness in the media of the statistics mentioned at the beginning of this chapter, of the practical impact of answers to the questions set out in (a) above in this section, and of the fact that the Law Commission's 2006-7 scheme was commissioned by Labour ministers who have been out of office – and their legacy obviously out of favour with their successors - current government inaction arguably indicates that the Law Commission's final report in 2007 might just as well not have been researched and written at all, although it is fair to say that Lord Marks' Cohabitants' Rights Bill, now back before Parliament, *does* substantially adopt the principles of the 2007 scheme.

However, official treatment of this Bill is odd, as while it is a private member's Bill and its content no doubt indicating unwelcome Labour associations, it is curious that the present and immediately preceding governments have still never taken the opportunity to adopt it: in seeking at least to create a scheme of some sort, its enactment would go some way towards supporting the last two ministry's stringent policies which have clearly been aiming above all at achieving delivery of family justice at least possible cost.

Moreover, if the Bill were adopted, now it is back on track after a second reading, government could clearly also secure any changes to its content that were wanted. Perhaps they could not have done so easily while in the previous coalition - despite the fact that, in the session immediately preceding the current Parliament, that coalition ministry included two new energetic Justice Ministers in the House of Commons⁵⁴ and House of Lords.⁵⁵

Nevertheless, the fact is that no steps have so far been taken to support this or any other legislative initiative. Such dismissive treatment is concerning, since without government sponsorship the likely success of Lord Marks' Bill must be limited, as is often the case with such Bills – as happened to those introduced earlier by the Liberal Democrat peer, Lord Lester of Herne Hill. Moreover, it is surprising that the Ministry of Justice team apparently continues to find no Parliamentary time to support Lord Marks' initiative, given that the Law Commission itself expressed the hope, at the time of the 2011 rejection of the 2007 report's recommendations, that an early opportunity would be found to legislate following the inauguration of the new 2015 Parliamentary term. Nevertheless, there is nothing currently to suggest that the position will change under the present government.

⁵⁴ Simon Hughes MP, who encouraged other reforming initiatives.

⁵⁵ Lord Faulks QC, who is an Arbitrator, and was therefore presumably aware of the initiative of IFLA, the pan-professional Family Arbitration scheme, to which some cohabitants have been obliged to have recourse rather than to incur the costs of Chancery trusts litigation under TOLATA 1996.

This is really surprising, particularly during the later period of austerity under the 2010-2015 coalition. The Law Commission work did produce in their final report a system for cohabitants which, while possibly not perfect, could only have saved money at a time when, from April 2013, post-LASPO 2012 increased costs were already being incurred by HM Courts and Tribunal Services, since the presence of large numbers of new Litigants in Person (LIPs) was already trebling time spent on cases as well as inflating the costs to HMCTS of running trials.

Considering how much court time would be saved by introducing a relatively simple piece of legislation to address the problems faced by separating cohabitants, it is surprising that the Law Commission's scheme is not only still ignored but has not been pressed immediately into service in a fast tracked piece of emergency legislation. It was, after all set out in considerable detail, including distinguishing cohabitants from married couples, although other jurisdictions have chosen systems much closer to *their* existing regimes for married relationships, such as in Spain's constitution and detailed regional laws⁵⁶, in Scotland's Family Law (Scotland) Act 2006⁵⁷ in federal Australia's amendments to their Family Law Act 1973 - a Commonwealth of Australia Act - and in New Zealand's Property Relationships Act to include cohabitants⁵⁸.

While global uniformity is neither necessarily desirable, let alone achievable, it must be noted that in formally recognising the emergence of this cohabiting family format these jurisdictions are all adopting the 'functionality' argument of many lobbyists for more radical reform, a thread also adopted in many of her contributions by Barlow⁵⁹. This perhaps raises a further question as to whether, nine years from the Law Commission's work, it might finally be time to consider looking at whether a simple amendment of the Matrimonial Causes Act 1973 could be the most cost effective action to take (along the lines of the distinctions made between married and unmarried relationships in the Family Law Act 1996, which has worked perfectly well in that context).

⁵⁶ See Chapter 7.

⁵⁷ See Chapter 6.

⁵⁸ See Chapter 8 for the approach of both of these Commonwealth common law jurisdictions.

⁵⁹ n31, n32, n33.

The question must therefore be asked at this stage which of these approaches is likely to be more *appropriate* to English law, since precisely as exact global uniformity is by no means essential (and indeed impossible in view of the variety of styles and frameworks adopted worldwide) it is also by no means necessarily the case that English law should adopt a unified, or near unified, system for both married and unmarried partners, whether that is simply because this has the merit of simplicity or because it is seen to work in other jurisdictions such as New Zealand, or for any other reason.

However, in view of the fact that since the Civil Partnership Act 2004 has taken as its close model the Matrimonial Causes Act 1973, there are already two same-sex regimes in English Law which mirror each other – that is, for traditional married couples under the 1973 Act, to which same-sex couples have now been added by the Marriage (Same-Sex Couples) Act 2013 - and (under the 2004 Act) for registered civil partnerships between same sex couples only. This already produces an uneasy framework as, apart from excluding only opposite sex cohabitants whose claims to legal recognition arguably ought to fit somewhere (such as in the apparently still live Civil Partnership Act 2004 amendment Bill) there has been no discussion as to where precisely the interests of opposite sex cohabitants should be located.

If the 2013 Act was an equality statute, the present result outlined above seems not only not to have achieved that purpose but to have perpetuated the *unfairness already identified*, in leaving only one category of couples living together without similar customised legal provision - opposite sex cohabitants, whose union is still totally non-formalised *qua* union. This seems a particularly glaring discrimination since unregistered gay unions now have the *opportunity* of either gay marriage or registered civil partnership, while opposite-sex cohabitants, who have presumably already *rejected* marriage, have only one choice, since they cannot register a civil partnership. They must either change their minds about marriage or remain two single persons.

However, instead of merely unfair, this situation also seems *illogical*, since such heterosexual unions are, in fact already recognised for some purposes as if they were married: moreover, some would add that this only occurs where it suits the

government, for example, in welfare benefits law, inheritance and protection from domestic violence, but *not* where it does not, such as for home rights which is still restricted by Part IV of the Family Law Act 1996 to married couples. Overall, this is a confused situation which is clearly inappropriate in a modern liberal democracy.

For welfare benefits the definition of ‘cohabitants’ is the same as the Law Commission’s – same or opposite-sex persons living together who are not related by blood or affinity. This therefore excludes family home sharers who fall into a different category and have been traditionally subject to a different corpus of jurisprudence. However, they too could doubtless benefit from a distinct property and legal responsibility regime, since this was not adequately catered for by the Law Commission’s 2002 Home Sharer’s report⁶⁰ which decided that such a regime was too complex to devise any framework for.

Ascertaining precisely any particular government’s ‘party line’ on marriage and cohabitation is notoriously difficult, and sometimes variable depending on whether an election is imminent, in which it is desirable not to offend any particular social sector. The Labour governments of 1997-2010 regularly drifted in their public statements, both within and outside Parliament, that is between supporting married *and* unmarried parents equally as the foundation of a family in which children could be brought up, and in supporting marriage as the best environment. The recent coalition government decided to implement favourable tax treatment for married couples and the present Prime Minister, now leading a Conservative majority administration, tends towards marriage supporting statements, although logically this may be as likely to offend the large numbers of single parents who have deliberately chosen that status as much as cohabitants.

While it would obviously assist in furthering the goal of harmonising European national systems, it does also seem that it would now only be *fair* in human rights terms, and *clearer* for the citizen in practice, if there were an explicit acknowledgement of the *status* of cohabitant. This is especially so as some statutes repeatedly use the word ‘cohabitant’ in a factual rather than a situational sense, for

⁶⁰ Law Commission, *Sharing Homes: A Discussion Paper*, Law Com 278, HMSO, 2002.

example the Family Law Act 1996, the Inheritance (Provision for Family and Dependents) Act and a plethora of welfare benefits legislation. This seems to recognise cohabitants for the purposes of those statutes as an accepted normative category of persons rather than simply addressing their lack of a discrete property regime on rupture of their relationship, despite the fact that the 2006-7 Law Commission inquiry was specifically briefed *not* to address such recognition of a separate status.

Whether a statutory regime for cohabitants was more or less close to the provisions of the 1973 married and 2004 civil partnership statutory regimes or not, it would seem that it would also be fairer and clearer if such a discrete regime at least moved away from obliging cohabitants to rely on both the general principles of the law of Equity and on Chancery statutes, such as 'TOLATA 1996, both of which were originally created for an entirely different purpose.

While the Chancery jurisdiction has ably demonstrated in recent decades that it is after all 'not yet past the age of childbearing' - for example in the significant continuing development of the doctrine of restitution and unjust enrichment - it does seem that it would be a short step towards the appropriate determination of cohabitants' rights either to give cohabitants their own statute or to include them in the appropriate sections of the Matrimonial Causes Act 1973. There is certainly a case for inclusion of cohabitants in that mainstream statute as the entirely successful precedent of Part IV of the Family Law Act 1996 indicates. In the 20 years since its passage there has ultimately proved to be no difficulty in applying the subtly distinct provisions of Part IV to married and unmarried couples, despite the initial *Daily Mail* led opposition to the concept of the original draft Bill. Indeed, the recollection that in 1996, that newspaper could in all seriousness oppose *any* specific domestic violence and home occupation protection for cohabitants, even clearly distinguished from that for married couples' (marriage based) home rights, indicates the extent of the social change that has been effected in the intervening two decades.

It does not, however, now appear *prima facie* that any cohabitants' rights legislation - distinguished from that available to married couples - would be objected to when cohabitants form such a significant section of society, since in the liberal democracy

of England and Wales, it is not, in the last analysis, an intellectual exercise as to whether cohabitants ought, or ought not, to be allowed recognition as a normative family unit. On the contrary, it is a fundamental right of access to justice of any significant section of society which requires such access if that is not otherwise adequately provided - and which should therefore have its own suitable jurisdiction, whether in a discrete statute or by amendment to include their class in another already catering for similar family functions.

Since the Charter of Fundamental Rights incorporated into the Lisbon treaty protects 'the family' as such, it is hard to see why cohabitants cannot belong to 'the family'. Thus there does not seem much excuse for failing to legislate to permit cohabitants to join the modernisation of Family Justice in the new Family Court and in a context so patently required, not least for the protection of women and children in cohabiting families, as identified by the Institute of Fiscal Studies⁶¹, protection of children and the weak being a prime historic function of the state with its origins in the role of the King as *parens patriae*.

In these circumstances it is odd that the Law Commission, having the opportunity so recently to create an entirely new regime for cohabitants, was obliged by its terms of reference to treat them entirely differently from both civil partnerships and married couples: however it seems this is probably best debited to the then perhaps remaining vestiges of opposition to allowing any association which might suggest marriage was no longer the only 'real' family foundation. Although the Law Commission noted in their 2006-7 work that there was little opposition to legislation to protect *property rights* especially where cohabitants had children, the former 'marriage only' lobby can surely now no longer insist on their prior position in view of the passage of the Marriage (Same-Sex Couples) Act 2013. In enacting this statute, Parliament has altered one of the key principles enunciated by Lord Penzance in the long standing leading case of *Hyde v Hyde*,⁶² namely that marriage was the union of 'one man and one woman'. Since, owing to the doctrine of parliamentary supremacy, Parliament is able to alter the traditional nature of marriage as understood in English law and culture, and recognised in countless judgments of the ECtHR in this way, it

⁶¹ n42.

⁶² [1866] LR1 P&D 130.

is arguably illogical *not* to extend recognition of cohabitation as a new family format – neither inferior nor superior to marriage but simply different – in the same way as marriage is now recognised in its new format.

Moreover, since the 2013 Act was presented as an equality statute, discrimination against cohabitants is a strange concomitant when the statute caters for every other intimate relationship. This 2013 legislation is also surprisingly advanced, in stark contrast with the legislative product of 2004, when the civil partnership statute was being drafted: it seems at that stage the Government Legal Service chose that civil partnership should simply mirror almost exactly the Matrimonial Causes Act 1973, despite the fact that this statute was much criticised for many years prior to that date, by academics, practitioners and public alike, as being hopelessly out of date and unfit for purpose. Then, having used this 1973 statute as a template - in effect creating a gay version of marriage though policy statements declared it was not so! - the GLS insisted it was nevertheless a completely distinct relationship. Indeed Baroness Scotland of Asthal QC⁶³, introducing the Act, repeatedly made this point. The logic is not easy to follow.

Looking even further back in the history of legislation actually unpopular with the public, the attempt to replace the 1973 Act's divorce provisions by Part II of the Family Law Act 1996 was the subject of such adverse reaction from both profession and public that the Lord Chancellor was ultimately obliged to announce that it would not be brought into force, although, amongst others, the Law Society and Resolution have since been pressing for a new regime of no fault divorce which is not markedly different from the rejected Part II. Indeed, there has been recent suggestion of a new investigation into possible reform, which was part of Resolution's recent Manifesto setting out the changes that this Solicitors' Family Law Association considers are required to Family justice generally⁶⁴.

The government policy position in relation to the status of marriage therefore appears to be equivocal rather than to adopt a stance of protection of marriage

⁶³ Hansard (HL) vol 660, cc 387-433, 22 April 2004, 11,37am.

⁶⁴ Resolution, 2015, www.resolution.org/familylawmanifesto/.

against any advance of cohabitation that might affect its statistics, and of therefore retaining distinctions between the two lifestyles.

Addressing the policy issues: how could a reforming government escape from the paralysis of apathy which appears to have stultified any reform?

It is difficult at present to see a downside to some discrete cohabitants' rights reform, especially if it is accepted that there is another way to treat the legal rights of cohabitants without either precisely equating their status to that of married persons or requiring them to access the expensive TOLATA 1996 litigation which is currently their only recourse.

Crucially, customised reform would not add any obligations that do not already exist under TOLATA but would have the benefit of enabling cohabitants' rights to be determined under discrete legislation as well as under the FPR 2010 in the Family Court without entering that Court by the back door as recently occurred in *Seagrove v Sullivan*⁶⁵. Certainly leaving cohabitants on their current pathway to costly Chancery litigation is highly unsatisfactory at a time when the remainder of 'the family' at last has a new unified Family Court, which is the centre of the remainder of the modernisation of Family Justice. However this remains their present fate unless they do manage to sneak into the Family Court through consolidation with a child welfare case already appropriately there, or have already entered into a binding cohabitation agreement which defines their respective rights on separation and are able to divide their assets accordingly themselves under that agreement.

If recognising a status for cohabitants were regarded as too fundamental, there could, of course, simply be a discrete cohabitants' property regime, in particular making provision for division of assets on separation and relocating any dispute within the Family Court, either closer or less close as the case might be, to the virtually identical Matrimonial Causes Act 1973 and Civil Partnership Act 2004 regimes, which are already providing respectively for married persons of both opposite and same-sex couples, and civil partners.

⁶⁵ [2014] EWHC 1410 (Fam).

Nevertheless, such truncation of a potentially comprehensive regime would be a pity, given the very long period during which nothing whatever has been done. However, it has to be recognised that the choice of direction of such a reform clearly depends on juristic preference and/or social or other policy, and almost certainly requires further research not included in the current Law Commission proposals of 2007, which pre-date the more recent introduction, also in 2007, of those of other common law jurisdictions in Scotland, New Zealand and Australia.

There are in any case strong practical reasons for bringing the resolution of cohabitants' property disputes within the fold of Family Law, where at present such disputes are not even located, either in jurisprudential theory or litigation enforcement.

First, it is not convenient that the Civil Procedure Rules 1998, as amended, should apply to such Chancery based cohabitation cases, rather than the Family Procedure Rules 2010 as in the case of the Matrimonial Causes Act 1973 and the Civil Partnership Act 2004. Nor is it convenient that cases are heard in such Chancery lists under TOLATA 1995, rather than under any Family Law statute, and not in the new unified Family Court, for which extensive modernising has 'taken place both in litigation procedure and 'N-CDR' dispute resolution, including the drive for transparency in decisions, clarity in everyday language in all information designed to be read by the general public, as well as in rules and new procedural forms. In all of these measures, accessibility to the public has been the prime aim.

Continuing litigation in the Chancery jurisdiction is only likely to perpetuate the *Burns* type case, in which it was not really surprising that Mrs Burns failed to show, as an unmarried cohabitant without formal property owning status needs to do, that the formal legal ownership of the family home did not truly reflect the rights of property between the parties - despite the fact that she and Mr Burns had lived there together for nearly 2 decades, she had brought up their children as devotedly as any fully contributing wife might have done, and contributed in the traditional homemaker's way in a married or quasi-married relationship where responsibilities are traditionally split in the way in which they were in that case.

An even more important point, as emphasised by the editorial of Resolution's Cohabitation Claims Guide is that 'the CPR context can add another layer of unfamiliarity'⁶⁶ because the Chancery process is so different from that of Family justice, especially now in the new Family Court, but the core practical point is that the Civil Procedure Rules 1998, even as extensively amended in accordance with emerging modern practice the last 18 years, do not admit the application of the Family Law protocols which follow long standing development at least since 1982 in discouraging adversarial claims, whereas mainstream civil justice is an adversarial system conducted along completely different lines.

This is the main difference between civil and Family justice which is keenly regretted by Family lawyers owing to their core belief that the best place for the resolution of any family dispute is not in court. However, if there is to be litigation, the second choice is that they be located in the *Family Court* or *Family Division* of the High Court. All other first instance applications have now been abolished as has the former Family Proceedings Court (FPC), and the former Divorce and Child Care designated County Courts have also, for more than 2 years, been subsumed into the new Family Court. There, application is made on one form and the gate-keeping arrangements then allocate the case to the appropriate level within that Court.

Indeed to the legal historian, it can be readily seen that 46 years after the wardship jurisdiction was removed from the Chancery jurisdiction, far from that Division of the High Court wanting to hold on to cohabitants' property problems, the unmet and repeated pleas of family lawyers to have those cases in the Family Court might well be suddenly trumped by the incisive process of the Chancery Modernisation Review. This could summarily decide that cohabitation cases have no place amongst the heavy commercial litigation which is now the regular Chancery diet, and that these issues should be sent to join the rest of Family Justice!

⁶⁶ Ashley Palminteri, *Cohabitation Claims: A Resolution Guide*, Resolution, 2011, www.resolution.org.

Since this would be likely to coincide with the view of all Family lawyers it is hard to see how if this can already happen incrementally through consolidation of cases on case management, it could not also in future logically happen at the start, so that any such case was determined by a judge of the Family Court with the expertise and ethos of family practice which has long been recognised as of a different character from other civil litigation, rather than by a judge of the Chancery Division who is likely not to have that ethos⁶⁷.

This distinct Family justice philosophy stems from the foundation in 1982 of the Solicitors Family Law Association by a group of specialist Family Law solicitors, who had recognised that Family Law litigation *was* different from other types of civil litigation and required a different, non-confrontational, approach, which so far as possible benefited the family as a whole. From this was developed a members' Code, which the Law Society very quickly recommended should be adopted by all Family Law solicitors, regardless of whether or not they were members of the Association, and which is now reflected in the Law Society's Family Law protocol and in good practice in Family Law litigation generally.

Further developments have included not only the incorporation of mediation (in a distinct Family Law version) into much Family Law practice but also the evolution of Collaborative Law, a scheme in which the parties and their lawyers all agree not to be involved in litigation at all other than for implementation of any orders by consent, for which the High Court has made provision for fast track implementation.

None of this applies in the Chancery Division of the High Court or within litigation in the Chancery lists of county courts, where the current equity resolution of cohabitants' property disputes are heard and determined. The current President of the Family Division, Sir James Munby P, is already promoting the desirability of reducing adversarial litigation in Family cases, through the introduction of his own Non-Court Dispute Resolution philosophy. However, as long as cohabitants' property disputes remain outside Family Law, such cases will not benefit from these

⁶⁷ Although there are honourable exceptions, for example, judgments of Balcombe, J and Charles J, both of whose backgrounds were Chancery practice, as indeed as is that of the current President of the Family Division, Munby P, and all have become distinguished Family justice authorities.

Family Court reforms. While the government may continue to press for more use of mediation and other DR, and more law reform to produce clarity in the law, thus obviating the need for litigation and reducing court costs in conducting such cases, cohabitants will not benefit from this initiative until potential reform of the law relating to cohabitants takes cohabitation claims to the Family Court.

There is another good reason for formally relocating TOLATA litigation within the Family Court, which is that it is, coincidentally, a distinct feature of *Seagrove v Sullivan* that grossly disproportionate costs have already been incurred in this case to date, which might well have been avoided in the Family Court if it had started there instead of waiting for transfer. It is notorious that High Court proceedings in the Chancery Division (or the Family Division for that matter, as that too is a Division of the High Court with its attendant costs) are expensive. On the other hand, in the new unified Family Court, there is significant potential for reducing these to a minimum since that Court's current modernisation of Family justice removes many of the previous complexities, not least in uniting the different levels of jurisdiction under one roof. Moreover, the new court obviates the need even to incur the expense of the High Court itself, in whichever Division, if a case can go directly to the Family Court where it will be cost effectively assigned to the appropriate level of judge. Thus costs could be saved and the ethos of the Family Court incorporated from the start, in connection with which it is politic to recall that Part I of the Family Law Act 1996 incorporates this ethos and philosophy. Notably, Part II did not succeed in reforming Divorce Law and was finally repealed by the Children and Families Act 2014, albeit only in that year, some 19 years after it was first enacted but never implemented!

Part I was brought into force however and clearly states in s 1(c) that

‘...that a marriage which has irretrievably broken down and is being brought to an end should be brought to an end –

- (i) With minimal distress to the parties and to the children affected...
- (ii) ...
- (iii) Without costs being unreasonably incurred in connection with the procedures to be followed in bringing the marriage to an end...’

Clearly, if this philosophy is suitable for resolution of problems associated with marriage breakdown, it is likely to be even better for those relating to the breakdown of a cohabitation relationship, especially as the Fiscal Studies Institute⁶⁸ has identified that the descent into poverty of women and children leaving such a relationship is faster and more severe than those in a married family which has broken up. In other words, cohabitants *need* the services of the cost efficient, modernised Family Law orientated Family Court at least as much as, if not more than, married people who are divorcing. Therefore it makes no sense at all for them to be litigating in any Division of the High Court, but certainly not within the extra complexities of the Chancery Division as explicitly identified by Resolution.

In Australia there has for some time been a discrete Family Court, specifically created for Family Law cases, a decision which was considered in England and Wales from the time of the Conservative Lord Chancellorship of Lord Mackay of Clashfern, but which was not in practice seriously considered for implementation prior to the Family Procedure Rules 2010, nor in fact progressed until the Crime and Courts Act 2013, and the implementation of the new unified Family Court of England and Wales on 22 April 2014.

Secondly, as identified by Mee⁶⁹, England and Wales is by no means alone or pioneering on *terra incognita* in addressing this issue of whether to legislate for cohabitants' rights: indeed we are somewhat tardy in getting round to it! The common law systems have previously tackled this litigation minefield from at least five different doctrinal bases: Equity, Property, Family, Contract and Restitution which Mee's classic text has examined within the law of five common law jurisdictions, England, Ireland, Australia, Canada and New Zealand. As he says in his monograph, he attempted 'to break down the barriers which in the past have hindered a full understanding of the issues involved' so as to make 'a determined effort to isolate each strand of the doctrinal tangle and to trace it back to its source', and has done so within the five common law jurisdictions which have each contributed in their different ways to one another's stock of 'persuasive authority'.

⁶⁸ n42.

⁶⁹ John Mee, *The Property Rights of Cohabitees*, Hart, 1997.

This work identified the resulting trust, estoppel and 'common intention' from England together with Lord Denning's 'resulting trust of the new model'; the 'modified resulting trust' from Ireland; 'unjust enrichment' from Canada; 'unconscionability' from Australia; and 'reasonable expectations' from New Zealand. Scotland, with a distinct system from England and Wales and Northern Ireland, (and owing something, in Family Law particularly, to the 'Auld Alliance' with France and that country's civil law jurisdiction) is not included in his analysis of a quarter of a century ago, although now it is naturally of more interest to Family Lawyers in England and Wales because of Scotland's recent legislation, its recent practice coming on appeal before the Supreme Court at Westminster, and, not least, the academic analysis of Wasoff et al⁷⁰.

Although Mee identifies Eire as the 'odd man out', in its disinclination to take much 'notice of foreign developments', he notes that the other four in their turn 'have shown no interest in the Irish approach'. He concludes that there are themes that draw these different doctrinal approaches together, including Eire's independence despite its being such a small jurisdiction, and in spite of the fact that the competing doctrines and jurisdictions themselves have not reached consensus in view of their 'common heritage, language and culture'.

If there are such positive benefits from legislative reform, is there some reason for retaining the status quo?

If so, it is hard to see, since continued lack of a normative regime seems likely to drive some appellant sooner or later to Strasbourg. The consideration of the cases of *Jones v Kernott*⁷¹ and *Gow v Grant*⁷² in the Supreme Court was a strong indication of what *could* happen if cohabitants' only existing remedies in English law were not constrained by the present lack of any normative regime. It is possible that if the common gender issue of disadvantage to the female cohabitant is pursued by Baroness Hale in other similar cases this could be the type of case to go to the ECtHR to start the human rights process for cohabitants, a step which was

⁷⁰ Fran Wasoff, Joanna Miles and Enid Mordaunt, 'Cohabitation: Lessons from North of the Border', (2011) 23 Child & Family Law Quarterly, pp 302-322.

⁷¹ [2011] UKSC 53. [89].

⁷² [2012] UKSC 29.

successful for transsexuals with the ultimate decision in Christine Goodwin's case, which finally forced the UK government to enact the Gender Recognition Act 2004.

It is worth noting that two of the justices sitting on the *Kernott v Jones* (2012) appeal in the Supreme Court (including Lady Hale) also sat in the House of Lords in that of its predecessor, the *Stack v Dowden* (2007) appeal, in which the judgments impart an air of unfinished business. Out of the 12 Supreme Court Justices who could have heard this case, only Lady Hale had the academic and Family law background which was really needed for this essentially 'Family' law context, as Lord Wilson (the former Wilson LJ) whose appointment was already confirmed at the time was not eligible to sit until after the case was heard.

The bland nature of the *Stack v Dowden* decision, particularly in the year of the Law Commission's Final Report, was particularly unsatisfactory, although as an authority it was, until clarified in *Kernott v Jones*, for four years still the leading case on cohabitants' property because no other had been to the Supreme Court. In informal discussion with the Association of Women Barristers in the week before that forthcoming appeal, Baroness Hale was of the view that the Law Commission's scheme was at least as complex as the application of the law of trusts in such cases which would face the Supreme Court and spoke favourably of the Scottish system which is very close to Scotland's financial provision for married couples on divorce. Sadly, Lord Neuberger of Abbotsbury, perhaps the leading property lawyer of his era, had at the time left the Supreme Court, having returned temporarily to the Court of Appeal as Master of the Rolls, so was not participating in this important Supreme Court decision, although he has since returned to the Supreme Court as President.

However the key query in relation to this question is naturally the philosophical one, as to whether the parties necessarily *wish* to have such a normative regime, because there is clear evidence of many cohabiting couples preferring to retain their individuality in both property and finance *and* their single identity within their cohabiting relationship. Some couples even prefer the contemporary trend of 'living apart together' ('LAT') although this is not exclusive to unmarried couples. High profile examples of married and unmarried 'LAT' relationships have and still do include well known academics and writers, such as Iris Murdoch and Professor John

Bayley, as well as respected actors and film producers, such as Helena Bonham Carter and Tim Bevan, which have appeared to work extremely smoothly.

Perhaps some input from psychology (possibly through the Medico-Legal Society and the literature of that crossover of the two professions) is necessary to explain the cohabitants' apparent preference, as displayed by the rising cohabitation and falling marriage statistics, for unmarried status, but by no means adequately explored or explained in the Law Commission's 2007 report, for which see further Chapter 5.

This inevitably raises the question of how to deal with the religious and traditional lobbies' objections to treating cohabitants in the same way, or nearly the same way, as married couples, as well as that of why cohabitants themselves prefer not to marry. This is not as easy as might have been thought, since while there is an established state church in England and Wales (the Church of England - although once there was also a separate Church of Wales) England and Wales does not now present as a religious country, despite the Prime Minister's periodic assertion in speeches that it is 'a Christian country'. It has every appearance of being in fact a multi-cultural, multi-faith country, in which there is religious freedom and a state church but the approach of most of the population is secular and church going or overt religion in any form is not conspicuous, unlike, for example, Spain which used to be a Christian (Catholic) country but states in its post-Franco constitution that it is 'a secular state'⁷³, a formal statement which appears to align with the contemporary practice of the population.

This non-religious quality in England and Wales is most recently supported by data abstracted in 2015 by the ONS from the 2011 Census which indicated significant changes in the proportions of the population who were or thought themselves 'religious', or thought about religion at all. There is some support for this in the views of Grayling who points out that many religious ideas seen as Britain's defining characteristics, are not Christian at all but come from Greece and Rome.

⁷³ See Chapter 7.

In this respect a study of any backlash experience in the two jurisdictions (Scotland and Australia) which have adopted unified, or virtually unified, schemes for married and cohabiting partners would be instructive, although in the case of the latter of these two states officialdom says it is distinct from marriage which is perhaps not entirely correct though there are distinctions as well as close similarities⁷⁴. This may be particularly illuminating for England and Wales since these two examples, while both in fact operating a system that works, are poles apart in background and beliefs, which suggests that possibly there is little or no potential doctrinal influence to be discerned in relation to a successful normative scheme but that the key influences are practical and pragmatic – possibly a policy attractive to a government anxious to offend as few constituencies as possible.

All the issues mentioned above which surround the future legal impact of cohabitation were serious questions which were not only ripe for academic critical analysis in 2006-7, but which the Law Commission appears not to have examined so as to identify any underlying theory in this context. However since recognition of cohabitation as a valid form of family unit affects both the lives of adults and children at the point of practical administration of family justice, this should surely be the subject of some doctrinal articulation. In this respect a closer look at some comparative insights may be useful.

What can be learned from treatment in other jurisdictions: Scotland and Australia

In Scotland, their endemic species of ‘marriage by cohabitation and repute’, in place for many years, is now replaced in the Family Law (Scotland) Act 2006 by a modern legislative framework for cohabitants, 2011 evaluation of which the Ministry of Justice in London gave as its reason for not taking any action on the Law Commission’s 2007 proposals for England and Wales.

Baroness Hale’s approval of the Scottish system’s affinity with the married provision in that jurisdiction, where, *prima facie*, it appears that the new Act is welcomed⁷⁵ thus suggests that a further small scale study would be worthwhile, although (given

⁷⁴ See Scotland, Chapter 6, and Australia, Chapter 8.

⁷⁵ Kenneth Norrie, *Commentaries on Family Law*, University of Dundee Press, 2011.

the relatively tiny population in relation to the remainder of the UK- only approximately 5.5million in Scotland) only a small sample would ever be likely to be available for research, particularly as the legal profession is tiny too and outside the principal cities the scanty population is spread very thin. However some fieldwork on Scottish popular opinion might still be worthwhile, since religion is still extremely significant in Scottish national life, as it is in Wales: the Sabbath, for example, has always been so strictly observed by many Scottish sects that Lord Mackay of Clashfern, when Lord Chancellor, was severely criticised by his own extremely strict sect for attending the funeral in London of a senior judicial colleague of a different religion, despite the fact that the funeral of a prominent senior judge was a normal incidence of his position as Lord Chancellor.

However, limited more recent fieldwork with Scottish *practitioners* in the course of the present inquiry⁷⁶ indicated that jurisprudentially *they* were not nearly as enthusiastic as Professor Norrie's *Commentaries* suggested, whatever might be the - still un-researched - position of the ordinary Scot.

Preliminary inquiries indicated some local plans for such research, potentially by Professor Elaine Sutherland, University of Sterling and Lewis & Clark Law School Portland, Oregon, USA, which may obviate the need for eventual independent fieldwork emanating from England, failing which, despite the likely small size of sample, the close geographical, jurisdictional and political proximity of Scotland would facilitate a proportionate, and probably relatively inexpensive cost effective, investigation before studying a jurisdiction further afield.

In Australia, where radical legislation indicates that tradition is routinely swept aside when contemporary demands require, similar provision was also introduced into their Family Law Act by legislation in 2007. Preliminary inquiries revealed the aim is to incorporate as many 'un-formalised' couples into the statutory regime as possible⁷⁷. It appears no local plans are at present projected for more than the very limited existing research, but are not ruled out either, and there are also extensive *travaux*

⁷⁶ See Chapter 9.

⁷⁷ Conversation with Professor Frank Bates, University of Newcastle, NSW, while attending the 2010 Conference of the Centre for Family Law & Practice at London Metropolitan University, July 2010.

preparatoires available: such literature is strongly recommended by Cretney⁷⁸ in his study of the development of legal doctrine in English Family Law statutes and case law, where he says 'studies of the process of law reform can be revealing...' and that 'what are sometimes dismissed as technical details influence the development of law and policy'⁷⁹.

Given the size of Australia and the fact that the enabling Act is a federal Commonwealth statute, this appears a potentially productive field for research into the impact of their reform and one which might attract some funding if any researcher could assemble the resources for such a large scale study.

Social acceptance in England and Wales? The Family Law Act 1996

Nevertheless if there is any guidance in England from the experience of the original hostility shown to the Family Law Act 1996 Part IV - which at first was intended to give the same home rights protection to married and unmarried couples - there could, in theory, still be opposition to any scheme aligning cohabitants and married couples in both status and any sort of legal framework. Although the 2011 Census found the population significantly less religious than previously⁸⁰, there may still be some strong cultural adherence to a concept of marriage distinct from cohabitation. It is worth recalling two instances in which the public has *not*, however, reacted in a hostile manner to fairly fundamental change of principles: the Human Fertilisation and Embryology Act 2008 and the Marriage (Same-Sex Couples) Act 2013.

The Human Fertilisation and Embryology Act 2008

While it is prudent to remember the Family Law Act 1996 experience, it is also equally quite possible that there would now be *no* opposition at all to cohabitants' rights legislation, since in an equally contentious subject area some of the more radical provisions of this 2008 Act were passed with little media fuss, despite the highly radical exclusion in the Act of the need for a child to have a father - *any* father at all! - and even allowing instead two mothers, this following the extensive human assisted reproduction technologies now made possible by science.

⁷⁸ Stephen Cretney, *Family Law in the Twentieth Century*, OUP, 2003.

⁷⁹ *Ibid*, Preface, pvii.

⁸⁰ ONS, Census 2011, www.ons.gov.uk.

Indeed the Act not only permits such a child to have only two mothers, provided the woman who is the 'other parent' accepts the agreed parenthood conditions set out in the Act, but this status can be registered under the Births and Deaths Registration Act 1953 ss 1 and 10, without any father being registered as well. That this is possible when the law places such importance in the Children Act 1989 ss 4, 8, 11 and 13 on the role of the father in parental responsibility ('PR'), contact, change of name and removal from the jurisdiction, is a significant change in philosophy. It apparently excited no public outcry even from the normally vocal fathers' pressure groups, especially the more exhibitionist organisations normally providing both copy and photographs for the sensationalist section of the press.

Compared to this, calibration of the precise degree of radical change between the 2008 and 2013 Acts is hardly worthwhile.

In the circumstances, especially in view of the number of births registered outside marriage, it is possibly now accepted that cohabitation is a fact of life not worth comment. Accordingly it might be worth continuing routinely checking the apparently rising numbers of respondents whose positive views are recorded by various polls as to (a) whether this is a fact, and (b) how it came about in a relatively short time since 1996.

It is well known that a government cannot afford to lose touch with the values of the people who have elected it, and that missing the rise of new social concerns and shifting moral values can be fatal to re-election, regardless of what other targets have been addressed by any administration.

In relation to (a) above, the complete absence of any significant media comment on the much more radical abandonment of traditional values in the 2008 Act than that proposed in 1996 does suggest that in 2008 the Labour government did not perceive any risk of significant disruption or they surely would not have sponsored such a statute as they did as late in their long period in office of 1997-2010.

In relation to (b) it may be that the public had moved on in the 12 years between the two statutes in 1996 and 2008, and thus dropped its hostility to any narrowing of the legal impact of the statuses of marriage and cohabitation: alternatively it may only mean that when the 2008 Act was passed they were not listening to, or even reading, the *Daily Mail*, which was the leading agitator in securing amendments to the 1996 Act. In either case obtaining the ordinary person's updated view on a formal recognition of cohabitation as a status alternative to marriage would be desirable, because of the fact that it is recognised that cohabitants have chosen *not* to marry when the alternative of marriage is available. Mostyn J, as early as 2003, when sitting as a Deputy High Court Judge before his full time appointment to the Bench, commented that he could

‘not imagine anyone nowadays seriously stigmatising pre-marital cohabitation as “living in sin” nor lacking the quality of emotional commitment assumed in marriage’⁸¹

This is echoed in Professor Rebecca Probert's monograph *Changing Legal Regulation of Cohabitation: From Fornicators to Family*⁸², which identified that only relatively recently has terminology in evidence of changing perceptions of, and popular attitudes to, cohabitants become more neutral and less disapproving, and that this also indicated changing presumptions about the character of modern society and the rule of law. This suggests that the significant changes are not so much the increase in the incidence of cohabitation, but of changed *perceptions* as such.

Attitudes to cohabitation in other jurisdictions

While Scotland and Australia provide excellent examples of such systems, there was very rapid positive feedback from Scotland in the 2010 Wasoff et al research⁸³, and initial academic commentary emerging in the learned journals in Australia, the timescale since these two schemes' introduction has not afforded either academe or the practising profession much opportunity to compare them to the statutory regime proposed by the Law Commission.

⁸¹ *GW v RW* [2003] EWHC 611.

⁸² Rebecca Probert, *Changing Legal Regulation of Cohabitation: From Fornicators to Family*, CUP, 2012.

⁸³ n70.

Nor is it easy to look further afield to see whether any of the ideas which appear to be sweeping in from overseas have imported any such broader perspectives into the socially acceptable foundations of English Family Law, to which the inflow has been at least as copious as the tide envisaged in the 1980s by Lord Denning when considering the impact of EU Competition Law. This is despite the influence of such organisations as the International Academy of Matrimonial Lawyers and the International Bar Association. Meanwhile Eire is reported to be considering a system similar to Scotland's, although the 2015 annual Cumberland Lodge weekend of the Family Law Bar Association (8-10 May 2015) devoted its entire programme to cross border influences on English Family Law.

However, in Spain where there are advanced equality ideas enshrined in the Constitution and the state is no longer constrained by religion as in the Franco years, could be the most likely candidate for fuller integration, especially as the fragmented independent regional government approach to the law is province based, so that different provinces of Spain may make distinct local provision. Catalonia already has a developed statutory system for opposite sex couples, other provinces in the Spanish devolved government system vary, and some, such as Galicia, did not appear to start with to be participating at all, although now all provinces have legislated.

Spain is one of the few European jurisdictions which already recognises gay marriage, which considering its religious historical background is certainly progressive. The King was historically, and remains today traditionally, 'His Most Catholic Majesty', a title granted by a later medieval Pope, the monarchy is relatively popular under the new young King Felipe VI, and frequent (Catholic) religious festivals remain a core element of the country's social and cultural life. However this appears in no way incompatible with their modern constitutional and practical equality. Equality reform was indeed a speedy advance from the completely un-modernised society existing at the end of the Franco regime in 1975.

Spain also has a significant expatriate British population, mostly resident in the southern province of Andalucia. While in most cases in the past Spanish Family Law did not apply to them, since the civil law system in place in Spain indicated that in the

case of litigation in any province by those expatriates in Family Law matters, the foreign Law dictated by their nationality would apply, although procedure remained that of the forum and would be Spanish. This was because Spanish law does not recognise the concept of English, or other, expatriates' domicile in Spain in the way that English law recognises their domicile there for other purposes such as UK taxation. However this governing law position has now changed since the implementation of the 1996 Hague Convention on Applicable Law substitutes Spanish law in respect of cases involving children and enforcement of decisions involving them and also in some unrelated cases involving foreign nationals resident in Spain. This means that Spanish law may now govern, which can be particularly confusing because the different provinces may take different perspectives.

Overseas systems and professional attitudes in England and Wales

Regardless of templates overseas but no actual English legislation, the change over time in the legal profession's approach to a cohabitants' regime is significant, as reviewed by Probert in her monograph. The Solicitors Family Law Association ('Resolution') for example, has long proposed a detailed scheme for closely aligning cohabitation and marriage which is supported by the Law Society Family Committee though they too have produced their own proposals, although neither scheme has progressed.

The cross border implications of English Law's lack of a legislative regime for opposite sex cohabitants is obviously routinely before practitioners in English and Wales since the entire topic keeps appearing, and one potential concern of theirs might naturally be that, if there should at last be a normative scheme for cohabitants in English law, where this would leave same-sex cohabitants not in civil partnership and would this affect the children of such relationships, if at all?

The answer to this is clearly that discrimination should not be supported and that same-sex cohabitants not registered as civil partners would necessarily have to be included in the definition of 'cohabitants' or it would not be fair to make changes for opposite-sex cohabitants alone, despite the fact that the government when enacting the Civil Partnership Act 2004 expressly left out opposite-sex cohabitants since they took the view that *they* had the option of the existing status of marriage. This was

formally set out in the accompanying policy statement, when introducing the proposed Bill, by the DTI Equality Unit in 2003⁸⁴ although Lord Lester's failed Civil Partnership Bill in 2002 would have provided for opposite-sex cohabitants, as Diduck and Kaganas⁸⁵ comment.

In regard to children, child issues have been separated from those concerning adults for many years - since at least the enactment of the Children Act 1989 - and it seems obvious that there would be no change in relation to them because of a change in status of their parents. The most telling example is in the HFEA 2008 and the Births and Deaths Registration Act 1953, whereby the status of parent given to same-sex parents when human assisted reproduction methods are used for such couples to have children by HAR, simply deals with the adults' parenting rights and obligations and makes no changes in respect of the children whether the parents are married or not.

However there might be some psychological impact because not all cohabitants who would be affected comprise a standard heterosexual couple who have simply chosen not to get married: the most recent human assisted reproduction statute, the HFEA 2008, has enabled the creation of some very atypical parents. There is little work at present on this aspect of the impact on children of the atypical families now created following the Gender Recognition Act 2004 and the HFEA 2008, although at least two academics, including a medical ethicist at the University of East Anglia and the former Chair of the Human Fertilisation and Embryology Authority, specialise in this area⁸⁶.

⁸⁴ DTI Equality Unit, *A Framework for the legal recognition of same sex couples*, Home Office, p13, para 14, 2003.

⁸⁵ Alison Diduck and Felicity Kaganas, *Family Law, Gender and the State*, Case & Materials, 2nd edn, Hart, 2006, p67.

⁸⁶ Anna Smajdor, 'The Harm of Being: Should Some Conceptions Be illegal?' Centre for Family Law & Practice Summer School, 2011; Anna Smajdor & Ruth Deech, *From IVF to Immortality*, OUP, 2007.

Is there therefore a case to say that it is time (at last) to formalise the law relating to cohabitation in English Law?

This question has been proactively asked by English commentators over at least the last two decades, and on which tentative schemes have been built by academics whose field of study it was. All have generally pressed for articulation of the rights and responsibilities involved in such a partnering, but without significant progress being made in acceptance of the principles, and still less in achieving legislation, while occasional Bills in Parliament have failed before reaching the statute book. There has been one consistently hostile commentator; Professor Ruth Deech whose commentary effectively began in a paper for the conference of the International Society of Family Law in Uppsala, Sweden, in 1979 and has continued through to her more recent Gresham College lectures as Gresham Professor of Family Law.⁸⁷

The underlying theory of this topic, arguably as compelling as the practical and policy pressures for introduction of a discrete cohabitants' rights regime, and the polarised views generated at various times, are initially therefore probably best addressed in a doctrinal literature review, for which see Chapter 3. Nevertheless, arguably there is at least *prima facie* justification to reopen an investigation into the potential for such a reform, which would make a significant contribution to English Family law, in which all the issues mentioned in the above sections of this initial scoping will be explored further in subsequent chapters, with a view to establishing that there *is* a place for a discrete normative regime for cohabitants in English Law.

⁸⁷ Ruth Deech 'The Case Against Legal Recognition of Cohabitation' (1980) 29 *International and Comparative Law Quarterly*, pp 480-497; Ruth Deech, 'Cohabitation' (2010) 40 *Family Law* p.39, 2009-10 Gresham Lectures, www.gresham.ac.uk

Chapter 2: Methodology

Introduction

This chapter considers the appropriate methodology for the project.

A preliminary survey of material available for the literature review scheduled for Chapter 3 suggests that the essential methodology can only be socio-legal, embodying the social constructive approach identified by Hart⁸⁸ and to a great extent based in the library. A great deal of useful work has been done by specialist commentators in this field, much of which is still valid even if some is not recent. Besides the core theme of functionality, this huge literature addresses amongst other themes the underlying theory which Hart recognises as transforming some moral principles into law, which is put another way by Maine⁸⁹ who recognised that the origins of most normative regimes were social before being reduced to formal rules, rather than the other way around.

Without going inappropriately deeply into legal theory for the present purpose, this recognition of self- developing norms is vital in the context of the instant project since it means that the function analysis of cohabitation actually has a valid practical foundation in socio-legal theory, a conclusion which has become clear in Chapter 1: but has apparently completely escaped three successive governments which might have long since legislated for cohabitants' rights if the matter had been seriously considered even as far as the practical political and economic benefits. This theoretical foundation is important in view of the historic context of the long struggle of such commentators to obtain some recognition for the concept of cohabitants' rights, which has been repeatedly argued for and supported through research by Barlow and her various team members who have often worked with her on extended

⁸⁸ H.L.A Hart, *The Concept of Law*, 3rd edn, OUP, 2012.

⁸⁹ Sir Henry Maine, *Ancient Law*, 1st edn 1861, reprinted with an introduction by F Pollock, John Murray, 1908.

projects⁹⁰ as well as where she has worked with others, such as in the Cooke led Nuffield Foundation project which specifically proposed a *Regime for England and Wales* in their 2006 Report⁹¹.

At the forefront of the literature must be the 2006-7 work of the Law Commission⁹² which will be singled out for separate evaluation in Chapter 4, since while there is still much of relevance to be found in their two reports, there are obvious important omissions, one of which is the subject of Chapter 5, which considers the positive choice which is apparently being made between marriage and cohabitation, an issue which is barely touched on in the Commission's reports. In particular some further consideration seems required of the reasons for the contemporary range of choices between marriage, civil partnership or cohabitation, now that same-sex marriage is an option but opposite sex registered civil partnership is not,; and also of the role that religion or other traditional influences might (or might *not*) now play in England and Wales, in distinguishing marriage and civil partnership on the one hand and cohabitation on the other.

Some comparative evaluation must then be undertaken of the schemes now already operational, and apparently well established, in the other jurisdictions identified as likely to be helpful to consideration of a scheme for English law, and this will be undertaken in Chapters 6-8. Following this some discussion is to be embarked upon with representative practitioners both in England and in those jurisdictions which, it is considered, can only be of assistance in identifying the frameworks with potential to

⁹⁰ Anne Barlow and Craig Lind 'A Matter of Trust', 19(4) (1999) *Legal Studies* 468, p 469-47; Anne Barlow and Simon Duncan 'New Labour's Communitarianism: supporting families and rationality Part II' (2000) *The Journal of Social Welfare and Family Law* 129, pp. 134-139; Anne Barlow 'Regulation of cohabitation, changing family policies and social attitudes: A discussion of Britain within Europe', (2004) 26 *Law and Policy* 57-86, at pp. 58-9; Anne Barlow and Geraldine James, 'Regulating Marriage and Cohabitation in 21st Century Britain', (2004) 67(2) *Modern Law Review*, pp. 143-176; Anne Barlow 'Cohabitation law reform - Messages from research (2006) 14 *Feminist Legal Studies*, pp. 167-180; Anne Barlow 'Cohabiting relationships, money and property: the legal backdrop', (2008) 37 *Journal of socio-economics*, pp.502-518; Anne Barlow and Janet Smithson 'Legal assumptions, cohabitants' talk and the rocky road to reform', (2010) 22 *Child and Family Law Quarterly*, pp. 328-350.

⁹¹ Elizabeth Cooke, Anne Barlow and Therese Callus, *Community of Property: A Regime for England and Wales*, Nuffield Foundation, 2006.

⁹² Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown*, A Consultation Paper, No 179, HMSO, 2006; *Cohabitation: The Financial Consequences of Relationship Breakdown*, Final Report, No 307, HMSO, 2007.

be successful for England and Wales. The results of this detailed empirical work will be found largely in Chapter 9, following up on the schematic outlines in Chapters 6-8⁹³ already dedicated to each of the jurisdictions selected for comparison. Were this resultant small scale research to show the potential viability of such a scheme in England and Wales, the contribution to be made by the present report would speak for itself as being of benefit to English Law, which is clearly at present conspicuously lacking compared to what has already been achieved by Scotland and is now apparently even planned by Eire. With this in mind a suggested draft Bill will be found in the Appendices.

For the reasons set out above there is a clear case for evaluation of the two similar single jurisdictions cohabitants' schemes already in existence in Scotland and New Zealand, also consideration of the longest established Commonwealth schemes of Australia (where regimes began at state level in the 1980s), and of the civil law scheme in the UK's fellow EU member state of Spain.

Some direct fieldwork also appears desirable in all these investigations, to flesh out analysis of the existing corpus of literature which is not confined to England Wales alone, and which appears to some extent to have turned round the anti-parity lobby of the 1980s and of the Law Commission's 2006-2007 work. However such preliminary scoping work as has been undertaken on the very large corpus of literature indicates that the wide differences of opinion in the literature, which are spread over a long period of study, indicate that there is often a different perspective available from even limited fieldwork with practitioners at the coalface, since as Lord Justice Sachs commented half a century ago 'the law is a living thing moving with the times and not a creature of dead or moribund ways of thought'⁹⁴.

In this connection, the literature has fallen to a trickle in recent times, despite the plentiful legislation in favour of other, smaller, constituencies than that of the apparently flourishing new unmarried family unit of cohabitants, although an

⁹³ Chapters 6 (Scotland), 7 (Spain) and 8 (Australia and New Zealand).

⁹⁴ *Porter v Porter* [1969] 3 All ER 640.

occasional article still appears periodically, either from an academic source⁹⁵, or more often from specialist practitioners⁹⁶.

As Coleridge J commented in his address to Jordan's annual Family Law conference in October 2013

'attempts at refining the law relating to the property rights of unmarried partners were side lined while results of studies in Scotland were gathered and considered, with the result that it has disappeared off the radar and in reality shows little signs of re-emerging'.

He added

'This unreformed area of Family Law can be very harsh and unfair. No one is suggesting that cohabitants should be given equivalent rights to married couples but there is a happy medium between full post -divorce provision and nil...the distinction is recognised in the case of widows and non-married cohabitants in the case of the 1975 Inheritance (Provision for Family and Dependents) Act which drew the subtle distinction'.

This comment is the more powerful as Sir Paul Coleridge, founder of the Marriage Foundation, is well known to be in favour of marriage, but has not been blinded to the need for cohabitation reform, despite the Marriage Foundation's 2013-14 research programme finding that cohabiting relationships were four time more likely to break up than marriages .

He went on to say:

'I suggest we need proper research, possibly research based, grown up discussion, and then legislation informed by 45 years of experience and social change. We can get it right with little effort ... So what it all comes to is, as the judges have repeatedly said, these areas need urgent and in depth legislative reform... the noble attempts by the Court of

⁹⁵ Simone Wong 'Shared commitment, interdependency and property relations: a socio-legal project for cohabitation, (2012) *24 Child and Family Law Quarterly* p60.

⁹⁶ Harrison-Drury blog, www.harrison-drury.com, on the website of these specialist Northern family solicitors, has continuing articles on cohabitation, last accessed 29 November 2015; Graeme Fraser, 'The government must support cohabitation reform', *NLJ*, 22 January 2015. (This author is Resolution's spokesperson on cohabitation reform).

Appeal and House of Lords, and more recently by the Supreme Court to put a new supercharged engine into the old chassis may be creative and, as a temporary measure, better than nothing, but they are no substitute for modern, relevant, and easily understood legislation, which does not call for endless recourse to hundreds of pages of interpreted precedent. Surely too the endless reliance on the medieval concept of the implied trust has gone on long enough and as far as it should. When the highest court in the land has again and again to resort to complex trust law to fill the gap to achieve justice in the field of family law it is the clearest possible indication that the legislation is out of date and the legislature has not done its job. They (the courts) did it in the 1960s in cases like *Gissing* and *Pettitt*.. to give married women rights before the 1970 reforms, then Parliament acted. They did it again in 1985 with pensions in *Brookes* to enable wives to share in the pension funds of their husbands, until the legislature finally acted to give the courts power to redistribute pension rights. They have been using it in the TOLATA litigation to ensure that a deserving cohabitant does not depart with nothing...⁹⁷

Although there are many other reasons why a clear exposition of cohabitants' rights would be beneficial, a short quotation from *Stack v Dowden* in the Court of Appeal makes clearer than any possible further critique of the present situation in which cohabitants' must use TOLATA, precisely *why* the Chancery Division might find a rationale for passing cohabitants over to the Family Court:

As Carnwath LJ as he then was (now Lord Carnwath in the Supreme Court) said when commenting on the TOLATA methodology in cohabitants' rights cases:

'...To the detached observer, the result may seem like a witches' brew, in to which various esoteric ingredients have been stirred over the years, in which different ideas bubble to the surface at various times. They include implied trust, constructive trust, resulting trust, presumption of advancement, proprietary estoppels, unjust enrichment and so on. These ideas are likely to mean nothing to laymen, and often little more to the lawyers who use them. Underlying the apparent confusion is a range of conflicting policy factors which can validly be used to support different ideas...'⁹⁸

⁹⁷Sir Paul Coleridge, 'Lobbing a Few Pebbles in the Pond. The Funeral of a Dead Parrot', address to Jordans Annual Family Law Conference, 9 October 2013, www.marriagefoundation.org.uk.

⁹⁸ *Stack v Dowden* [2005] EWCA Civ 857, per Carnwath LJ [75].

However, while it is all very well to recognise that reform is needed, since cohabitation is not a family form which is recognised by the law, at present the English Legal System is in the same position as the 'pregnant widow' identified by Amis⁹⁹ in his (apparently autobiographical) novel of the same name which, reflecting his theme, deals with change in social relationships since the 1960s, and in which he quotes Alexander Herzen¹⁰⁰:

'The death of the contemporary forms of social order ought to gladden rather than trouble the soul. Yet what is frightening is that what the departing world leaves behind is not an heir, but a pregnant widow. Between the death of the one and the birth of the other much water will flow by, a long night of chaos and desolation will pass.'

It is difficult to describe the present situation of the long hoped for cohabitants' normative regime in English law more graphically, since such a discrete legal regime as seems required is arguably both probably appropriate and actually necessary to reflect society's changes at a time when the modernisation of Family Law and the new Family Court is itself in full flood.

On the other hand that specific drive for cohabitants' rights reform has been in process for such a long time in its own transitional 'long night of chaos', which is coincidentally such an apt description of the social change which has been its own background, and which has evolved without any corresponding reform of the associated law. It is therefore this long evolution which so clearly indicates the necessity of at least some limited fieldwork in the jurisdictions which appear successfully to have taken the plunge in introducing legislation, so as to provide some practical focus, and indeed some conclusions as to whether their innovation might be said to have been reckless – and a warning to English law not to follow without further consideration - or inspired, and therefore a helpful guide.

⁹⁹ Martin Amis, *The Pregnant Widow*, Jonathan Cape, 2010.

¹⁰⁰ Alexander Herzen, *My Past and Thoughts*, new edition California Press, 1992.

A plan for the fieldwork

In view of the difficulties in lining up suitable consultees in each of the distant jurisdictions, and in particular because of the inevitable time and distance hurdles to be overcome, it was decided first to draw up a master background questionnaire to send ahead by email, which received ethical clearance from LJMU's Research Ethics Committee and this is included in the Appendices. This questionnaire was adapted as necessary for national reasons, for example, where the breakdown of types of lawyers' firms in England and Wales included standard City/West End, regional etc and other obviously English & Welsh distinctions, this was adapted to reflect roughly equivalent but nationally distinct categories: such as in Scotland, Edinburgh/Glasgow/other city and rural locations; in Spain Madrid/Barcelona, mainland/Canaries provincial locations; and in New Zealand and Australia similar urban, rural and more remote locations.

The aim was to make use of qualitative research's facility to obtain detailed insight into individuals' experiences, and thus to conduct qualitative interviews with family professionals, but where possible to contrast their responses with those of academics both in person and from within the literature, since past experience has shown that these two resources do not always match. This steer was obtained from an earlier project in New Zealand conducted by George in relation to Relocation, on which he reported at the second international conference of the Centre for Family Law and Practice at London Metropolitan University in July 2013, and later wrote up his definitive account¹⁰¹, identifying the qualitative research employed as 'a systematic, rigorous and theoretically sound method for investigating and understanding the social world' which he further approved as 'grounded in the interpretative tradition' as 'flexible and sensitive to the social context in which the data is produced'¹⁰².

¹⁰¹ Rob George, *Relocation Disputes, Law and Practice in England and New Zealand*, Hart, 2014.

¹⁰² George relied heavily on Carol Smart, Bren Neale and Amanda Wade, *The Changing Experience of Childhood*, Polity Press, 2001, pp 174-175, and Jennifer Mason, *Qualitative Researching*, Sage, 1996, for these views in relation to his own New Zealand researches, which seemed a useful precedent since, like his study the present one aimed to look only at the experiences and views of legal practitioners so as to capture what was happening in their practices following the introduction of their respective legislation.

Selection of the consultees was next considered and a relatively easy process identified since in Scotland the legal profession is small and largely concentrated on Edinburgh and Glasgow. Thus a selection of any mainstream practitioner(s) would necessarily include the input of others since experience is thus inevitably regularly and routinely shared. In Spain anything like comprehensive regional experience was a hopeless goal owing to the differing local cultures and detailed legislation based on the local provincial government system; thus in that case, concentration on the predominantly English settled area of Andalucia , was the obvious choice, in view of its local Anglo-Spanish lawyers, who however have a national and international reach. In New Zealand the small scale of the single jurisdiction and small population spread over the two islands, but with the main legal centre in Wellington, also concentrated attention in the South; while in the vast expanse of Australia the choice was so large that most reliance was placed on those academics and practitioners who regularly travel to Europe and worldwide for conferences and contribute to the International Survey of Family Law.

For England and Wales, practitioners were selected from the Central London Family Law area around the Royal Court of Justice and eastwards towards the City, but excluding the big City commercial firms which do not do much Family work, the 'West End' firms who work from slightly less prestigious locations, and some regional firms, all of whom belonged to Resolution and subscribe to its Code and values.

Participants were to be initially contacted by email in the form of the sample letter approved by the Ethics Committee, which explained that participation would be anonymous and that nothing would be included which might identify them, and that they were then to be sent the master questionnaire, adapted appropriately where necessary, as set out above, and the standard informed consent form.

The full complement of eventual interviewees aimed for an equal number of academics and practitioners from each jurisdiction studied and information gathered was scheduled to be set out in both the individual Chapters 6-8 and in the conclusions of Chapter 9. All interviews were scheduled to be conducted between 2012 and 2014, recorded, transcribed and anonymised, and to last for varying times between half an hour and an hour and a half, although sometimes followed up by

longer email comment from interviewees, where this was suggested either by time and distance difficulties or by some particular factor which indicated this suitability.

It was realised that analysis of the interviews was likely to be driven very much by the content of the interviewees' own material which emerged through the semi-structured interviews planned, although it was assumed that common themes would emerge, since the interviews were driven by the standard questionnaires.

Projected conclusions on analysis of the interview data and comparison with the literature review leading to possible suggested draft legislation

It was appreciated that comparison must then be made between the conclusions posited by the literature and the practical results of the fieldwork interviews which it was realised were likely to be particularly informative, since it is trite that academic and practitioner analysis do not always coincide, so that such a reality test is highly desirable. Should these two processes (as was hoped) show a viable way forward, a potential final outcome aimed for draft legislation.

Chapter 3 Literature Review

Introduction

The primary aim of this chapter is to examine selected academic and practitioner contributions to the literature on the developing cohabitation trend, which began to be recognised in practice in the late 1970s¹⁰³. This was followed in succeeding decades by extended commentary in the debate on whether this social trend should be recognised in a formalised legislative regime for unmarried cohabitants. The chapter critically reviews the most significant themes which have emerged, with the principal aim of highlighting those ideas which, while originally of their time, still have contemporary relevance, albeit sometimes potentially in a slightly different manner from that initially intended.

A secondary aim is to select from the prolific output those arguments which might support and dovetail with, rather than merely to run alongside, contemporary pressure towards incorporation of modern themes of equality and human rights which have been developing Family Law in modern times; also to look for key underlying theory and if possible to identify sound reasons for cohabitants to be treated as part of the family rather than as outsiders, and in some way inferior. The main reason emerging from the leading commentators appears to be the functionality argument, early adopted and maintained by Barlow¹⁰⁴ and later taken up by Cooke¹⁰⁵ without much attention being paid to any theoretical arguments for protecting cohabitation as an alternative to marriage and registered civil partnership¹⁰⁶.

¹⁰³ Ruth Deech, 'The case against legal recognition of cohabitation', (1980) 29 *International and Comparative Law Quarterly*, pp 480-497.

¹⁰⁴ Anne Barlow and Craig Lind, 'A Matter of Trust' (1999) 19(4) *Legal Studies* 468, pp 469-475.

¹⁰⁵ Elizabeth Cooke, Anne Barlow and Therese Callus, *Community of Property: A Regime for England and Wales* Nuffield Foundation, 2006,

¹⁰⁶ This aspect is explored further in Chapter 5 which looks at the potential reasons for couples' choosing cohabitation over other possible relationships which would impart legal status.

The corpus of literature: 1980-2015

A substantial body of literature has been accumulated on cohabitation, of which the Law Commission's 2006-7 work examined a portion of the most significant for their purposes.

However, the impact of this substantial academic and practitioner contribution has apparently been such that its effectiveness in practice appears to be in inverse proportion both to its bulk and its persistence over a lengthy period of time. Thus some key contributions must now be selected for contemporary relevance, as the Law Commission did in 2006, since - like most long running lobbying campaigns - the nature of the debate has changed over time. Unfortunately, in the case of cohabitation, this has culminated in nothing being done at all to advance any of the sometimes powerful arguments by achieving the practical outcome of legislation.

Nevertheless, there *has* been some advance in case law, since as noted by Sir Paul Coleridge when addressing Jordan's annual Family Law Conference in 2013¹⁰⁷ the Supreme Court has been obliged, in the absence of missed opportunities for primary legislation, to adapt and clarify existing principles of English law which assist cohabitants' property rights, as set out in the judgment of Baroness Hale in the Supreme Court in the Scottish appeal of *Gow v Grant* (2012), and further supported by similar statements in those of her brethren in that case.

This review of the literature could therefore inevitably not be entirely comprehensive, since there is now so much of it that, as when selecting cases, some will inevitably be classified as only further exemplars of principles already discussed or points already substantially taken.

Selecting the key literature on cohabitation

It is of course yesterday's news that looking for underlying theories in contemporary Family law is not unlike looking for a needle in a haystack, since much of the

¹⁰⁷ 'Lobbing a Few Pebbles in the Pond: The Funeral of A Dead Parrot', annual Family Law Conference 9 October 2013, www.marriagefoundation.org.uk;

development of the common law is incremental with little regard for the codification found in civil law jurisdictions: in this, cohabitation is no different from any other mainstream family topic, although perhaps more notoriously debated without apparent impact than in the case of some other such mainstream topics. Moreover this particular debate has stretched out over a period in which several governments - any of which could have implemented family specialist recommendations from both academe and practice in relation to cohabitation - have not given the matter priority, although it is fair to say that there have been historic hurdles to law reform in the field of cohabitants' rights dating even from before the Family Law Act 1996.

The contemporary couple/family relationship and its incidences - partnership status, property and responsibility for children - have not attracted the sort of theoretical analysis beloved of the continental academic. The creation of a framework of normative legal rules to protect cohabitants' rights is not a project that has claimed instant recognition as the core of a corpus of new principles which must be enshrined in legislation either urgently or at all. In this respect cohabitation has apparently had an unfair deal since that has not been a fate which has necessarily hindered either initial or amending legislation in other Family law fields which were arguably neither as pressing, although they might not have been as apparently controversial.

The starting point for a search for doctrinal influences on the development of contemporary family law, is therefore, according to Cretney¹⁰⁸, existing English statute and case law and a study of the processes which led to change in the law in the twentieth century, and *not* a study of the social and economic forces which influence attitudes towards legislation and legal practice, although he does allow that 'the process of law reforming can be revealing'.

In his seminal history of the development of Family law - a discipline which was said by Lord Shawcross as late as 1947, to be 'a very simple branch of the law' which required 'no study or thought at all' - Cretney considers that officials in government departments and parliamentary counsel have great influence on law reform and that it is therefore worth studying unpublished papers and archival sources, including

¹⁰⁸ Stephen Cretney, *Family Law in the Twentieth Century*, OUP, 2003, Preface, pvii.

studies on the working of the legal system, in order to trace the path of reform and perhaps to articulate what he calls the 'fundamental characteristics' of English Family law, since it seems that Family law in England Wales does have such characteristics, even if it does not have either underlying theory or much of a normative framework .

However, not much theory or framework seems to have applied to cohabitation, although one class of such literature, of influence in its time in generating initial academic interest in cohabitation, but which is probably of little contemporary use, is the early statistical work of commentators such as Kiernan¹⁰⁹ and John Haskey, until recently Head of the Population and Demography Unit of the Office of National Statistics. This is because of the conclusion set out in Chapter 1 that numbers are not logically a key driver for reform in the cohabitants' normative regime context, so that only the existence of the trend and identification of its continuing upward sweep - which *is* supported by figures - is still of interest in relation to the literature.

Although it is without doubt that cohabitant families now form a significant part of the population, there is some confusion as to their precise position in the statistical pattern of relationships, owing to the way in which the Office of National Statistics' Families and Households tables and periodic bulletins are sourced and structured. As a result, it seems to be not simply a temptation to take the easy way out, if one skates straight over the contribution of both the Office of National Statistics and the commentators on their various published figures, since there appears to be little coherence in their present day approach to documenting what cohabitants are doing and why. This is not least as the latest interest in cohabitation versus marriage appears to be only in the numbers of registered civil partners who have upgraded to full marriage, which does not help to sharpen the longstanding 'fuzziness' of the data on un-formalised cohabitation as such, because those registered civil partners already had the benefit of a recognised legal regime.

¹⁰⁹ Kathleen Kiernan, 'The Rise of Cohabitation and Childbearing Outside Marriage in Western Europe' (2001) 15 *International Journal of Law, Policy and the Family* p1; Kathleen Kiernan and Kate Smith 'Unmarried Parenthood: new insights from the Millenium Cohort Study', (2003)114 *Population Trends* 26, figure 1; Kathleen Kiernan 'Unmarried Cohabitation and Parenthood in Europe' (2004) 26 *Law and Policy* 33,p.40, figure 2.

Making sense of relevant contemporary cohabitation figures

Statistics released following the 2011 Census certainly show that married couples are now in a minority. In the married age groups - that is, those old enough to be married - numbers had slipped to 47% of the population, although in London, for example, only one third of the population was married¹¹⁰. However then the picture becomes more confusing, as one reason for the low married numbers is the steep rise in the numbers of single person households and because of the 105,000 registered civil partnerships apparently identified at that time. More confusingly, this also does not seem to fit with the averages consistently claimed that registered civil partnerships have been taking place at a rate of approximately 6,000 per year since the implementation of the 2004 Act in 2005.

Statistics that are a little more helpful are the Office of National Statistics releases of January and November 2015, which certainly do support the current trend towards a preference for cohabitation over marriage. For example, the table Families and Households 2014, released on 28 January 2015 shows that at that date cohabitant families had increased by a fraction under 30% in the period 2004-2014, making them now the fastest growing family form within the 18.6m UK families, of which 3m were identified as opposite sex cohabiting couples' families and 84,000 same-sex cohabitant families as compared with 12.5m married couples' families overall. However these figures did not separate out age groups which appear to be of key relevance to the trend identified.

The equivalent Table for 2015, released in the Bulletin of 5 November 2015, presents a picture which is a degree more helpful than the earlier release - although still far from clear in attempting to discern how the trend towards cohabitation is actually working. This is because the tables now include marriage and registered civil partnership figures as a sole category, giving a figure of 12.5m families in this class with a slightly raised figure of 3.2m opposite sex 'cohabitant' families out of a total of 18.7m families – although this at least separates out the un-formalised

¹¹⁰ *The Guardian*, 11 December 2012.

cohabitants of both same and opposite sex unions and does show who precisely is still without recourse to some legally recognised normative regime.

This most recent statistical exercise has, nevertheless, concerned two particular pressure groups whose aims are to support family stability, one of them, in particular, specifically aiming to support marriage. This latter group is the Marriage Foundation which has identified that while at the present time 90% of 60 year olds have been married at some stage, at most only 50% of today's young adults are likely to be so, and that divorce is currently highest in the age group 50-64; while other figures¹¹¹ indicate a 25% increase in marriages of the over 65s, whether divorced, widowed, or previously single. The second group is the Equal Civil Partnerships for All campaign, which considers that the marriage figures generally could be improved if opposite sex civil partnerships were permitted, as this has been the experience of other jurisdictions¹¹².

Leaving aside the surge in the 65+ age group, marriage figures for all ages in the last few years appear to have hovered at around a quarter of a million a year with apparent slight rises, for example increasing by 5% in 2012 to 262,000, although in reality this is a net fall, owing to the increase in overall population figures. At the same period cohabiting family formation has been a galloping trend, suggesting that the literature needs to be reviewed in relation to the *function* of cohabitation and any law reform taken from that point.

Key themes of the post millennium literature

It therefore seems that much literature of the past 40 years will be of limited use in looking for such underlying theory as it is unlikely to relate effectively to contemporary cohabitation which, if one pursues the social constructivist path to enlightenment, now ought to claim some space in a reform programme to bring the law up to date, so that it matches and serves current social and economic conditions.

¹¹¹ *The Observer*, 15 June 2014 based on ONS figures for 2011-12.

¹¹² This will be followed up in Chapter 5 which basically considers the choice between marriage and cohabitation but in which the extension of civil partnership should perhaps have a place.

Nevertheless, there are some useful contemporary pointers, starting with the Family and Parenting Institute, the Centre for Social Justice and the Institute for Social and Economic Research, Essex University, which all provide useful data in assessing the likely form of the family of the future based on current attitudes. Baroness Deech of Cumnor, who has always been and remains against legislating for cohabitants' rights, has not been afraid to draw on these sources to show that the sharp decline in divorce decrees is because of the rise of cohabitation from which it is much easier to emerge if a relationship breaks down. As a result she considers that there is no need to reform divorce law as this would only push the statistics up even higher, but that different methods are required to service the contemporary family unit more appropriately¹¹³.

Meanwhile there is in fact some still potentially useful literature, especially where based on empirical studies, which could be analysed in order to ascertain what, if any, useful macro- or micro-level work has been done in the past 40 years to look individually at the four broad family groupings which society now appears to favour – marriage, for both opposite- and same-sexes; opposite-sex cohabitation; registered civil partnership and informal same-sex cohabitation: and then to draw broad brush conclusions as to the requirements of contemporary family law.

In the circumstances it must first be asked whether it is worth dissecting all the history, when it has been only relatively recently that serious attention has been devoted to cohabitants. However, given the clear numbers of cohabitants that have been emerging from the Office of National Statistics¹¹⁴, it would appear that it surely cannot still be argued that some sort of norm cannot at last be created in which cohabitant families can be recognised. While much of what has been written in the past is now out of date, because, some of the earliest are surprisingly in tune with contemporary trends. For example, one of the leading original mid-1990s academic and practitioner monographs¹¹⁵ sought to argue support for the function element of

¹¹³ Ruth Deech, 2009-10 Gresham Lectures, 'Cohabitation', www.gresham.ac.uk, reprinted in (2010) 40 *Family Law*, p39.

¹¹⁴ See Chapter 1 and above.

¹¹⁵ John Dewar and Stephen Parker, *Cohabitants*, 4th edn, Sweet & Maxwell, 1995.

cohabitation, an analysis since firmly taken up and established by Barlow *et al*¹¹⁶ and Cooke *et al*¹¹⁷, regardless of the fact that the cohabitants' constituency still has no discrete legal regime. In this context, perusal of the bibliography of the extended literature quickly establishes that the 'numbers' element is such that they are only peripherally important, since the various historic and contemporary drivers appear to be culture, ideas, concepts, perceptions and other influences. This is not really surprising since while cohabitation numbers have steadily risen, as has the numerical population though not in proportion, ideas and other influences have changed, not least because of the changing composition of that population.

Dewar & Parker's early work, emanating from this very productive partnership of a leading academic and leading practitioner, and obviously aimed primarily as a book for practitioners, did nevertheless attempt to look at the underlying theory, which practitioners inevitably require for persuasive argument in court – in this case the identification in cohabitation of a similar function to marriage in establishing a family format as well as an intimate relationship.

The function argument is, nevertheless, separately important since it is trite that Maine's discovery of the fundamental truth of law making in his respected classic 19th century text *Ancient Law* is that law has historically only made rules for societies which have already in practice created them¹¹⁸ so that early identification of the function element of cohabitation is notable. In other words, if it is unarguable that there was already a normative role for cohabitation identified by the early academic commentators, which was also taken up by other, later, English based academics after it seems much of the literature began: this is paralleled in other cases in Family Law, for example in Australia. It therefore seems that any arguments against the factual establishment of a normative *function* for cohabitation are now superfluous:

¹¹⁶ Barlow, Anne (2004), 'Regulation of cohabitation, changing family policies and social attitudes: A discussion of Britain within Europe', 26 *Law and Policy* 57, at pp. 58-9. Anne Barlow and Geraldine James 'Regulating Marriage and Cohabitation in 21st Century Britain', (2004) 67(2) *Modern Law Review*, pp. 143-176; Anne Barlow 'Regulation of Cohabitation, Changing Family Policies and Social Attitudes: a Discussion of Britain within Europe' (2004) 26 *Law and Policy*, pp. 57-86; Anne Barlow, 'Cohabitation law reform - Messages from research' (2006) 14 *Feminist Legal Studies*, pp. 167-180; Anne Barlow, 'Cohabiting relationships, money and property: the legal backdrop', (2008) 37 *Journal of socio-economics*, pp.502-518.

¹¹⁷ Elizabeth Cooke, Anne Barlow and Therese Callus, *Community of Property: A Regime for England and Wales*, Nuffield Foundation, 2006.

¹¹⁸ Sir Henry Maine, *Ancient Law*, 1861, John Murray and reprint 1908 with a foreword by F Pollock.

what is thus missing if Maine's approach is followed is a normative *legislative* scheme to complement the social function.

For this inquiry it is not, therefore, intended to include a timeline survey which would be disproportionate, but to select those contributions to the doctrinal debate which appear to remain most relevant to the contemporary context, with such evolutionary background as is strictly necessary. Earliest comment in fact more often includes key contributions from the judiciary in decided cases than from academe, especially before academic comment began to develop in this field, because in the early days of doctrinal development, the primary source of case law – the judiciary - was the most reliable, although continuing evolution of family law also draws some backward looking reflections¹¹⁹.

The salient points appear to fall into the following five categories:

- (a) the historical background
- (b) underlying theories on the distinction between marriage and cohabiting relationships
- (c) the contemporary basis and relevance of the choice to cohabit rather than marry
- (d) indications that there should be a formal status and legal regime for cohabitants as a recognised family unit, and
- (e) more detailed schemes for the introduction of a discrete legal regime for this contemporary social norm.

(a) Historical background

Cohabitation without marriage is not new: it existed in ancient times including in Greece¹²⁰ and Rome¹²¹ and throughout the Middle Ages. Its longstanding existence was probably originally responsible for the modern myth of common law marriage: the only aspect that is genuinely 'new' is the escalation of cohabitation without marriage in the latter half of the 20th century when - at least in theory - it apparently became socially and legally acceptable to cohabit rather than to marry: or at least as

¹¹⁹ Gillian Douglas and Nigel Lowe, *The Continuing Evolution of Family Law*, Hart, 2007.

¹²⁰ A R W Harrison, *The Law of Athens: The Family and Property*, Clarendon Press, pp 13-15, 1968.

¹²¹ Susan Treggiari, *Roman Marriage: Iusti Coniuges from the time of Cicero to the time of Ulpian*, Clarendon Press, 1994.

long as the status of cohabitation and that of marriage was distinct, because the literature of those past decades is often hostile in tone to cohabitation as a potential threat to marriage and social stability. Deech, for example, remains a commentator who three decades later still remains opposed to the notion in her 2009-10 Gresham Lectures¹²².

Going back to the 1970s and 1980s, following the radical changes in morality and social norms of the 1960s, there was even a strong judicial anti-recognition lobby which as time went on was quietly deprecated by the more forward thinking judges who had to deal with cohabitation in practice, both in relation to its own legal context and others, and especially in Commonwealth jurisdictions: see , for example, *per* Kirby, P, in the Australian case of *Bryson v Bryant*¹²³, who commented ‘...*de facto* relationships, akin to marriage, are neither uncommon nor (in most circles today) a source of opprobrium’.

In 1970s England and Wales, Lord Denning, in an early judicial attempt at developing special rules for cohabitants, tried to do what he could for cohabiting women who had no home rights by attempting to use the procedural route of the Married Women’s Property Act 1882 s 17 to give them an interest in the homes that they shared, and had often improved, while cohabiting with their legally owning partners: see, for example *Pettitt v Pettitt*¹²⁴ where Lord Reid led a unanimous rejection of development of the s 17 procedural route but (with Lord Diplock) suggested that there might be merit in considering a fictional contract between the parties which led to the common intention principle. This was followed by *Gissing v Gissing*¹²⁵ which affirmed the other idea advanced in *Pettitt* that there was a ‘family assets’ doctrine.

Both ‘contract’ (actually or notional) and ‘family assets’ survive today in family justice theory, the former most recently in Baroness Hale’s pursuit of the imputed common intention in *Jones v Kernott*¹²⁶, also in the developing law on ring fencing in

¹²² [2011] UKSC 53.

¹²³ (1992) 29 NSWLR 188.

¹²⁴ [1970] AC 777.

¹²⁵ [1971] AC 886.

¹²⁶ [2011] UKSC 53.

financial provision following divorce or other decree, and in relation to both marital and non-marital - that is cohabitation - agreements.

Thus the s 17 scheme was a short lived and fleeting idea, and has been dismissed as mere judicial sympathy: but Lord Denning was not without appreciation of legal doctrine and pinned his developmental theory on the concept of discretion given to the court about the distribution of property rights on the breakdown of marriage, on which a number of such post WWII decisions of the Court of Appeal had been based.

The problem, however, was that this discretion did not transplant effortlessly into the Chancery Division where cohabitants' property rights were decided, albeit that that Court had a jurisdiction historically based in equity. Lord Upjohn had already cast doubt on the s 17 theory in *National Provincial Bank v Ainsworth*¹²⁷, and after Lord Denning's early 1970s attempts to help them, cohabitants were once again left in the awkward position of recourse to the ordinary law of trusts determined in the Chancery Division so as to secure property rights they had not adequately protected – on which they then had to rely and still do.

As a result many schemes and commentaries were put forward by academics and practitioners in the years up to the Law Commission's work in 2006-7, e.g. Barlow & Lind¹²⁸; Barlow, who became a leading specialist, alone and with others and Barlow & James, who renewed the argument for recognition of the *function* of cohabitation, as evidenced in the wider approach in Europe rather than linking it to the religious ideologies associated with marriage¹²⁹. It was Barlow *et al*¹³⁰, who in 2005 identified two myths entertained by the public about their supposed equal treatment of cohabitants and married couples; and Barlow *et al*, which in 2007 assessed the impact of the government's (failed) *Living Together* cohabitation information

¹²⁷ [1965] AC 1175 at pp 1235-1236.

¹²⁸ Anne Barlow and Craig Lind, 'A Matter of Trust' (1999) 19(4) *Legal Studies*, 468. Anne Barlow and Barlow & James, n112.

¹²⁹ n116. n117..

¹³⁰ Anne Barlow, Simon Duncan, Elizabeth Cooke, Geraldine James and Alison Park, *Cohabitation, Marriage and the Law*, Hart, 2005.

campaign¹³¹; and Resolution (the Solicitors' Family Law Association) which in 2008 put forward a discussion paper supported by Lord Lester of Herne Hill QC and subsequently made the basis of one of his Cohabitation Bills. On the other hand Auchmuty immediately put the alternative view, namely that there was nothing much to recommend about marriage (or indeed, it appears to have seemed to her, any of the other state regulated relationships, a stance which she still maintains¹³².

Other significant contributors include Bailey-Harris¹³³ who in 1998 felt it appropriate to include cohabiting relationships in her multi-disciplinary survey of asset division on family breakdown at an SPTL conference in that year; Barton¹³⁴ whose 1985 monograph on cohabitation contracts coincided with consideration by the Council of Europe on whether to recommend that such contracts should be enforceable, which the Council finally announced in the affirmative in 1988. Later with his Staffordshire University colleague Hibbs, Barton's exploration of the perceptions of engaged couples revealed that the affianced devoted little time to any other issues but the wedding celebrations when they decided to progress to marriage, and none at all to the legal aspects of that step¹³⁵, which was revealing in indicating that married couples appeared to have as little regard for the law applying to that status as cohabitants did to their legal position. The human rights issues in relation to cohabitation have been contributed by Choudry and Herring¹³⁶.

Statistics and their interpretation in the period up to the Law Commission project in 2006-7 have relied heavily on contributions from Kiernan¹³⁷ who looked at patterns of divorce and cohabitation across nations and generations for the Centre for Analysis of Social Exclusion; also Haskey, and Haskey and Lewis who examined

¹³¹ Anne Barlow, Carol Burgoyne and Janet Smythson, *The Living together Campaign: An Investigation of the Impact on legally aware cohabitants*, Ministry of Justice, www.justice.org.uk, 2007, last accessed 13 November 2013.

¹³² Rosemary Auchmuty, 'What's so special about marriage? The impact of *Wilkinson v Kitzinger*' (2008) *Family Law Quarterly*, 475, pp475-6. See further Chapter 5 which offers a more appropriate opportunity to consider the potential respective appeals of these state regulated statuses as against informal cohabitation, than is possible in the present more general literature review.

¹³³ Rebecca Bailey-Harris, (ed), *Dividing the Assets on Family Breakdown: Strengths and Weaknesses of the Law*, collected papers of a conference at KCL, later separately published by Jordans Publishing.

¹³⁴ Chris Barton, *Cohabitation Contracts: Extra Marital Contracts and Law Reform*, Gower, 1985.

¹³⁵ Chris Barton and Mary Hibbs, 'Perceptions of the Affianced', (2001) *Family Law*, p 197.

¹³⁶ Shazia Choudry and Jonathan Herring, *European Human Rights and Family Law*, Hart, 2010.

¹³⁷ n109.

commitment in marriage and cohabitation. Figures from these studies are regularly updated by new data from the Office of National Statistics and the Government Actuary but, as mentioned above, it still seems that precise figures relating to cohabitation remain elusive to capture since, unlike marriage and civil partnership, and PACS in France, there is no registration or potential 'tracking' pathway as such unless cohabitants are in receipt of welfare benefits.

Nevertheless, this may not matter since it is clear that the issue of a discrete regime for cohabitants is definitely not entirely about numbers once a defined trend sufficient to indicate a constituency is established.

It is surprising that this complete lack of legal recognition for cohabiting families has been maintained not only following the Law Commission's 2007 Final Report on their two year 2006-7 project¹³⁸ but even following the more recent Private Members' Bill in the House of Lords in which Lord Marks QC has persisted despite change of government disrupting its progress. Either of these initiatives would much more efficiently replace the current Chancery litigation when the parties cannot resolve their own property issues on separation, a point which in logic might have had some claim on government attention already beleaguered by other concerns such as the EU referendum, unmanageable volumes of migrants and apparently uncontrollable terrorists.

Moreover, even if successive governments did not like the Law Commission's work at first, and do not particularly like Lord Mark's current Bill, recent revival of the latter has presented an opportunity for a government also under pressure to reduce the national deficit, particularly since there should be a pressure to unite its economic and Dispute Resolution in so far as that deficit is contributed to by excessive cost of running the justice system which is itself being increased by LIPs disregarding what are obviously unpopular DR policies by insisting on representing themselves in court. It is curious that apparently none of these distracting running sores that one would expect a government to want to lose appear to be encouraging any attention to be given to Lord Marks' Bill. .

¹³⁸ Law Com No 307, 2007.

Various reasons have been suggested for this apparent reluctance of some governments to address both the practical impact on the nature of the family as a whole and on the children born or taken into such family unit and the theoretical basis of the adult cohabiting relationships - which in fact *do* appear to have several key distinguishing factors from marriage apart from the absence of the marriage certificate.

For example, the distinguished Canadian Family Judge, The Honourable Mary Southin, emphasised one of these cohabitation versus marriage distinctions in her powerful dissenting judgment in the leading Canadian case of *Crick v Ludwig* as long ago as 1994 when she drew attention to both the mindset of the parties and the expectations of permanence of the relationship, which she identified as completely different in cohabitation and marriage¹³⁹. In that case she concluded that it was therefore dangerous for judges automatically to assume that 'young people who live together must intend the relationship to have the permanent quality of a formal marriage, albeit without the piece of paper' whereas 'the social reality... is that many of these couples have no such intention' and 'are simply having a good time without intending any commitment, emotional or economic, to each other'. It is notable that not only the majority judgment in that case and subsequent Canadian legislation suggest that her views were not uniformly shared by either Canadian judiciary or Parliament, but more recent literature in England suggests that this scepticism about permanence in cohabiting relationships could be a reason for continued reluctance to legislate for cohabitants' rights in England.

Such a concern certainly chimes with suggestions by some writers that there is, and should be, commitment and intimacy in such relationships *before* they are recognised in law¹⁴⁰ but contrasts with some others who do not see that long running cohabiting relationships can always be used to show that there is *less* commitment in cohabitation than in marriage. Nevertheless there has been in the

¹³⁹ [1994] 117 DLR (4th) 228 (Canada).

¹⁴⁰ Simone Wong, 'Shared commitment, interdependency and property relations: a socio-legal project for cohabitation. (2012) *Child and Family Law Quarterly*, p4.

past 3 years an American study by Pollard and Harris¹⁴¹ showing that 41% of cohabiting men aged 18-26 were 'not completely committed' to their live-in girlfriends. However it may be that the age group in that study was below the average age of contemporary marriage, which in England and Wales has risen steeply as found by the Law Commission¹⁴².

Further, and first of all, whatever age group is considered, of its nature there is often a difficulty in establishing when a cohabiting relationship either begins or ends. But one must wonder whether any relevance of commitment is appropriate, as the separation problems of cohabiting couples occur whether or not there has been commitment in the first place (and who is to say what level of commitment there may be in many short *marriages* which break up too).

The British Columbia Court of Appeal, unanimous except for the Southin dissenting judgment in the *Crick* case, nevertheless awarded the female cohabitant of 2 years in that case \$45,000 under the doctrine of unjust enrichment: moreover in New Zealand an academic criticism of that jurisdiction's cohabitants' law - an opt out regime - is that people who enter into the sort of potentially transitory cohabitation as described in the Southin judgment in Canada do not always realise when the New Zealand law applies to them (a situation which, if the basis of unjust enrichment is relevant, might be concluded would actually make it *more appropriate* to protect the other party, rather than a reason *not* to have a regime at all of some sort! New Zealand provides a check list by which the judge then decides whether the couple is cohabiting or not.

One reason for lack of focus on the distinctions between the two types of relationship is that it is said by others, besides the Honourable Mary Southin, that some judges have dangerously jumped to conclusions about the nature of a cohabiting relationship and therefore wrongly assimilate all such relationships with the more familiar status of marriage (which is especially more familiar to senior judges at their likely age, status and stage in life). This was a theme taken up by Booth J when

¹⁴¹ Michael Pollard and Katherine Mullan Harris. Working Paper 2013., Rand Corporation, Santa Monica, CA, USA. www.rand.org.

¹⁴² See Chapter 4.

cohabitation was raised at the time of the inquiry she chaired for the Lord Chancellor in 1985 into matrimonial procedure, in which, in summary, she concluded that there was already an alternative regime for cohabitants who considered themselves disadvantaged – that is, marriage.

The other main reason routinely advanced for not legislating is that the focus of the law has shifted to children, a theme taken up by virtually every Family law textbook author, so that the status of their parents' relationship is unimportant with regard to the child's legal position whereas the significance of the parents' *parenting* relationship with the child is now of prime importance.

This is certainly supported by the volume of literature on children's issues in Family law which has now reached epic proportions, just as the cohabitation literature in the general Family law field has tailed off. However this seems to ignore the volume and significance of statistics which influenced the Institute of Fiscal Studies to report that women leaving a cohabiting relationship with children take both themselves and their children into poverty on becoming single mothers¹⁴³. While the same fate seems also to happen to women who leave marriages with children where financial provision is, for one reason or another, not adequate, in their case there are at least some rights provided by a statute upon the basis of which it should be possible to settle on some appropriate financial provision without entering expensive and stressful litigation, which is not in the interests of the individual or the State.

(b) Underlying theories of the distinction between marriage and cohabitating relationships

A more fundamental reason for this lack of focus, despite the academic and practitioner debate, may be that little attention has been paid to the theoretical basis of cohabiting relationships. To understand this seems to involve looking elsewhere, at the reality of the basis of contemporary *marriage* which no longer resembles the profile of rural and suburban married life in the 1930s, which was the system before the social changes brought about by WWII and cemented by those of the 1960s, and which clearly Booth J had not realised by 1985.

¹⁴³ Alissa Goodman and Ellen Greaves, *Cohabitation, Marriage and Child Outcomes*, IFS C114.

This may be traced not through academic articles but through magazines and domestic publications of the first half of the 20th century. These range from *Illustrated London News*, recording the garden suburb and new town building projects between the two World Wars of 1914-1918 and 1939-1945, to *Good Housekeeping* and the Good Housekeeping Institute, and affiliated women's interest, interior and garden design publications, some of which can be located through the Women's Library, now to be found centrally accessible on the fourth floor of the main library at LSE.

Prior to the social change of the late 1960s, it was normal for the marital home to be in the name of the male breadwinner and the wife remained at home to attend to housekeeping and the upbringing of the children. As this social conditioning, and discrimination against women in the workplace, was displaced and it became usual for married women to work, the picture of marriage which appears in the case law of the 1970s and 1980s is now only a fantasy, particularly as soon as it became necessary for both halves of a couple to work because two incomes became necessary to service the mortgages generated by the trend towards home ownership promoted by the Thatcher governments of the 1980s and 1990s. Thus it is even more inappropriate to equate even lengthy cohabitation to formal marriage that simply does not have the 'piece of paper', as was attempted in the case of Mrs Burns in 1984, giving rise to some of the more memorable 'sound bites', in the report of that case. Cohabitation is clearly distinct, but there may be many reasons for why it is.

On the other hand whereas at that time it is clear from the cases that cohabitants often employed the same practical framework – of a male breadwinner and a female homemaker, largely because the man would usually be able to work and fund a mortgage and home improvements while the woman provided the home base – as time went on the case law shows that it became broadly more usual for married couples to own their homes jointly as joint tenants and to share expenses, although not necessarily prime responsibility for children, but that cohabitants did *not* necessarily follow in adopting this practice - hence Mrs Burns' plight.

It also seems from cohabitation cases dating from later than the initial post 1960s period that as time went on the parties still seldom bought a home together as married couples usually did; and in those cases where cohabitants did purchase in joint names, their 'joint' ownership was often muddled, whether intentionally or inadvertently. This was because the title documents did not make clear whether this was a purchase as joint tenants beneficially or as tenants in common, and as the parties were not married the court would not willingly assume beneficial joint tenancy since this required a leap over a chasm that the court was not prepared to bridge. The picture of cohabitant life in the post 1960s era shows in case after case that this pattern continued beyond *Pettit* and *Gissing*, decade after decade in the later cases of *Eves v Eves* (1975), *Stokes v Anderson* (1981) *Windeler v Whitehall* (1990), *Oxley v Hiscock* (2004), *Stack v Dowden* (2007)¹⁴⁴.

(c) What is the contemporary basis and relevance of the choice to cohabit rather than marry?

It is thus also necessary to look at the reasons that cohabitants prefer not to marry. These are clearly sometimes, but not always, financially motivated, since the financial issues can often be addressed by pre-marital agreements: does the decision to cohabit therefore depend on the very nature of perceived marital commitment, or perhaps its avoidance as identified in Canada by Southin J, above or a psychological aversion to marriage? And if so why?

This approach to choice in the nature of the personal partnerships of couples setting up house together has become possible because, largely following the Industrial Revolution and two World Wars, marriage changed from being a 'mainly economic institution to a mainly psychological one', as identified by Haffner¹⁴⁵. Many women who can earn their own living or have their own inherited or otherwise accumulated assets clearly now prefer to control their own finances, for example, Ms Radmacher, the heiress in *Radmacher v Granatino*, just as¹⁴⁶ many men, especially those who have experienced divorce and financially damaging financial settlements, do not

¹⁴⁴ *Eves v Eves* [1975] 1 WLR 1338; *Stokes v Anderson* [1991] 3 FLR 391; *Windeler v Whitehall* (1990) 2 FLR 505; *Oxley v Hiscock* [2004] EWCA Civ 546, [2005] Fam 2011 [68]; *Stack v Dowden* [2007] UKHL 17, and in the CA [2005] EWCA Civ 857.

¹⁴⁵ Julian Haffner, *The End of Marriage: Why Monogamy is not working*, Random House, 1993

¹⁴⁶ *Radmacher v Granatino* [2010], UKSC 42.

wish to be exposed to further risk of this type. For example, in this context, there is the practical evidence of the large numbers which the leading Family solicitors report as insisting on marital and cohabitation agreements before they will enter either relationship.

Nevertheless, it is clear that there are further underlying reasons why some will prefer not to marry but are willing to cohabit on the right terms. Some of these are touched on in Dewar & Parker, which had the added benefit of Dewar's experience at Griffith University at a time when Australian law was far in advance of England and Wales in the concept of *de facto* relationships.

Their monograph analyses the law relating to cohabitants in 1995 at which time it seems to have been realised that the balance between marriage and cohabitation was beginning to change, although by this date three incarnations of the Law Society's qualifying examinations for solicitors were regularly including coverage of a section called 'The Unmarried Family' in their Family Law elective. In fact up to 1992, when the Legal Practice Course was introduced to replace the former Final Examination of the Law Society for solicitors, Family Law was *not* an Elective subject at all, but one of the compulsory heads of the then new qualifying assessments which succeeded the former Part II, because it was prior to this 'reform' considered inappropriate that all solicitors should not have some knowledge of the broad principles of Family Law.

This recognition of the separate new sector of the family in the solicitors' practice of the 1980s may indeed be a reason for not opting at that time for a cohabitants' legal regime which was close to that of traditional marriage, as it establishes that cohabitation was a growing and distinct alternative to marriage before that significant growth was apparently first noticed in the 2001 census, but that there was also no consensus as to whether, and if so where, cohabitation belonged in English law - or not.

However, this does not seem to be a reason *now* for (i) not having a legal regime of their own for cohabitants since the syndrome has spread so widely in the intervening period (ii) not having a legal regime which is fairly close even if not identical to that of

contemporary marriage in English law? - since it more recently appears that - despite the 1994 judicial comment in Canada - in English cases where there is no specific cohabitation contract the parties' partnership approach is much the same, as established by Cooke *et al*¹⁴⁷ in 2006, and there has always been much emphasis on *function* in the literature generally.

In view of the lengthy two decades of debate that the transsexual issue took to be resolved and the present rate of progress in resolving long standing concerns about the impact of the lack of a legal regime governing cohabitation, there is likely to be as long a timescale before cohabitants have any better regime to resolve their status and property issues than that already existing: unless some more proactive initiative is embarked upon than waiting for government support for reform.

One such excuse for inactivity in this regard, which lasted well past the millennium, was that it was unknown how many couples were involved as claimed by Roberts in 2002¹⁴⁸. Roberts, a former Director of the Family Policy Studies Institute, cites the limited data available, particularly on the length of cohabitation, a problem which has still not been solved in view of the fact that there is no official starting or end point for a cohabiting relationship, unlike marriage and civil partnership, although Roberts relied on Ermisch & Francesconi¹⁴⁹ and Haskey¹⁵⁰ for concluding that 'the median duration was 27 months and less than one in twenty have been together for more than 10 years'.

Moreover, it seems that this 'fuzzy data' was claimed to persist as late as the Law Commission's consultation in 2006-7 when the rather dismissive tone of their reports, which relied on these figures, seems to indicate that they were not overwhelmed by the statistics available.

¹⁴⁷ Elizabeth Cooke, Anne Barlow and Therese Callus, *Community of Property: A Regime for England and Wales*, Nuffield Foundation, 2006.

¹⁴⁸ C Roberts, 'Cohabitation: Some Reflections on Development' (2002) *SFLA Review*, SFLA, January 2001

¹⁴⁹ John Ermisch, and Marco Francesconi, 'Patterns of Household and Family Formation' in Richard Berthoud and Jonathan Gershuny, (eds) *Seven Years in the Lives of British Families*, Bristol: Policy Press, 2000.

¹⁵⁰ John Haskey, 'Cohabitation in Great Britain: Past Present and Future Trends – and Attitudes' (2001) 103 *Population Trends* pp.4 and p.26.

We now know that denial of basic transsexual rights was indefensible in human rights' terms. Will we eventually have to admit the same about cohabitation following a further challenge in Strasbourg? Or is there now a case for revisiting the concept of cohabitation *vis a vis* marriage as a social norm? In the absence of some good reason why not, this now seems only logical, particularly as, since the implementation of the Civil Partnership Act 2004 and the enactment of the Marriage (Same-Sex Couples) 2014, cohabitation appears as much a valid basis for family life as the status of registered civil partnership and same- sex marriage.

(d) Indications that there should be a formal status and associated legal regime for cohabitants as a recognised family unit?

It is by no means the case that a recognised status and attendant legal framework for cohabitants is a small self-contained topic confined only to academe. Indeed, it is not, and frequently appears, like Banquo's ghost, in other contexts such as court hearings which are not primarily about cohabitation. This is because the state of cohabitation inevitably impacts in other areas of law – for example, in financial provision on divorce. In *Fleming v Fleming* (2004)¹⁵¹ and *W v W* (2009)¹⁵², to take two example cases, the question arose as to what was the appropriate contribution for a cohabitant to make to the household budget of the payee of an ancillary relief periodical payments order which was to be capitalised, although in one of these cases the judge did *not* have to decide this issue, since this question was academic because the payee wife was entitled to capitalisation for her commitment to the marriage and the family in any case.

Nevertheless the judge must routinely ask such a question as this cohabitant's contribution issue frequently arises in cases where a payee wife is cohabiting and the payer husband does not wish to continue supporting her if another man is in a position to do so. This is clearly an additional reason for clarifying the status of cohabitation if it is going to flow over into other areas of Family law. The approach of the court in this type of case so far has thus always been that in English law cohabitation is *not* the same as marriage, since it does not give rise to the same

¹⁵¹ [2004] 1 FLR 667.

¹⁵² [2009] EWHC 3076, [2010] 2 FLR 985.

responsibilities and obligations as marriage. Since there is this discernible gap between the two states, and in view of the unjust enrichment which may otherwise occur if the ordinary law of trusts is relied on, it may be that New Zealand has made the right choice in legislating for an opt out scheme which requires the parties to make other provision or to be ruled by a default regime when an identifiable cohabitation breaks up, since this would also address the *Fleming* and *W v W* contexts.

A good example of this distinction between the recent impact of remarriage and cohabitation arose in *Atkinson v Atkinson* in 1987¹⁵³, where the judgment famously said that Mrs Atkinson was in greater need of her periodical payments order, which the court would not therefore cancel, because her cohabitant had chosen a low paid job, even though it was conceded that the lady and her cohabitant had not married for financially motivated reasons - that is, because then she would lose her periodical payments order which terminated on remarriage, as such payments, and pensions, commonly do. In this connection it is interesting to note that the recent coalition government did announce that such forfeiture will no longer occur in the case of the pensions of war widows, as termination in the case of voidable marriages which were subsequently annulled has always come as an unexpected and unwelcome shock to the holders of armed forces pensions, and most others, as occurred in *Ward v Secretary of State for Social Services*¹⁵⁴.

Moreover although the Equality Act 2010 s 198 has now removed the husband's obligation under the common law to maintain his wife, the Matrimonial Causes Act 1973 still retains a framework to divide the parties' assets, including their earning capacities, on divorce. Thus the 2010 Act is a somewhat empty provision in this context since in the partnership of marriage it is likely that the wife has been maintained if she did not work. The concept of maintenance by one party of another, in this context, whether married or unmarried, also remains in the Inheritance (Provision for Family and Dependents) Act 1975 on death, though none is available to the cohabitant separating from a partner in life, whether maintained by that other partner during the cohabitation or not or not..

¹⁵³ [1995] 2 FLR 346.

¹⁵⁴ [1990] 1 FLR 119.

On the other hand the court used not to take pre-marital cohabitation into account at all when computing the length of married life for ancillary relief (now financial provision) purposes other than in exceptional circumstances, such as the *Kokosinski* case¹⁵⁵ where there had been substantial commitment over a longer period than most marriages: now if it *is* substantial, and 'seamless' in practice they do. Yet one July in 1995, when Lord Justice Thorpe suggested on a hot afternoon in a case called *B v B*¹⁵⁶, which was heard on practically the last day of the legal summer term, that the day might come when pre-marital cohabitation would be considered as part of the length of the marriage, there was gentle laughter in the coffee bars around the Royal Courts of Justice, and upon the rest of the profession's reading the subsequent law report, on the basis that such a novel idea could only be put down to end of term day dreaming, suggesting that the end of a hot July was time for the higher judiciary to have their well-earned summer vacation.

Although nowhere is there to be found any distinctive point at which judicial attitudes changed to this treatment of pre-marital cohabitation, judgments then eventually began factually to list the years of marriage and the years of pre-marital cohabitation, without however drawing any articulated conclusions as to the specific relevance of the pre-marriage years.

It is therefore difficult to see how, in the contemporary context where marriage numbers are falling and cohabitation rising and predicted to rise further, the importance of formalising the cohabitants' legal status and the incidents of that status can be ignored much longer. If anything, this is reinforced by the Equality Act 2010 s 198, in abolishing the husband's common law duty to maintain the wife - and this was also the statute that in the next section also abolished the presumption of advancement, although neither of these changes was retrospective. However the Act does not, it seems, affect the obligation for partners, married or unmarried, to support each other *for social security purposes* if they are living together, and each to support their children.

¹⁵⁵ [1980] 3 WLR 55.
¹⁵⁶ [1995] 1 FLR 559.

In the circumstances it would appear that a completely different approach now needs to be taken to rights to both property and financial support in both marriage and cohabitation, in which case some work would be desirable on both the present confused state of financial provision under the Matrimonial Causes Act 1973 and the status and incidences of cohabitation, and on such legal rights and responsibilities as might exist between the cohabitants. There has of course been such work on the latter by the Law Commission in its 2006-7 programme on the financial consequences of cohabitants' relationship breakdown, and also ongoing work on the former also by the Law Commission ¹⁵⁷, currently still 2 years later being further taken forward by the Family Justice Council which has taken on the task of articulating the 'needs' aspect of that recent Law Commission work.

The really significant difference between marriage and cohabitation now therefore seems to be that for marriage there is already a system in existence, under the 1973 Act and the case law which has developed in relation to ss 21-30 and s 33, which broadly provides a scheme for the parties' future after divorce, but nothing but the complex and expensive Chancery litigation based system of trusts, proprietary estoppel and contract at the disposal of separating cohabitants who cannot agree their own scheme.

Surely in 2015-16 - and counting towards the likely timescale based on past experience towards achieving any reform in similar controversial contexts - cohabitants should have something better than existing, and which is based on some doctrinal principles and research into reasonable expectations in both these contemporary relationships?

However, legal analysis of this situation appears to have withered, although journalists outside legal academic and practitioner fields continue to write: for example, in the USA in the Huffington Post ¹⁵⁸ which examined the risks of cohabitation with children; in the UK, The Telegraph ¹⁵⁹ concluded that marriage instead of cohabitation was only a consideration for a minority; and there has been

¹⁵⁷ Law Commission, *Marital Property, Needs and Agreements*, Law Com 343, HMSO, 2014.

¹⁵⁸ 12 September 2013.

¹⁵⁹ 10 January 2014.

the occasional hostile article indicating that cohabitation was threatening marriage, of which there is no genuine evidence except for such inquiries as The Telegraph's into whether in contemporary intimate relationships marriage is actually considered, at least at first. There are also occasional articles in financial journals about lack of rights to maintenance and property, and sometimes by eminent and knowledgeable speakers, such as that of Sir James Munby, President of the Family Division, giving the Michael Farmer Memorial lecture in October 2014, in which he said:

'If a marriage is terminated by divorce the court has power to redistribute the matrimonial assets between the spouses. There is no such relief for cohabitants when their relationship breaks down, however long the relationship has lasted. This is an injustice which has been recognised as long as I have been in the law. Reform is desperately needed.'¹⁶⁰

This, from the President of the Family Division of the High Court, and in a context when no one appears any longer to be writing anything new about cohabitation, seems a powerful indication that all has already been said, but nothing has been done, so that currently a sense of direction in this field of potential law reform has for the time being stalled.

One way of addressing this problem might be by looking at what might be the reasonable expectations of the ordinary person in this regard, that is the views of specialist lawyers' clients - those ordinary people who go to lawyers because they cannot readily understand the present law – a constituency recognised by Cooke *et al* in her 2006 project to have some place in any assessment of a potential regime for cohabitants. The small amount of empirical research which the team conducted for this project, which was the subject of their 2006 report, is amongst the most helpful in all the literature available, its only drawback being that it did not focus closely on the point of view of the female partner. This was unfortunately since that project involved a variety of semi-structured interviews with couples rather than specifically women: whereas if the potential for indirect discrimination is a key

¹⁶⁰ Address by Munby P, Legal Wales Conference at Bangor University, 10 October 2014.

component of what ordinary people think, it is logical that the *female*, not necessarily *feminist*, view is important¹⁶¹.

A secondary impetus for following up the Cooke *et al* approach was an in a 2010 issue of *Country Life* (which it is possible, owing to the timing, was influenced by the Cooke *et al* report which was in circulation at the time) in which there is a quotation from a young professional, expressing a view typical of the non-lawyers' approach to the dichotomy between marriage and cohabitation, in which she says:

'Marriage used to be an articulated deal, but now it is much more of a compromise. If you are lucky the traditional model can work, but now women want different things, and that includes me....'.

She continues

'now roles are undefined...it's constant negotiation' and that she is interested in 'the grey areas, in the changing relationships between men and women... brought up expecting to have a life that panned out in a particular way but riding the wave of social change' and that this has 'broadened their options'¹⁶².

This echoes a 1998 article by Rothenbacher¹⁶³ of the Mannheimer Zentrum für Europäische Sozialforschung at Mannheim University in Germany, in relation to his study on social change in Europe where he traces and summarises the fundamental shifts of family responsibility in the home and work to support it since WWII. This study looked at different age groups and differences between Eastern and Western Europe, as does Willekins¹⁶⁴ also writing in 1998 in the same essay collection.

There is also a 1996 contribution on this theme from Cretney¹⁶⁵ with a viewpoint on the power struggle within the family.

¹⁶¹ The imaginative approach of this writer and her team is one which is better taken up further in Chapter 9 when drawing conclusions.

¹⁶² Anon, *Country Life*, Time Inc UK, 10 October 2010.

¹⁶³ Franz Rothenbacher, 'Social Change in Europe and its Impact on Family Structures' in John Eekelaar and T Nhlapo *The Changing Family; Family Forms and Family Law*, Hart, 1998.

¹⁶⁴ F J C Willekins 'Long Term Developments in Family Law in Western Europe', in John Eekelaar and T Nhlapo, *The Changing Family Family Forms and Family Law*, Hart, 1998.

¹⁶⁵ Stephen Cretney, 'What will the women want next? The struggle for power within the family 1925-1975' (1996) *12 Law Quarterly Review* p.110.

In a 2011 article in an issue of another upmarket 'glossy', *Bazaar*¹⁶⁶ it is even suggested that marriage is 'anachronistic'

Moreover, the Law Commission's 2006 consultation paper comments that it is now rare for unmarried parents who are cohabiting when they have children 'to bother' to marry before the birth of a child even if they do so afterwards, and not necessarily particularly promptly.

This suggests that marriage and cohabitation are now co-existing much more routinely than previously, that cohabitation is now socially acceptable, that the distinction between the two forms of family building is narrowing and will probably continue to do so, and that attitudes may even be quite different now from those exhibited in the *Hansard* debates around the time of the passage through Parliament of the Family Law Act 1996 (and its unsuccessful predecessor which it replaced, the Family and Domestic Violence Bill 1995). Certainly the ease with which the Marriage (Same-Sex Couples) Act was passed in 2013 suggests that the controversy (perhaps still remembered with alarm by governments) which occurred in 1996 when a group of back benchers and the *Daily Mail* led the campaign of hostility towards any similarities of status being accorded to cohabitants even when the most generous home occupation rights were given to spouses would be unlikely to mar any contemporary legislation to provide basic rights to cohabitants¹⁶⁷.

(e) Introduction of more detailed schemes for a legal regime for this contemporary social norm

There have been a number of such schemes, apart from the Law Commission's in 2007, for example Resolution's 2008 version, *Reforming the law for people who live together: shared home, shared rights*¹⁶⁸. This was a consultation paper dating from the autumn of 2008, and linked to the campaign for Lord Lester's 2009 Bill, which ultimately did not succeed, but was generated by the government's decision to do nothing about the Law Commission's work, reasons for which Resolution

¹⁶⁶ Anon, *Bazaar*, Hearst Magazines, May 2011.

¹⁶⁷ An account of the notable disruption of the Parliamentary process which was said to 'threaten family values' and to be 'controversial', as recorded in *Hansard*, may still be read in *Guides to the Family Law Act 1996* (Bird, 1996, Burton, 1996, Cretney, 1996 and Horton, 1996).

¹⁶⁸ www.resolution.org.

(unsurprisingly) found unconvincing. It proposed a different scheme from the Law Commission's. On the other hand the Law Society, which had long supported reform, also had its own slightly different proposals dating from as long ago as 2002, *The Case for Clear Law: Proposals for Reform* although these have not been pressed in competition with Resolution's.

The fact that after this long timeline, and several failed legislative attempts there is still no movement towards government sponsored reform, even of the most limited kind, is worse than unfortunate, especially in view of the limited legal aid available for the existing expensive litigation which is the current cohabitants' remedy.

Before looking in detail at the existing overseas schemes which are most likely to have lessons for a relatively simple equivalent in English law it would therefore be worth taking a fresh look at the 2006-7 work of the Law Commission (which follows in Chapter 4), and in particular following up their work on potential reasons for the selection of cohabitation over marriage or civil partnership, before looking at the successful existing schemes in other jurisdictions which suggest that they may provide lessons to be learned in

In view of the fact that England and Wales is a common law jurisdiction, is part of the United Kingdom and is a member state of the European Union, the obvious schemes to examine are self-selecting, and in the following order as set out in Chapter 1:

- **Scotland** which is also part of the United Kingdom and close geographically;
- **Spain**, which has been strikingly modernising in its progress from a Catholic dictatorship to contemporary European democracy and has a substantial expatriate British community accessing its courts on both the mainland and its islands which are also provinces of Spain; and then the work of
- **Australia and/or New Zealand**, whose developments have consistently been ahead of English law's in recent decades but which contribute to the cross border thinking of other common law jurisdictions such as ours;

Conclusion

These alternative regimes will therefore be critically analysed in Chapters 6-8, prior to which Chapter 4 will consider the ongoing relevance, if any, of the Law Commission's now somewhat dated work, applying the same critical analysis, while Chapter 5 will follow up one aspect of their work which received little attention in 2006-7, namely why a preference appears to be being shown for cohabitation by large numbers of those partnering in England and Wales. These obviously useful investigations will be supported with some limited field work with practitioners in each jurisdiction, including some perspectives from England and Wales, and conclusions drawn from those consultations in Chapter 9. Finally in the Appendix will be found a short draft Bill which the current project suggests would now be more likely to achieve enactment than the much longer Private Members Bill based on the Law Commission's 2006-7 recommendations. This Bill is currently still in the House of Lords after re-introduction May 2015 but so far has not made much progress¹⁶⁹

¹⁶⁹ The text, and process through Parliament, of that current Cohabitants' Rights Bill can be found at www.parliament.uk.

Chapter 4 The Work of the Law Commission 2006-7

Introduction

This chapter analyses the 2006-7 work of the Law Commission in relation to its limited brief to formulate proposals for the division of the parties' assets on their cohabiting relationship breakdown. It then critically reviews those results of the scheme which might still be relevant to the urgent contemporary need for legislation noted by the President of the Family Division¹⁷⁰.

The prime aim is critically to examine what might reasonably be recycled from this two year work programme, so far neglected by both the government which commissioned it and by two successive ministries in the eight years since its completion. A secondary aim is to compare the practicality of the proposed scheme with those of the jurisdictions treated in Chapters 6-8.

Background

The work of the Law Commission in 2006-7 was a long-hoped-for opportunity for a comprehensive survey of the rights and obligations of cohabitants, at a time when it was also hoped that this identifiable family group, which had been growing steadily in England and Wales for several decades, was at last going to be recognised as a new family unit for which legislative provision should be made. At the time this was not least as numbers of cohabitants' families had most recently been growing faster than before which seemed to have generated sufficient concerns in the then Labour government to achieve an instruction to the Law Commission to look into the matter of associated law reform. Sadly, the work of the Commission, when it finally received its brief, was more restricted in scope than it might have been, and in practice was confined by their instruction to devising appropriate recommendations to make to government for division of a cohabiting couple's capital assets on their

¹⁷⁰ See Chapter 3, n160.

separation, although some incidental research was also to be done into associated topics so as to inform that goal.

The project was, therefore, a major disappointment when it started out, a greater one when it was completed, and an even more bitter failure to address the needs of a significant section of the population when it was not even implemented: although the latter was not much of a surprise since, anecdotally, stories still circulate in academic and practitioner circles of one High Court judge, on taking office as Chairman of the Law Commission, immediately finding - on an early sweep of the past work of the institution to which he had just been appointed - an alarming number of unimplemented reports gathering dust in the Commission's archives.

It is a fact that the Law Commission is a creature of statute¹⁷¹, so can only undertake work in accordance with a request from the Lord Chancellor; and only then if an identified government department is willing to take forward any recommended legislation. However, restricting the project in the manner elected was hardly addressing the social change which had driven long standing debate about the appropriate manner in which this new family form should be treated in law.

Is it therefore even worth analysing the Law Commission's 2006-7 work? The answer to that is in fact indubitably in the affirmative, as their reports in any case disclose issues that need flagging up and addressing in various ways if there is ever to be a discrete normative regime for cohabitants in English law. Towards the achievement of this, the present inquiry is intended to contribute, even if not comprehensively to deliver in detail, since it appears that striving after too much detailed perfection is precisely what has delayed and obstructed this outcome previously.

Factually, the pathway to the 2006-7 project's final report¹⁷² was that in 2005 the Law Commission was asked by the then Government to look at the law applying to unmarried couples when they separate. In 2006 the Commission issued a

¹⁷¹ Law Commission Act 1965.

¹⁷² Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown, Final Report*, No 307, HMSO, 2007.

consultation paper¹⁷³ followed a year later by the recommendation of a new scheme for financial rights for such unmarried couples who either had children or had been together for 2-5 years. The scheme was based on contribution to the relationship and, if desired, cohabitants could opt out of it in favour of their own arrangements.

However this scheme was never implemented as the government indicated that it preferred to wait until research was available on the similar Scottish system, based on the Family Law (Scotland) Act 2006. However, four years from the final report - and although such research on the Scottish system was, in fact, already available¹⁷⁴ - the then Justice Minister, Jonathan Djanogly, announced that the research findings, funded by the Nuffield Foundation, did not 'provide us with a sufficient basis for change in the law', and added 'We do not intend to take forward the Law Commission's recommendations ... in this Parliamentary term'¹⁷⁵. The present Parliamentary term is the second since that announcement, and still there is no government sponsored progress.

Nor was there any revisiting of the project by the coalition government which succeeded the new Labour administration which had commissioned the Law Commission work in the first place, and then abandoned its recommendations. In a way this was surprising since the coalition shared no political or ideological beliefs with its predecessors and had every opportunity to take on a reforming stance as indeed they did during that Parliament, during which there has since been legislation for same-sex marriage (2013), also implemented in March and December 2014, for the much smaller constituency of exclusively same-sex couples, whether those already in civil partnership and wishing to convert to civil marriage, or those having been awaiting that legislation, They were indeed comparatively a very small constituency, since average annual civil partnerships have been settled around 6,000 per annum over the time since the Civil Partnership Act was implemented in 2005 and this was initially not much enlarged by marriages since 29 March 2014,

¹⁷³ Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown, A Consultation Paper*, No 179, 2006.

¹⁷⁴ Fran Wasoff, Joanna Miles and Enid Mordaunt, *Legal Practitioners' Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006*, University of Cambridge Faculty of Law Research Paper No11/03, SSRN.

¹⁷⁵ Jonathan Djanogly, *Hansard Written Statement*, 6 September 2011.

when the initial marriage provision came into force, despite totalling 15,000 up to the end of 2015.

Consequently, were it not for the baton having now been taken up by Lord Marks of Henley-on-Thames - Jonathan Marks QC a leading practitioner at the Family Bar - who has now twice introduced a Private Member's Bill into the House of Lords which seeks to implement much of the substance of the 2006-7 Law Commission work no progress whatever would have been made to take forward the work undertaken by the Commission at some public expense.

Unfortunately this Bill, having by mid-December 2014 only completed its second reading to qualify for its House of Lords Committee stage, then had to retrace the earlier steps again following the dissolution of that Parliament for the election of May 2015. The only positive factor in this is that the perseverance of this Bill's sponsor has at least kept the process moving forward, despite his having been obliged to restart at precisely the point at which previous such Bills, introduced by Lord Lester of Herne Hill QC in 2008 and 2009, also stalled and were taken no further.

As this abandonment after one or two readings, is unfortunately usually the fate of such Bills unless supported by the government, sadly the Marks Bill is probably not likely to make further progress with much expedition, and indeed it might not even reach the statute book at all unless sufficient Parliamentary time can be found for it. Moreover, however well received in the House of Lords, any such Bill must then navigate likely political opposition in the House of Commons, where the more outspoken resistance is often concentrated.

This continued non-implementation of the 2006-7 recommendations is therefore a sorry result of work done by the organisation which is intended to advise the government on necessary law reform and of which a significant section of the public such as the present cohabitation constituency should have the opportunity to benefit.

In view of its age, the next question is whether this 2006-7 Law Commission work is therefore still likely to be of any practical use in any way? The answer to this question must be in the affirmative, despite the fact that time and social change have

now moved even further on from the perspective of 2007, and also despite the fact that the consultation paper is lengthy and in some places repetitive so that any worthwhile analysis may inevitably also not be short.

There is also the issue that there were, in the restricted brief of 2005, the original design flaws which might not now be any longer entirely relevant. For example, is it still strictly correct to assume that there is no point in ignoring the possibility of creating a separate status for cohabitants who do not fall within the existing provisions of the Civil Partnership Act, or do not register if they technically can? This has been dismissed as irrelevant in the past owing to the alternative provided by marriage, which is now available to both sexes. But what about those who do not marry or register because they want to live together in a committed relationship without either of those formalities, as this seems to be saying something to the world at large about a choice to live within that family format.

Nevertheless, the 2006-7 work was the last on English law aspects of legislating for this important new family form and some analysis of what has been investigated so far cannot therefore legitimately be side stepped.

The perspective from 2015.

This Law Commission work thus remains the latest initiative in England and Wales towards providing the discrete legal regime for cohabiting couples who are neither legally married nor in registered civil partnerships, nor perhaps availing themselves of the new status of marriage for same sex couples, provided by the Marriage (Same-Sex Couples) Act 2013, and which it seems there is still some belief in an impetus for achieving ¹⁷⁶ although some academics still adhere to the theory that

¹⁷⁶ Principally by Sir Paul Coleridge, *Lobbing a Few Pebbles in the Pond: the Funeral of a Dead Parrot*, *Address to the Annual Family Law Conference 9 October 2013*, www.themarriagefoundation.org.uk. And Graeme Fraser, 'The government must support the reform of cohabitation law', *NLJ*, 22 January 2015. (2008) *Family Law Quarterly*, 475.

there are people who continue not to choose to marry at all, see for example, Auchmuty¹⁷⁷ .

However, the Law Commissioner was not the only, nor the first, to propose a normative scheme for cohabitants, since both the Law Society Family Law Committee and the Solicitors' Family Law Association (Resolution) have proposed such schemes¹⁷⁸ and there clearly remains support for some reform, not least from the Supreme Court, which appeared to be 'grumbling' a little at the work they were required to do to extrapolate from existing precedent in the English appeal in *Jones v Kernott*¹⁷⁹ . In the following year, moreover, they were stating the case for reform somewhat more trenchantly in *Gow v Grant*, the first appeal heard from a decision under the Scottish system, where Baroness Hale in particular deplored the lack of progress in this respect, when she largely approved the Scottish system stating that cohabitants in England and Wales 'deserved no less'.¹⁸⁰

The Law Commission itself has concurred, stating 'The prevalence of cohabitation and of the birth of children to couples who live together means that the need for reform can only become more pressing over time'¹⁸¹ . Moreover, while Lord Marks' Cohabitants' Rights Bill, under consideration in the last Parliamentary session, has now been revived in the present session, following earlier aborted initiatives by Lord Lester, and the Inheritance (Cohabitants) Bill 2012 which was not taken further either, this is at least a sign that there is still thought to be some responsible interest in legislating on the basis of the Law Commission's work, even if successive governments have been dismissive of it.

It is, however, possible that the government was right not to take the 2006-7 scheme any further in 2011, though not necessarily for the reasons given. The Law Commission's 2006-7 work is now over 8 years old, and the 2006 consultation paper and the 2007 report have not necessarily covered all the issues

¹⁷⁷ Rosemary Auchmuty, 'What's so special about marriage? The impact of *Wilkinson v Kitzinger*' (2008) *Family Law Quarterly*, p 475, and see Chapter 5.

¹⁷⁸ See www.resolution.org.uk, *Reforming the Law for People Who Live Together*, 2008.

¹⁷⁹ [2011] UKSC 53.

¹⁸⁰ [2012] UKSC 29, [56].

¹⁸¹ Statement by Professor Elizabeth Cooke, 'Response from the Law Commission' 6 September 2011, www.lawcom.gov.uk. also reported in *The Times* and other broadsheets.

which with the passage of time and other developments are now becoming increasingly obvious.

In short, there is more to the cohabitation debate than property or inheritance rights, or protection of the vulnerable. Even rudimentary comparative study indicates that there are other ways of achieving some significant improvement in cohabitants' problematical separations without a complex new statute. Apart from the Family Law (Scotland) Act 2006 introduced by our close neighbour Scotland, several other civil as well as common law jurisdictions, have managed to put workable schemes in place, e.g. Spain, Australia and New Zealand and even Eire, the Irish Republic, is considering legislation. England and Wales surely need not be left behind indefinitely. Nor should England and Wales even be left behind in this way because of the apparent need for Parliament to address other issues, nor for fear of obstruction from traditionalist lobbies, nor even owing because of political concerns of offending any other constituency, since there is now no imminent election, the issue is irrelevant to the EU Referendum and there is ample time to address such essential housekeeping.

The Law Commission's work therefore bears some re-examination, first the initial consultation, then the final report.

The 2006 consultation paper

The consultation paper is in 12 parts with 5 appendices. It is convenient therefore to summarise the structure and content as it stood at the time that it was issued in 2006 before commenting on changes that have occurred in the 9 years since that time, during which much has moved on, making redundant at least some of the material considered. Some points may also now appear in sharper focus than was perhaps realised to be desirable at that earlier stage, and to which less attention and/or or emphasis was given then for one reason or another.

It has to be said that the first impression of this work is that, if the government was not wholeheartedly behind reform in accordance with whatever recommendations the Law Commission might have been expected to make, the entire 2006-7 process

of consultation, research and recommendations was overly complex and that something simpler might have had greater appeal. However it is now, of course, possible to select the useful parts of the work, and to discard the rest if arguably not any longer relevant.

The Introduction – Early Mistakes

This highlights that the consultation paper is strictly a consultation (although the content was put together with the assistance of many specialist experts who are identified in its Appendix 1) and that no conclusions had been formed as a result of the preliminary work of drafting it to place the issues before the public - although it does also refer to putting forward a possible new scheme. However this 'consultation only' claim is fairly quickly abandoned when it is explained, in this same introductory section, that the Commission had nevertheless already concluded that they preferred to rely on encouraging individuals to make express written agreements to 'agree the terms on which they are living together before they begin to do so'¹⁸².

This approach was despite the fact that it was acknowledged that there was significant public misunderstanding about the consequences of cohabitation in the belief that, under common law, married couples' rights were acquired after a period of living together, also that there had been various attempts to educate the public, including the Government's 2004 Living Together campaign, investigated and reported on by one of Professor Anne Barlow's research teams¹⁸³. Moreover, by the time that the 2006 consultation was reached, the Commission - dismissing the idea of adding opposite sex couples to the Civil Partnership Act 2004 - was actually stating that 'there is no pressing social need for opposite-sex couples to have a "marriage alternative" which confers broadly similar rights and obligations as marriage'¹⁸⁴, a conclusion directly contradicted by Professor Cooke in her statement in 2011, mentioned above, that reform was urgent.

¹⁸² Law Commission 2006, paragraph 1.29.

¹⁸³ Anne Barlow, Carole Burgoyne and Janet Smythson, *The Living Together Campaign: an investigation of the impact of legally aware cohabitants*, Ministry of Justice, 2007.

¹⁸⁴ Law Commission, 2006, paragraph 1.31.

It is therefore stranger than ever that in 2011 the decision was taken *not* to implement the Law Commission's 2007 recommendations as by that date there had developed an extensive academic literature on the 'common law marriage myth' misunderstanding¹⁸⁵, as by that stage the cohabiting public had in some way internalised a firm impression that such common law marriage existed and protected them, indeed it appears that they are still telling their legal advisers that they firmly believed in this when entering the cohabiting relationship!¹⁸⁶

With the benefit of hindsight, this dismissal of 'pressing social need' may have been a mistake, as possibly was the inclusion in the 2006 consultation - without actually following it up - of the background to the project in the Commission's 2002 Discussion Paper *Sharing Homes*¹⁸⁷ which had reviewed the law relating to property rights of *all* individuals who might share a home (such as friends and relatives, including siblings) and who might therefore claim an interest in the shared property.

While that earlier shared homes project did not address *only* the *rights of couples*, despite its still being labelled on the Commission website as a part of their Cohabitation work, if the apparent link made with it in the 2006 Cohabitation Discussion Paper had *then* been followed up, it might immediately have raised a train of thought later taken up some years later by Baroness Hale, when assessing the practical efficacy of the Scottish scheme in *Gow v Grant*¹⁸⁸ - namely that both the Scots' essentially compensatory statute and the English Law Commission's scheme were likely to be most usefully developed from the principles of *proprietary estoppel* than from the more complex scheme of trusts¹⁸⁹.

There are in fact indications that Lady Hale began to touch on this train of thought in both *Stack v Dowden*¹⁹⁰ and *Kernott v Jones*¹⁹¹ when she insisted on the constructive - rather than resulting - trust as the appropriate approach to shared

¹⁸⁵ Rebecca Probert, 'Common Law Marriage: Myths and Misunderstandings (2008) 20 *CFLQ* p1.

¹⁸⁶ See Chapter 9,

¹⁸⁷ Law Commission, *Sharing Homes: A Discussion Paper*. Law Com 278, HMSO, 2002.

¹⁸⁸ [2012] UKSC 29.

¹⁸⁹ *Ibid*, at [55] where she discusses the possible practical outcomes of the Scottish legislation's compensatory approach.

¹⁹⁰ [2007] UKHL 17

¹⁹¹ [2011] UKSC 53.

ownership of the family home where a couple acquired such a property in joint names and made themselves jointly liable for any mortgage¹⁹², before actually articulating the relevance of the compensatory approach in *Gow v Grant*¹⁹³, the first Scottish appeal to come before the Supreme Court. Since in this later appeal she explicitly referred to the discretionary remedy which is the key benefit of proprietary estoppel, and which she had seen when reviewing the practical application of the Family Law (Scotland) Act 2006 in that case, it is interesting to speculate what might have been included in the 2006 Consultation paper had the Law Commission team thought about these concepts further at the time they were writing that first document. It might have saved several years and much work if that reflection had been developed before either *Kernott v Jones* or *Gow v Grant* had reached Lady Hale's more penetrating analysis, and might have avoided the overly complex regime they in fact recommended in their Final Report, which at the time most people could not realistically see working in practice.

It is fair to say that the Commission *had* intended *in 2002* to clarify and simplify the complex principles of trusts and proprietary estoppel when at that time they still had hopes of creating a Shared Homes scheme - that is, before giving up what they eventually saw as the unequal struggle of achieving that, because, they said, it was just *not* possible to achieve such a simplification in a contribution based scheme which would provide for a fair result 'in the diversity of domestic circumstances which are now to be encountered'. They had obviously been strongly motivated at that time to provide more certain outcomes than under the TOLATA system, which, since they did not achieve their aim, now remains, years later, not much changed despite the efforts of the Supreme Court in the cases mentioned above. Clearly, if they had succeeded in providing a new Shared Homes scheme, this would have applied also to cohabiting partners, whether same - or opposite-sex, and whether they were in an intimate relationship either on their own or heading a family. Altogether the period 2002-2007 seems to have seen a number of missed opportunities.

However, as the 2002 Shared Homes work was eventually abandoned without recommendations, and the fleeting reference to it in the 2006 Cohabitation

¹⁹² Ibid at [51] of the joint judgment of Lady Hale and Lord Walker.

¹⁹³ [2012] UKSC 29.

Consultation paper not followed up, the whole focus of the Law Commission's 2006-7 work took another course and thus missed the chance to achieve a very different outcome half a decade before the government declined to implement their 2007 recommendations, which happened to coincide with Lady Hale engaging with the choice of underlying juristic theory in relation to the family home in her seminal Supreme Court judgments of 2011 and 2012, mentioned above.

Nevertheless, the Commission's proposed reliance on education of the public towards entering into consensual private agreements should, perhaps, have already been explicitly abandoned at an even earlier stage than the 2006 Consultation Paper, such as when the Law Commission received their brief in 2005, as even at that stage the Living Together campaign, then already failing, was not the first such (unsuccessful) attempt at awareness raising in this respect. In the 1980s the law reform society JUSTICE had already imaginatively conducted a similar campaign, with sponsorship from Nat West Bank, apparently with no educative effect whatever at that time: this was thus a previous project of which the government should have been aware since, while JUSTICE was always an all-party apolitical organisation, there was a long history since its foundation in the 1950s of government attention to the evidence based reports of its working parties.

Thus even before the Barlow team's report for the Ministry of Justice in 2007¹⁹⁴, there were no indications that the ordinary public had become any more receptive to the possibility of the private ordering that the government had naively advocated, so it seems strange that this 'educative' policy was even seriously considered, since it completely ignored the fact that expectation of such a sea change in public perception and cooperation was probably the triumph of hope over experience.

If the throwback to an educative approach was an initial error, the terms of reference of the 2006-7 project were clearly Mistake No 2: this was that the Commission was to work *only* on financial hardship of cohabitant couples and their children on relationship breakdown, and in clearly defined relationships, and that the project

¹⁹⁴ Anne Barlow, Carole Burgoyne and Janet Smythson, *The Living Together Campaign: an Investigation of the impact on legally aware cohabitants*, Ministry of Justice, 2007, since available on the MOJ website, www.justice.gov.uk, last accessed 3 November 2013..

would include consideration of the place of cohabitation contracts, but that it was *not* intended to be a comprehensive review (such as to include intestacy). Rather the task was to focus on the impact of separation, and in any case specifically excluded status (besides a number of associated issues which it was probably right to omit or the project would have become unwieldy). On the other hand the really fatal driver was this limited focus which did not send a message that radical reform, addressing a new family format, was the flavour of the project.

The work was also to concentrate on couples' relationships as such (whether same- or opposite-sex) and to look towards devising a scheme for financial relief on separation, possibly on an 'opt-in' basis (but *not* one which treated cohabitants as if they were married).

Such a possible scheme was set out in Part 6 of the consultation paper, and was to have strict eligibility criteria, besides which the basis of any awards was to be contribution based. While narrowing the focus was clearly right, since the Law Commission has often found that large scale projects need taking apart to form smaller discrete tasks, actually *omitting* status probably made their work more rather than less difficult, and the omission of intestacy was probably a major mistake as practical experience has shown - especially while people continue to believe that they are in a common law marriage!

Only far down the hierarchy in this introductory paper was reference made to the statutory schemes in other common law jurisdictions such as Australia, New Zealand and Canada, and to the Scottish scheme, and even then they are distinguished elsewhere as 'deferred community of property and associated remedies' in such a way that the impression is given that this might not be the way forward in the common law jurisdiction of England and Wales. In effect this dismissed the likely underlying theory of stable cohabiting relationships, namely that, with due respect to the Honourable Justice Mary Southin in Canada in 1994¹⁹⁵ (see Chapter 2) they are *not necessarily* transient, short lived and uncommitted, so that their stability indeed appears to have been the main driver in the common law jurisdictions mentioned.

¹⁹⁵ *Crick v Ludwig* (1994) 117.DLR (4th) 228 (Canada).

With the benefit of contemporary perspective, this approach was arguably fundamentally misguided, although there were no doubt good reasons for it at the time. Of course the fundamental problem was that the Law Commission was a creature of statute - so only able to work within the confines of its practices, which require sponsoring of its work by a government department willing to implement legislation if that is recommended, plus approval of the Lord Chancellor, which immediately restricted its activities. Nevertheless, it is clear that the tradition based policy current in 2006-7 was still resisting a Same-Sex Marriage Act which has now been enacted, having 6 years later been carefully presented as an equality measure. There have since been social changes in the public approach to both homosexuality and cohabitation: see below. This seems immediately to raise a question mark over the whole tone of these historic reports.

Thus, very early in the Law Commission's 2006-7 work the fatal seeds were sown to achieve a doomed result of what might have been a successful initiative to create a discrete normative regime for cohabiting families. This appears to have been owing to the failure firmly to dismiss, without wasting time on any significant investigation, the mistaken traditional idea that members of the public intending to cohabit *will* both consider and, at that point, *make* such practical agreements as the Law Commission thought appropriate: and also to dismiss any idea that the very cohabitants for whom rather conservative provisions were being contemplated might see themselves as enjoying a different status from either marriage or civil partnership or as two single people, rather than a committed couples.

The Social Context.

While nine years have elapsed since this part was written it now looks very old fashioned in the light of the contemporary approach to cohabitation, which is in effect now a social norm even if it is not yet a legal norm. Quite properly, the demographic data is included showing the decline in marriage and the increase in numbers of cohabitants and their children, as well as identifying the drivers towards cohabitation, the fact of increased relationship duration, the reasons for these syndromes and actuarial estimates for future further increases in numbers of those affected. However, nowhere else is the dated approach of the project in the 2006 consultation

so clearly demonstrated as in the Commission's obsession with the data: the impaired focus thus given to the remainder of their work, cast something of a blight, a fate which was already flagged up by exclusion of the long list of items that the team was *not* to consider, but some attention to which might have better informed their approach to legislation for some basic, practical, cohabitants' rights.

The data do not tell the research team anything at all, for example, about the reasons for cohabitation being elected in place of marriage or registered partnership, and therefore anything about what provision really needed to be made for such a significantly emerging unit – instead, the raw data available only told them that cohabitants were there, because they were not in marriage or registered partnerships. Had this data been followed up by some semi- structured interviews they could have had qualitative data as well, a resource which can be analysed and is well recognised as reliable and robust¹⁹⁶.

This material also notes that these cohabitation trends had been observed in other *European* countries¹⁹⁷, a highly relevant factor owing to the contemporary incidence of cross border movement of families - cohabitant as well as married - since the volume of international child abduction cases being reported was clearly indicating that by 2006 there was already established a cross border relationship breakdown trend involving several of our federal European neighbours - as much as more distant jurisdictions such as Australia and New Zealand - France and Germany being favoured European destinations.

Such an incidence of European family mobility is clearly more of a concern in the absence of a normative regime for cohabitants in English law, since under the EU treaties freedom of movement is positively encouraged in international business contexts. Thus by 2006 family mobility must have for some time been indicating that a discrete regime for cohabitants was likely to become urgent since, once cross border complications apply in family breakdown, unravelling both married and unmarried relationships becomes complex and expensive - and descent into poverty

¹⁹⁶ See Jennifer Mason, *Qualitative Researching*, Sage, 1996.

¹⁹⁷ Kathleen Kiernan, 'The Rise of Cohabitation and Child Bearing Outside Marriage in Western Europe' (2001) 15 *International Journal of Law, Policy and the Family*, p1.

being much more acute, and more quickly, in the case of cohabitant family breakup than in the case of married separations, as later specifically identified by the Institute of Fiscal Studies¹⁹⁸.

The key statistics identified in the 2006 consultation paper are quoted from the 2001 Census of the Office for National Statistics although the problems of obtaining entirely accurate information are acknowledged¹⁹⁹. Other associated statistics are taken from 2001 ONS *Social Trends* and *Population Trends*, now of course very dated although the very datedness is of value. In particular it records that in 2001 there had, *since 1991, been a 67% increase in cohabiting couples, and the numbers had been increasing significantly since the 1970s*. Over one and a quarter million children had been found to be dependent on cohabiting couples, that just over half a million of such children were in cohabiting step-families: moreover three quarters of a million cohabiting couples had a dependent child or children.

Data also showed that there had been a steep increase in births to cohabiting couples: in 1970 these were less than 10%, but in 2004 those born to cohabitants were 42% of all births, with a similar increase in the proportion of such births registered by both partners over the same period - 76% of which were to parents living at the same address from which it was deduced that they were cohabiting, while one-parent registrations had remained fairly constant at under 10%.

ONS data in 2005 and 2006 further showed that there had also been a drop in marriage figures per year over the previous 30 years: 480,000 in 1970 to around 300,000 by 2000, although there had been small rises. Divorce had also risen in the 1970s-1980s, possibly directly increasing the proportion of marriages which were re-marriages for one or both parties: this category amounted to two-fifths in 2003. Records had also showed that marriage was being deferred to the late 20s and early 30s: the ages 25 and 23 respectively recorded for men and women in 1970 had risen to 31 and 29 in 2003. The Law Commission had identified reasons for this in a pattern of earlier cohabitation preceding marriage and because of the older ages

¹⁹⁸ Alissa Goodman and Ellen Greaves, *Cohabitation, Marriage and Child Outcomes*, IFS, C114 2010.

¹⁹⁹ Michael Murphy 'The Evolution of Cohabitation in Britain, 1960-1995, (2000) *54 Population Studies* p 43; Jean Knab, 'Sharpening a Fuzzy Concept', Princeton University working paper, 2005.

later recorded when entering into first partnerships, which they obtained from a study of Ermisch *et al* in 2000²⁰⁰. This account of relevant data potentially affecting cohabitants included consideration of the relatively new phenomenon of 'living apart together' for which 2005 and 2006 studies by Haskey were relied on²⁰¹.

Reading the Consultation Paper today, almost a decade later, the most obvious question which is immediately posed is 'How could it possibly have been said in 2006, by any researcher confronted with this data, that reform was *not urgent*?'

However, the answer to this question may have been because regard had also been had to the ages of cohabitants, which clearly had contemporary significance, in that while it was noted that cohabitation had increased across all generations since 1970, the greatest increases were stated to be in the younger age groups, and 2004 data showed that the highest numbers of all were in the 20s, for both men and women. This may have been seen as evidence that cohabitation might have been transitory owing to social change being most marked in the lifestyles of those in their 20s, but appears also to have led to some not necessarily compatible views. While the section begins with the statement that 'Marriage remains the most popular form of partnership' not long into this section it is then being said that 'Combined with the data about age at first marriage, it is clear that cohabitation has overtaken marriage as the preferred form of first partnership'²⁰². There is also then reference to 'establishing co-residential relationships (whether marriage or cohabitation) later in life', which does not seem to coincide with the greatest increase in cohabitation relationships being in the 20s age group as stated previously.

Further 2005 statistics evidenced that three quarters of cohabitants in Great Britain aged 16-59 had never been married and about one fifth of cohabitants had been divorced, that the increase in births to cohabiting parents was accompanied by a corresponding drop in married births and that conception outside marriage now

²⁰⁰ John Ermisch and Marco Francesconi, 'Patterns of Household and Family Formation' in Richard Berthoud and Jonathan Gershuny (eds) *Seven Years in the Lives of British Families*, Bristol: Policy Press, 2001.

²⁰¹ John Haskey 'Living Arrangements in Contemporary Britain: Having a Partner Who Usually Lives Elsewhere' and Living Apart Together '(2005) 122 *Population Trends* p.35; John Haskey and Jane Lewis, 'Living-Apart-Together in Britain: Context and Meaning', (2006) 2 *International Journal of Law in Context* p.37.

²⁰² Law Commission, Consultation paper, Law com 179, 2006, paragraph 2.18.

rarely resulted in the parents' marrying before the birth, or in 'shotgun weddings' - suggesting that these had simply been replaced by cohabitation²⁰³.

It was also acknowledged that while cohabitation existed across all classes and socio-economic circumstances, cohabiting parents were generally less affluent than married ones, that this decreased the chances of the couple marrying, and that there was a good deal of literature and research on this issue which pointed to a theory that cohabitation was favoured as it allowed for an easier exit from the relationship²⁰⁴.

It is fair to say that these were all conclusions that are probably still valid today, especially owing to the post-*Radmacher v Granatino* (2010) popularity of marital agreements but at the time should perhaps have been one of the most powerful indicators that some legislation was urgent to address the practicalities of cohabitation breakdown - especially as the Office of National Statistics' data relied on showed that at that time most cohabitants were owner occupiers, although there was also some evidence even then for younger cohabitants renting their homes, which would almost certainly be a more marked situation today when the age of first home purchase has become so delayed, owing to current high property values in relation to earnings and the high deposits now required.

Data was also included on the duration and outcomes of cohabitation. Late 1990s data put average duration at 27 months as opposed to the median length of marriage at divorce in 2004 which was 11 years, although it was also accepted that there had been a steady increase in the median duration of cohabitation. The Ermisch-Francesconi late 1990s research (Economic Research Council Research Centre, 1998) suggested that 60% of cohabiting couples would eventually marry, although this does not seem to match the declining marriage rate evidence elsewhere in the section, nor when that evidence is also supported by future projections of marriage rates which (according to this section) are addressed later in the paper.

²⁰³ John Ermisch 'The Puzzling Rise in Childbearing Outside Marriage' in Anthony Heath, John Ermisch and Duncan Gallie (eds) *Understanding Social Change*, OUP, 2005; Anne Barlow, Simon Duncan, Geraldine James and Alison Parks, *Cohabitation, Marriage and the Law: social change and legal reform in the 21st century*, Hart, 2005.

²⁰⁴ Rebecca Probert, 'Trusts and the modern woman: establishing an interest in the family home' (2001) 16 *CFLQ* p 275.

Public attitudes to Cohabitation were also dealt with here. The British Social Attitudes Survey 2000 showed that at that time (now 15 years ago) 67% of respondents agreed that it was 'all right for a couple to live together without intending to get married'. This was an increase by more than 10% from 1994, although responses 'varied markedly by age group' and a survey for BBC Panorama claimed that as much as 84% thought this situation was 'all right.

This data ended with the statement that 'what is clear is that cohabitation has become an established part of British society' and that the Government Actuary's department had projected that by 2031 over 1 in 4 couples would be cohabiting rather than marrying. The actual figures relied for this statement were 16% cohabiting and 41% marrying and that the ages and numbers of those cohabiting would be expected to increase by the target date, to 305,000 men and 234,000 women over 65, which, it was noted, had significant implications for such relationships ending by death²⁰⁵.

However all these figures, as mentioned in the present and previous paragraphs, have so far escalated in the intervening period since they were first relied on that none are realistically any longer of practical use, other than to show that there was some urgency for legislation in 2006! As a result, it is hardly surprising that this section of the Consultation Paper is more of a shock to read in 2015 than it could possibly have been when this data was included in the consultation paper in 2006, at which point there was clearly a case for reform, which has now been so completely overtaken by events in various ways that it would now not only be droll to suggest that cohabitation is not an accepted fact of life but also that it still seems to relentlessly growing, so that 'by how much' is not a useful question to ask .

Under the impact of contemporary perception of a clear case for reform in 2006, this volume of indicative statistics from as long ago as 2006 is especially remarkable when, despite some obvious inconsistencies, it was at the same being seriously suggested that there was 'no pressing social need' for a normative legal regime for

²⁰⁵ Government Actuary's Department *Marital Status Projections for England and Wales*, 2005 (this data is now kept by ONS).

cohabitants. Presumably the influence must have been the long held view, current since the 1985 Booth Committee, that marriage was available and cohabitants should make use of it. However, if anything, the pressing social need is even more compelling nearly 10 years later when the separate cohabitant constituency is much clearer and judges regularly accept cohabitation as a social norm even if not always legally provided for²⁰⁶.

However, the 2006 'no urgency; approach is certainly mutually exclusive with the view expressed by Professor Elizabeth Cooke in September 2011 referred to above. In that statement, made on behalf of the Law Commission when the government announced that it would not implement the 2007 recommendations, she made the only realistic point on the basis of the evidence which had been gathering over years - that owing to 'the prevalence of cohabitation...the need for reform can only become more pressing', which is clearly the currently correct conclusion, regardless of any ambivalence that might have been justified in 2006.

How the Law Recognised Cohabitants in 2006.

Much was made in 2006 of the fact that cohabitants were not totally unknown to the law which then made provision for them (and still does) in various respects. Attention was duly drawn to the financial and property consequences of cohabitation and its breakdown and also to the prevalent myth, apparently still believed by many people, that living together for some period of time created a 'common law marriage' - a position which remains static, speaking for itself in that the lack of reform has resulted only in the initiatives of Baroness Hale and other Justices of the Supreme Court, already noted, to clarify the existing common law. This, therefore, was one of the better sections of the Consultation Paper, since it drew attention, in stark detail, to the fact that the current provision in 2006 was completely unsatisfactory, including in particular, that public knowledge of the law- based on the 'prevalent myth' - was positively dangerous to those unfamiliar with the true position, as to which there is no evidence that there has been any change since 2006, thus cogently supporting Professor Cooke's 2011 conclusion.

²⁰⁶ See further Chapter 5.

Thus the lay cohabitant has since been left sleep walking through the legal position identified in 2006 whereby, while providing no discrete regime for stable cohabitation, the law potentially ranges through self- regulation by cohabitation agreements, or gifts, to the creation of trusts of the family home, none of this very satisfactory. In particular, any *express* declaration of trusts of land, such as under the Land Registration Act 2002 s 44(1) and the Land Registration Rules 2003, r.95(2)(a) has to be effected on either form FR1 for first registration or Form TR1 on transfer, all of which still clearly floats somewhere above the heads of most of those involved in cohabiting relationships, considering the continued prevalence of their disputes regularly coming to court!

As a result, the continued progress through the courts of cases like *Kernott v Jones* in 2011 and *Seagrove v Sullivan* in 2015 makes clear that the cohabiting lay public is in no way any more knowledgeable about their situation than they were in 2006 and/or in any case still not consulting their lawyers where they might at least have done so if they had had any recollection of the publicity at the time for the Law Commission's 2006-7 work.

How much easier this would of course be for those involved if at any time between 2007 and 2011 either one of two governments which by then had had the chance *had* done something to implement a normative scheme - at least as scheme of *some* sort if the Law Commission's scheme was not entirely acceptable – so as to enable cohabitants either to work out their own cohabitation agreements at the start of their relationship, or to use that scheme as a guide to brokering an agreed solution when the relationship broke down.

It must be wondered to what extent the consultation paper was read with any attention by those at the time in the Ministry of Justice who were presumably charged with advising the Lord Chancellor on the urgency for reform which was later emphasised by Professor Cooke: significant space is given in Parts 3 and 4 to the express and inferred common intention constructive trusts which have in many cases resulted in a party whose name has not been put on the title documents being treated as the beneficiary of an express common intention to share, such as in

Grant v Edwards in 1986²⁰⁷ and *Eves v Eves*²⁰⁸ in 1975. The Consultation paper even expressly noted that ‘the case law remains crucially ambiguous on whether a court may infer a common intention from financial contributions if the parties confess to having never considered the matter of ownership’ - the very point which has since had to be dealt with by the Supreme Court in *Jones v Kernott* in respect of which there has been some criticism of the Justices’ concept of imputing intention from the parties’ conduct if they could not identify it from express terms .

This examination of the legal ambiguities also concedes that ‘The clear lack of any actual intention might be expected to rebut an inference of common intention to share beneficial ownership’ and that ‘Some judicial remarks suggest that this is not necessarily the case, though those remarks themselves are ambiguous’²⁰⁹. As if this were not enough to argue for urgent introduction of a normative scheme, sale and occupation are also considered in the Consultation Paper under the Trusts of Land and Appointment of Trustees Act 1996 (TOLATA) - whereby application may be made to the Court to resolve disputes over a home co-owned by cohabitants - and under Part IV of the Family Law Act 1996, or Schedule 1 of the Children Act 1989 where the couple have children.

This part also considers the transfer of tenancy function under Schedule 7 of the Family Law Act 1996, and summarises maintenance and capital provision for children, respectively under the Child Support Acts and the Children Act 1989, as well as property entitlement on the death of a cohabitant under the Inheritance (Provision for Family and Dependents) Act 1975, besides the complete lack of provision under the present intestacy rules, save for the limited power of the Crown to make discretionary provision for ‘dependants’ of the intestate if the estate is in fact *bona vacantia*, under which exception discretionary grants have been made to surviving cohabitants.

Unfortunately this rehearsal of a cocktail of non-specific remedies that might be fished through in case some helpful provision might be found to provide an *ad hoc*

²⁰⁷ [1986] Ch 638.

²⁰⁸ [1975] 1 WLR 1338.

²⁰⁹ *per* Waite LJ in *Midland Bank v Cooke*, [1995] 4All ER at 575D and H, and *per* Chadwick LJ in *Oxley v Hiscock* [2004] EWCA Civ 546, [2005] Fam 211 at[68].

remedy speaks for itself. If anything in the Consultation does, it is clearly articulated here that a customised normative scheme is required, for which at present there still remains no adequate substitute. The Consultation paper could not make clearer that while cohabitants and their children are not *ignored* by the law, resolution of financial and property affairs on the termination of cohabitants' relationships are not only 'driven by strict property law' which the parties are unlikely to understand, but that 'there are problems that it has left un-remedied and (even) created'.

With all due respect to the Law Commission team of the time of this 2006-7 project, this final concessionary comment noted in the paragraph above is a significant understatement, especially in the post LASPO 2012 virtually legal-aid-free landscape, where litigants in person are entirely unprepared and lacking in aptitude to navigate their way through a recondite area of the law which challenges many law students (and indeed some practitioners as soon as they have left their professional qualifying examination rooms).

It is simply not appropriate for ordinary members of the public to have to forage for the law in a number of statutes and a plethora of case law when there is no evidence that they are managing that even in the relatively simple contexts of marriage and civil partnership, where they are at least concerned with only one or two statutes - the Matrimonial Causes Act 1973 and the Civil Partnership Act 2004 - in which to find the relevant provisions affecting the divorce of married partners or dissolution of registered civil partnerships. Apparently the government has just found it necessary to clarify and consolidate the law of Sale of Goods²¹⁰ for better understanding of the consumer, so why not – much more urgently and when the Law Commission was expressly involved for the purpose - the law relating to cohabitants?

A leading set of Family Law Barristers Chambers has recently found it necessary to publish a detailed guide called *DIY Divorce and Separation*²¹¹ for the litigants in person who are now obliged to secure orders in relation either to marriage or registered civil partnership: the reason being, of course, in order to conduct their own cases without legal aid when they cannot afford advice or representation. However

²¹⁰ Consumer Rights Act 2015.

²¹¹ S Sugar, P Clapham, J Foster, *DIY Divorce and Separation*, Jordans Publishing, 2014

no professional source, at the Bar or in the solicitors' part of the profession, has so far braved publication of a similar layman's guide for cohabitants, and it is not far to seek the reason why in that case, when the law is so scattered and complex.

A similar statute for cohabitants seems little relative clarity for lay people to have asked for when required by the government to deal with matters concerning their property and financial interests without legal advice or guidance, especially since cohabitants' sheer numbers have vastly exceeded those indicated to be using the Civil Partnership Act, which remained between 6,000 and 7,000 unions a year until the introduction of same-sex marriage under the 2013 Act when there has been a surprise defection to same-sex marriage. This, however, appears to be confined to same-sex marriages only, but not the core opposite sex cohabiting community where figures continue a steady rise. For example, the latest 2015 cohabitation figures²¹² seem to be now 3.2m and were already 2.9 in 2011 when the Law Commission's scheme might reasonably at last have been implemented after the publication of the Wasoff Scottish research²¹³.

With regard to the case law referred to by the Law Commission in 2006, this is a point where the law has already moved on since 2006-7, in that there has now been the Supreme Court decision following up *Stack v Dowden* (2007) in *Jones v Kernott* (2011) where the court has dealt with the instance of cases where common intention might be *imputed* from conduct, in respect of which - despite Lord Bridge's earlier view in *Lloyds Bank v Rossett* (1995) - Baroness Hale has suggested that this raises no particular problem, especially as she has in the same 2011 case confirmed that the constructive trust is the preferable pathway when attempting to discern the parties' intentions in connection with shared ownership in the family home. Although Lord Neuberger did not agree with her in *Stack v Dowden* where he expressly preferred use of the resulting trust, while arriving at the same numerical result via that distinct route.

²¹² November 2015 ONS statement.

²¹³ Fran Wasoff, Joanna Miles and Enid Mordaunt, 'Cohabitation: Lessons from Research North of the Border' (2011) 23 *Child and Family Law Quarterly*, pp.302-322.

Consequently this, surely, presents an unarguable case for the clarity of legislation: when the current President and Deputy President of the Supreme Court cannot agree on the pathway to clarity in a core issue between cohabitants legislation spelling the matter out must be the solution, both to any disquiet about such divergence of doctrine and to confusion by the ordinary person who is entitled to know with certainty what the law is?

It is fair to say that the consultation paper makes clear that the 2006 team was aware of the criticisms and the potential impact within the law of human rights, that is, that the law was already then perceived as ‘unfair...uncertain and...illogical’ besides being ‘procedurally complex’. It was conceded that many of these failings affected cohabitants, both those with children and those without, but which did impact, uniquely or more acutely, on those who did have children. It was acknowledged that there was criticism that litigation on the breakdown of a relationship failed to provide fair outcomes, ‘in particular by failing to recognise the value of certain types of contribution made by one party to the acquisition of assets owned by the other’, also ‘the economic sacrifices made by those who give up paid employment... in order to care for the couple’s children’. It was acknowledged that the root of this criticism was because of the law’s apparent inability to recognise contemporary domestic financial management, failure to respond to the parties’ interdependence and an inherent lack of remedial flexibility in the law’s concentration on distinct assets rather than looking at the parties’ economic positions as a whole.

In the circumstances, this is the one section of the Consultation Paper which needs little or no comment, except to say that if this situation was realised *why* was it not ‘urgent’ to achieve some reform, and perhaps *why* was the tone of both the consultation and the final report not more compelling? – which, had it been shorter, more succinct, and its key points less buried in excess descriptive matter of less importance, might have been an important achievement. Such a more robust final report might have convinced both supporters of the research team and the government receiving their reports that reform was necessary. This should have been realised especially since, before the end of 2007, human rights aspects had moved on slightly in that the Lisbon Treaty, then under negotiation and since signed by the UK, and which was at the time notable for advancing protection of ‘the family’,

thus created even stronger arguments for reform of the cohabitant constituency in that 'family'.

One contention not well developed at the time - owing to the length and diffuse nature of the consultation paper - was the long standing grievance that in the absence of common intention to share ownership of property - mainly the family home - the law of implied trusts was unsuited to cohabitants' disputes because of the arbitrary allocation of a beneficial share to the one who paid the mortgage, but not to the one who paid household bills: and that this did not fit with the realities of family life²¹⁴.

This was a key point in support of the need for a simple scheme, and it is fair to say that the paper conceded that 'whether an applicant succeeds in establishing an interest may be entirely fortuitous', and that 'it could be said to favour calculating and self-interested individuals over the more altruistic (or less legally aware)' because 'many people simply do not appreciate the significance that the law attaches to certain intentions and contribution, and the lack of significance it attaches to others'. However, the structure and drafting, as so often in the Commission's 2006-7 documents, managed to obscure both the evidence for reform and the obvious channel through which it should be achieved - that is, through a discrete normative scheme - despite the fact that it was also acknowledged that the search for common intention 'neglect[s] most of the ethical case to be made, in the family context, for having this jurisdiction at all'²¹⁵.

Another curious failing of the Commission's 2006-7 documents is the mismatch between the Commission's apparent awareness of the principle in strict property law that non-financial contributions are not recognised to establish an interest in property and their acknowledgement of the disproportionate economic impact upon women of child care in cohabitation. The Law Commission could have been expected to have followed this up, not simply because women in general and female cohabitants in

²¹⁴ Simon Gardner, 'Quantum in *Gissing v Gissing* constructive trusts', (2004) *120 Law Quarterly Review* p 541 at 546.

²¹⁵ Simon Gardner, *ibid* (2004); Rebecca Probert, 'Land law and ex-lovers' (2005) *Conveyancer and Property Lawyer*, p.168 at pp171,172; Anna Lawson, 'The things we do for love: detrimental reliance in the family home (1996) *16 Legal Studies* p.218.

particular can often be in part time or no employment, but can also often suffer low pay and lack of career progression when actually employed, then suffering again through the inevitable consequence of their then having smaller pensions - or lack of pension provision for them at all - and thus, through lack of any claim which married women would have under the Matrimonial Causes Act 1973, delayed poverty²¹⁶. However, again this was not capitalised upon as it might have been, despite the fact that contemporary cases in the House of Lords – the 2006 *Miller, McFarlane* judgments²¹⁷ – were examining the entire concept of fairness, besides needs, compensation and sharing, within the married context.

It is not that the Law Commission was not aware of these issues in relation to cohabitants, as space is also given to the improved provision by then available in childcare, tax credits, maternity and parental leave and flexible working to support 'family friendly' employment since the classic cohabitant's disadvantage case of Mrs Burns in the 1980s. Again, however, despite reciting these benefits, and acknowledging that the law does 'fail the primary carer cohabitant' when economic sacrifices have been made, opportunity was lost to emphasise that inevitably the resulting economic disadvantage may continue long after the relationship ends, although had it *not* ended the support within that relationship would probably have made up for the sacrifices which would have been compensated both financially and non-financially – and that this is a key problem in providing appropriately on the ending of a cohabiting relationship.

One of the most significant failures of the Commission's 2006-7 work is that they did not consider that the Scottish scheme was capable of addressing these sorts of issues impacting on a female cohabitant, while still treating an ex-cohabitant as cohabitant rather than equally with an ex-spouse, as the Scottish Act was then shown to be able to do in *Gow v Grant*²¹⁸. This failure is difficult to understand, as the Scottish scheme was already enacted before the London project was half way through and was sufficiently advanced to have been appropriately flagged up for late detailed consideration in the 2006 Consultation Paper,

²¹⁶ Katherine Rake (ed), *Women's Incomes Over Lifetime*, HMSO, 2008.

²¹⁷ *Miller v Miller and McFarlane v McFarlane* [2006] UKHL 24.

²¹⁸ [2012] UKSC 29. See Chapter 5.

A further point to be extracted from the paper is the surprising one that limited use was being made of the existing provision for accommodation and financial support under Schedule 1 of the Children Act. It was suggested that this was because, like the TOLATA jurisdiction, this is a remedy that might be found too complicated to be of practical use owing to the fact that in an 'ordinary money' case the capital will not be available to provide a home for the child and carer cohabitant, as well as for the other cohabitant who has moved out. Another reason might be because the court has no power to order the non-resident parent to pay the mortgage, while the carer parent may not have the means to support the home or the non-resident parent to provide maintenance for the former cohabitant, and because the accommodation provision will in any case terminate when the child reaches majority.

This contrasts with the position on divorce where the child's parents are married²¹⁹ since then the Matrimonial Causes Act 1973 may address all these problems. There is also the problem of the procedural complexity in any cohabitants' property dispute case which is well documented by Lord Justice Carnwath in *Stack v Dowden*²²⁰.

Indeed, once more in the instance of the potential Children Act 1989 remedies, complexity of existing provision needed to be much more forcefully put. Moreover, while the Commission did address the uncertainty created by such decisions as *Oxley v Hiscock* (2004) in the Court of Appeal of which there was much academic criticism (Gardner, 2004, and Cooke, 2005), the illogicality unfairness of provision on death but not on separation, and the human rights implications were not fully exploited, which is odd since they engage Article 8 (the right to respect for family life and home) and Article 14 (the right to be free from discrimination in the exercise of Convention rights) which means that cohabitants must not be treated worse than married couples (*Rasmussen v Denmark*, 1984, *Saucedo v Spain*, 1999).

While it is true that in many respects cohabitants are treated the same as married couples in English law, clearly on separation and to some extent on death they are not, although the 2006 Consultation Paper concludes that it is 'unlikely' that the

²¹⁹ Munby, J, 'Families Old and New' (2005) 17 CFLQ p487 at 497.

²²⁰ [2007] EWCA Civ 857 at [75].

European Court of Human Rights would treat shortcomings in cohabitants' treatment as a violation of Article 14, especially as that Article is only engaged if there is breach of another Convention right. However the Consultation Paper seems to have proceeded on the basis that either the Court would not be concerned, or, if it did take exception, any deviation from what might be regarded as a norm would be proportionate to a legitimate aim, and also that some cohabitants might argue that they actually had a *right* to different treatment, precisely because they are *not* in fact in an analogous situation to married couples!

This latter idea must be wrong. Given the IFS 2010 research²²¹, even if cohabitants are entitled to a right to distinction of treatment for themselves, could this possibly be right for the children in their care? It is a principle of English Family Law that children should not be disadvantaged in any way on account of the status of their parents. This may be loosely dated to the abolition of the status of illegitimacy which had impacted upon them since the early Middle Ages, and from which followed the Legitimacy Act 1976 and the gradual separation of Child Law from the main corpus of Family Law following the Children Act 1989, although the welfare principle in s 1 of that Act is older and can be traced back to the Guardianship of Infants Act 1925, despite not having much practical effect until later in the 20th century.

It is fair to say that the Consultation Paper does acknowledge that there might be a case for claims of indirect discrimination against the *children* of cohabitants, but raises a further problem in that Article 1 of the First Protocol as well as Article 8 will protect the property rights of potential respondents, so that *they* could object to any reformed law to replace the existing declaratory provisions available within the law of trusts and other remedies discussed, which currently apply to them and their property.

This is a problem created by failure to view Family Law as a whole when dealing with its micro-compartments, but actually is probably a paper tiger. In the case that legislation was introduced to protect the weaker parties in a cohabiting family – usually the woman and children - any complaint could surely be met by the pincer

²²¹ Alissa Goodman and Ellen Greaves, 'Cohabitation, marriage and child outcomes, IFS C114.

movements of the proportionate and legitimate aim arguments, and of course by an opt out provision, which is a feature of the New Zealand scheme for cohabitants²²².

The Consultation Paper thus concluded that any case for reform would therefore have to be stringently evaluated, presumably owing to these potential conflicts, but this is a pedestrian argument, stating nothing but the blindingly obvious, and surely what the 2006-7 work was intended to consider and address. In any event there is an approach already taken by English Family Law in the case of conflict, for example in such disputes as relocation of a child with a parent which will impact on the contact of the left behind other parent. In such a case the normal approach attempts to prioritise the rights of children, although it must be accepted that sometimes the solution is that there is no solution as the child itself may have competing rights, that is, to meaningful contact with both parents, the carer parent and the non-resident parent.

Nevertheless, in the case of financial impact of parental separation on a child, preservation of the first consideration that is normally given to minor children in cases under the Matrimonial Causes Act 1973 and s 15 and Schedule 1 of the Children Act 1989 must surely trump any other consideration where there is a conflict, since the provision of a home and enough resources to live there during a child's upbringing are usually regarded as the basic minimum to secure a child's welfare.

However, the human rights aspects of any cohabitation reform is one of the aspects which has been overtaken by events after the 2006-7 period in which the Law Commission work took place, since when English Law also has a new Equality Act and the European Union has new treaties. While the equality aspect of same-sex marriage was taken on board in presenting that Act as an equality measure, no such fundamental approach to the human rights aspects of English law's treatment of cohabitation was included in the 2006-7 work. This is not surprising since the Lisbon Treaty, also known as the 'Reform Treaty' was not signed in Lisbon until December 2007 and did not come into force until 2009.

²²² See Chapter 8.

This treaty significantly changes human rights protection within the EU, mostly in amendments to Article 6 of the Treaty on European Union. These provide that the EU Charter of Fundamental Rights is legally binding, having the same status as EU law, and that 'the European Union' shall accede to the European Convention on Human Rights²²³.

It is thus possible that there is a newly highlighted indirect discrimination issue involved in the non-recognition of cohabitants as such within English Law which inevitably impacts disproportionately on women and children in any cohabiting family where a traditional division of labour is the norm, since on leaving the relationship the woman is more likely to fall into poverty, taking the children with her, as established by the IFS²²⁴. This is probably inevitable, in the absence of an accessible discrete normative regime which protects the homemaker woman's rights to a share of the family wealth which she may have helped to create in the manner identified in historic leading cases where common intention has sometimes, but not always, been found in the parties' conduct, owing to the uncertainty of judicial outcome. This theory has been touched on by human rights commentators but is nowhere investigated in prior work in this field. This cannot be right and it would seem that any updated perspective must include a consideration of this indirect discrimination, which is flagged up by at least two commentators, Choudhry & Herring²²⁵ who also refer to work on indirect discrimination by Glennon²²⁶, in both cases post-dating the Law Commission project.

The Consultation Paper did evaluate the case made by the perceived shortcomings in the law, including by looking into research into marriage and cohabitation, and the possible sufficiency of existing or adapted remedies for the ills identified²²⁷.

²²³ Sionaidh Douglas-Scott 'The European Union and Human Rights After the Treaty of Lisbon', (2011) 11(4) *Human Rights Law Review*, pp 645-682. www.hrlr.oxfordjournals.org, last accessed 30 March 2016.

²²⁴ n217.

²²⁵ Shazia Choudhry and Jonathan Herring, *European Human Rights and Family Law*, Hart, 2010, pp. 419-420.

²²⁶ Lisa Glennon, 'Obligations Between Adult Partners: Moving From Form to Function' (2008) 22 *International Journal of Law, Policy and the Family* 22; see also Session on *Indirect Discrimination*. Queen's University Belfast Summer School, 2009; Lisa Glennon and Brice Dickson, *Making Older People Equal*, Belfast Equality Commission of Northern Ireland, p 11.

²²⁷ See John Dewar, *The Normal Chaos of Family Law*, (1998) 61(4) *Modern Law Review*, pp.467-485.

Marriage, registered civil partnership or self-regulation under contract or trusts, including the place of opt-in or opt-out alternatives, had all been long suggested alternatives. The options for, and cost of, reforms and the impact of any reform on different types of cohabitants were all duly reviewed by the Commission, but the charge of unfairness in the law's treatment of cohabitants was approached on the basis that any unfairness is self-inflicted, since a cohabitant may marry or self-regulate by adopting another form of protection, such as a trust or cohabitation agreement. Alternatively, whether there should be an opt-in or opt-out scheme was also considered.

Unfortunately, however, the Commission also relied on the educative work of the Living Together Campaign, drawing attention to the consequences of cohabitation without marriage, civil partnership or other legal arrangement, although they did accept that some cohabiting partners have no choice as the other cohabitant may reject marriage, civil partnership or even a cohabitation agreement, although it was also accepted that many cohabitants were, for whatever reason, simply not taking these steps when they are available.

However, equally unfortunately, this area of the 2006-7 work was bedevilled by failure to note that time was already marching on somewhat vigorously, since the Living Together Campaign was in 2006 already nearing the end of its life, and has since completely petered out, the website having shortly afterwards entirely disappeared. Nevertheless, even in 2007 it must objectively have been doubted whether such educative initiatives were genuinely effective or even had the potential to be so, given the long past ineffective results of the JUSTICE campaign of the 1980s, and the fact that unprotected cohabitation, and the marriage myth, were both firmly continuing.

In the circumstances it was a flawed and forlorn hope even in 2007 to suppose that the ordinary member of the public would cooperate by suddenly accepting the fact that there were no common law quasi-marriage rights for cohabitants. This was so obvious that it was later followed up by a series of articles over the succeeding 5

years, including a leading monograph²²⁸ in which she traced the history of this erroneous belief back to far earlier than the 1970s when ‘common law wives’ featured fairly frequently in the press. First instances found were in pre-1960s cases and common law marriages overseas, especially in far flung locations where no Anglican clergy or local law were available, so that some recognition had to be given to a variety of alternative rites. Next, there were more cases, even further back in the 1700s, prior to Lord Hardwicke’s Clandestine Marriages Act 1753, an early measure intended to prevent forced marriages for property acquisition reasons, but which had the effect of requiring more strict formalities than previously.

The other major flaw in the 2006-7 work is the concern that any statutory protection for cohabitants might undermine marriage, although the Law Commission did take note of research in Australia where cohabitants have had some protection since 1985 and this has *not* had any identifiably adverse impact on marriage. There is also concern expressed in the Consultation Paper that there may be no justification for interfering in cohabitants’ rights to self-determination in not marrying, so that it might be preferable to explore the experience of some other jurisdictions’ alternative civil unions, for example, New Zealand’s Civil Union Act 2004 and France’s *Pacte Civile de Solidarite* (PACS). However, it seems that nothing came of this,

Concluding that it would be appropriate to enable those who chose not to be subject to any new legislation to opt out, and that there were already at least 2 opt-in schemes available in English law which were not being taken up by some - that is, marriage and civil partnership - the Consultation Paper did then move on to consider a potential opt-out scheme, which would enable there to be a default system in place, unless the parties positively agreed to opt out of it. The Consultation Paper indeed pointed to the adoption of this solution in several jurisdictions both common law and civil, although no attempt was made to evaluate any of them.²²⁹

The Consultation Paper also addresses the common suggestion that failure to marry shows lack of commitment, that is, in choosing instead to cohabit, but does reject

²²⁸ Rebecca Probert, ‘Common Law Marriage: Myths and Understanding’, (2008) 20 *CFLQ* p.1; Rebecca Probert, ‘The Evolution of the Common-Law Marriage Myth’, (2011) 41 *Family Law* p.283.

²²⁹ For an account of some of which, however, now see Chapters 6-8.

this as inappropriate on the ground of the continuing evidence that numerous couples are already living together on the basis of their *belief* that they enjoy a 'common law marriage' which is hardly compatible with a lesser commitment than marriage. Additionally, studies have in fact found commitment between cohabiting couples²³⁰ together with credible reasons for their rejecting marriage, ranging from not wanting a public ceremony to not being able to afford the apparent cost of a wedding, but again the Commission goes no further into this thread²³¹.

The section on eligibility for a statutory scheme concludes that those with children should definitely qualify, but that those without children pose more difficult questions for decision since they are less likely to have suffered any economic disadvantage through their cohabitation. This is because - except in the case of death of the other partner where there is already provision under the 1975 Act - they could resume their pre-relationship lifestyle, unless there was some strong case for seeking provision from the other partner.

It was therefore resolved in the consultation to leave the issue of provision for a separated childless cohabitant to the views of those responding on whether such cohabitants should be included in a new statutory scheme - however oddly proposing exclusion of those with few assets and low household incomes who would often be renting their homes as they would be able to use the tenancy transfer and child support provisions: which, however, should logically be a decision for choice of remedy of those concerned.

A further suggestion that judges could adapt existing law, perhaps adopting a comparative perspective in particular with Australia, New Zealand and Canada²³² was clearly seen as similarly unsuitable since there had already been academic

²³⁰ Jane Lewis, Jessica Datta and Sophie Sarre, *Individualism and commitment in marriage and cohabitation*, Lord Chancellor's Department Research Series No 8/99, 1999; John Eekelaar and Mavis Maclean, 'Marriage and the Moral Bases of Personal Relationships' (2004) *31 Journal of Law and Society* p.510; and L Jamieson, M Anderson, D MCrone, F Bechofer, R Stewart and Y Li, 'Cohabitation and commitment; partnership plans of young men and women' (2002) *50 Sociological Review* p.356.

²³¹ For which see further Chapter 5.

²³² John Mee, *'Property Rights of Cohabitees'*, Hart, 1999.

comment that this was a task for Parliament²³³, despite the fact that the lack of reform has left the Supreme Court to do something very similar in adapting existing common law principles, on which the justices have commented in their judgments in *Jones v Kernott*²³⁴. The concept that judges might be able to make the necessary changes to the law has now also been effectively commented on by the Supreme Court in that very *Jones v Kernott* appeal decision, where the court did take the opportunity, not only to clarify their less than comprehensive analysis of the law in the earlier case of *Stack v Dowden*, but also to comment on the fact that they had had to do so since legislative reform had not been effected over a long period²³⁵.

The other oddity of the Consultation Paper was that costs of potential litigation, in the absence of a normative scheme, were also considered but not thought to be 'burdensome', although the topic not taken any further, despite the fact that there were obviously identifiable costs of the existing situation, whereas a new scheme could be self-financing even if parties were eligible for legal aid. Costs is, of course, an area where there has been very significant change since 2007, since there is now usually no legal aid available and normally costs are no longer awarded in Family cases except where there is litigation misconduct or other good reason for departing from the principle that each party pay their own.

First the idea that costs could be 'not burdensome' would not have survived the Jackson Inquiry into costs in civil litigation²³⁶ the recommendations of which were implemented in the Legal Aid, Sentencing and Punishment of Offenders Act, 2012, (LASPO 2012) in force April 2013, which has removed almost all civil legal aid as well as from most Family Law cases.

Moreover, the Jackson Inquiry was designed precisely to find a way to control the escalation of costs in litigation, which in the case of heavy costs in the Chancery Division of the High Court has always been a significant factor in a litigant's decision as to whether to start proceedings in a trust case – and which inevitably is where

²³³ John Mee, 'Property Rights and Personal Relationships: reflections on reform' (2004) 24 *Legal Studies* p. 414 at 453.

²³⁴ [2011] UKSC 53, per Lord Collins [56]-[66] and per Lord Kerr at [67].

²³⁵ *Ibid*, per Lord Wilson at [78].

²³⁶ Sir Rupert Jackson, *Review of Civil Litigation Costs, Interim Report*, 2009; *Review of Civil Litigation Costs, 2009-10, Final Report*, both available at www.judiciary.gov.uk.

cohabitants are obliged to litigate if alleging a constructive or resulting trust, or proprietary estoppels – that is, the stock in trade of cohabitants' property disputes since cohabitants have no access to the Matrimonial Causes Act 1973 or the Civil Partnership Act 2004.

Secondly, legal aid has since largely disappeared following LASPO 2012, so that whether cohabitant parties who required a determination of their property rights could obtain legal aid or not so as to litigate is now irrelevant, since there is so little legal aid available to apply for.

However the really major flaw in the Law Commission's 2006-7 work is that, while in conclusion the Commission rejects the view that any new remedies should attach to a new legal status to which cohabiting couples could opt *in* by registration, it was accepted that eligible couples should be able to opt out. The exclusion of a cohabitation status - although not the fault of the Commission but of their original brief - may also be a mistake since those common law jurisdictions which *have* recognised a status of cohabitant as being in fact an 'un-formalised' partnership, have apparently successfully side stepped problems which appear to have presented themselves to those briefing the Commission initially, and generally in the Commission's 2006-7 work.

Clearly, a close look should be taken at these jurisdictions which, in the interests of practicality, this inquiry has always had the intention of doing in view of the established experience in those leading common law systems²³⁷.

Financial Relief on Separation: The Scheme Proposed in 2007

The scheme eventually proposed was based on structured judicial discretion indicating clear principles rather than fixed rules, and to some extent analysed the underlying principles in other jurisdictions, rejecting a needs- or partnership-based - scheme similar to that available to married couples under the Matrimonial Causes Act 1973, which had been advanced by some commentators such as Bailey-

²³⁷ See Chapters 6-8.

Harris²³⁸. Instead a contribution-based and disadvantage-generated system was preferred, linked to 'economic advantage' and 'economic disadvantage', as found in the Scottish legislation.

The aims of the scheme were set out to provide what were said to be fair, principled, flexible but certain, coherent and consistent outcomes, which were also 'clear and readily comprehensible' and 'practical in application'. It recognised the balance needed between 'predictability which flows from firm rules and the flexibility to secure justice in individual cases' and agreed that this was 'notoriously difficult to achieve'²³⁹ - but on balance opted for discretion, partly as this was said to be well recognised by English Family law.

The proposed scheme did, however, recognise the importance of giving credit for non-financial contributions and sacrifices which are linked to economic advantage and disadvantage and which should be capable of being valued, but did not consider that adopting a partnership approach would be appropriate for cohabitants because some do not adopt such a stance, unlike in most marriages; or so it is said, though there are many which do not²⁴⁰.

In view of this sort of example, it is obviously too sweeping to attribute gold standard commitment to married couples and a lesser quality in a cohabiting relationship.

Moreover, precise valuation of domestic contributions is rejected because although such contributions have commercial value - because if they were not made professional domestic help or child care might have to be paid for - it was

²³⁸ Rebecca Bailey-Harris, 'Law and the unmarried couples – oppression or liberation' [1996] 8 *Family Law Quarterly*, p. 137; Rebecca Bailey-Harris (ed) *Dividing the Assets on Family Breakdown: Strengths and Weaknesses of the Law*, collected papers of an SPTL conference at KCL, later separately published by Jordans Publishing.

²³⁹ As argued for by Wilson J, now Lord Wilson of Culworth, a Justice of the Supreme Court, 'Ancillary Relief Reform: Response of the Judges of the Family Division to Government Proposals', (1999) 29 *Family Law*, p 159.

²⁴⁰ See, for example, the dissenting judgment of Baroness Hale in *Radmacher v Granatino*, [2010] UKSC 42, where she appears to be severely deploring the lack of mutuality between the parties where the husband had moved, not only employment but also continents, 'for the wife's happiness. However, the wife had not extended the same courtesy to him when he was unhappy in his new employment, accepted as a consequence of the move when she could have done this so as to recognise and address his lower income following a career change undertaken to secure his own happiness.

considered impractical to attempt to value the ‘tasks beyond the range of a domestic servant’ in the ‘support, love and affection so necessary to maintain a happy family unit’²⁴¹. This approach appears to be on the basis that such ‘extra’ non-commercial services should not have a value because they are not available on the market, which apparently accounts for the rejection by Australian courts of any attempt to value them despite early attempts to do so.

This, then, was the basis for the Law Commission’s rejection of what is called the ‘global accounting’ principle, of valuing every last contribution that a cohabitant may make when attempting to produce a fair outcome on separation and thus preferring the economic advantage/disadvantage model which appears to work on the basis of a ‘retained benefit’ together with an ‘economic disadvantage’ beyond the point of separation.

Instead the Commission therefore looked at various methods of quantification of economic disadvantage, drawing on experience in New Zealand and Scotland, which did not appear to be necessarily precise or systematised, indeed in one New Zealand case²⁴² the judge’s method was described as ‘judicial plucking out of the air’²⁴³. In Scotland the calculation of economic/advantage disadvantage has been said to be ‘particularly difficult to quantify’, although this is now included for use in the new provisions under the Family Law (Scotland) Act 2006, and Baroness Hale in *Gow v Grant*²⁴⁴ has indicated that she found it worked.

The Law Commission went on to consider that no particular property should be ring fenced when considering how to apply the proposed scheme over which property/ies might be relevant in a particular case. This is another point which has been overtaken by events in relation to married couples’ property since English case law has since been developing in relation to inherited and pre-acquired property in cases where ‘needs’ in the Matrimonial Causes Act 1973 s 25 criteria does not trump any such claims. Further, the most recent Law Commission work, the report on which

²⁴¹ Per Lord Wilson of Culworth, [2011] *Jones v Kernott*, UKSC 53, [89]; n71.

²⁴² *Fischbach v Bonner*, (2002) NZFLR 705 (New Zealand).

²⁴³ See per Clarke J, in *Black v Black*, an Australian case (1991) 15 Fam LR 109.

²⁴⁴ [2012] UKSC 29.

was published on 27 February 2014, has also considered ring fencing in detail²⁴⁵. However this work is not yet quite finished, since while concluding that it might be too difficult to formulate any rules or guidance in relation to such ring fencing, the Commission then referred further work on the concept of 'needs' to the Family Justice Council. Although they immediately entered this task into their 2014-2015 work schedule no result has yet been published.

Basically, as far as the FJC's task is concerned, the key to unlock this conundrum about whether any property should be ring fenced before orders are made under the Matrimonial Causes Act 1973 is probably whether any of it is realistically required for 'needs' and, in principle, whatever is ultimately decided in relation to spouses under that Act could well inform the treatment of such property in a cohabitants' separation. If a normative scheme is eventually introduced to deal with financial arrangements on breakdown of their relationship any ring fencing felt appropriate under the 1973 Act could simply be adapted for cohabitants as well. Arguably, the point should certainly not be dismissed outright in the cohabitation context since, depending on the length and circumstances of that cohabitation, such ring fencing might or might not be relevant, since if this entire topic of cohabitants' position on separation is to be tackled properly inevitably there will be similar points arising as on a married separation of assets.

Finally the Commission considered how the scheme would operate in practice, for example in practical terms whether there should be a needs based ceiling once a party had established eligibility or whether there should be any, or merely transitional, support. It seems these thoughts were generated by the practical consideration of the forensic problems that might arise in proof of economic advantage/disadvantage. Further it was apparently decided that conduct should have no relevance to the scheme - unless financial or litigation misconduct- since generally in married financial provision cases there is no relationship between conduct and economic provision, unless such conduct had impacted on a party's earning capacity, such as in the case of some well-known divorce decisions²⁴⁶.

²⁴⁵ Law Commission, *Matrimonial Property, Needs and Agreements*, Law Com 343, 2014.

²⁴⁶ See for example, *Jones v Jones* [1976] Fam 8.

With the benefit of hindsight, it is clear that the Law Commission's 2006-7 team had not in fact thought through the practical considerations which have since been articulated by the Scottish scheme, which has also been academically evaluated, not only by the speedily funded Wasoff *et al* research project²⁴⁷, but also by Baroness Hale in *Gow v Grant*, where the opportunity arose in that first Scottish appeal to reach the Supreme Court. Thus this is another instance in which the 2006-7 work has been overtaken by events, and not least by the further Law Commission work on 'needs' 'agreements' and 'ring fencing' for married parties which, without in any sense jumping to any conclusion of equating cohabitants' situations to those of spouses, is clearly potentially informative if, the function argument is accepted, as is arguably increasingly inevitable²⁴⁸.

Eligibility for any new normative scheme

The Law Commission saw basic eligibility as membership of a 'couple' (two individuals only), 'characterised by (sexual) intimacy and exclusivity', sometimes described as 'partners in an enduring family relationship'. They were not in favour of any marriage analogy although it was accepted that some UK statutes do define cohabitation in this way, for example in the terms 'living together as if they were husband and wife, such as in the Family Law (Scotland) Act 2006, s 25(1)(a)and(b).

There are, however, many terms in use around the common law and civil law world, such as simply 'cohabitant'²⁴⁹, '*de facto* partner'²⁵⁰, 'domestic relationship'²⁵¹. Nevertheless, the thrust of the Law Commission's argument in this respect was that the marriage analogy is inappropriate and probably contributes to the common law marriage myth, but this was another issue on which the Consultation Paper invited the views of those responding to the consultation.

²⁴⁷ Fran Wasoff, Joanna Miles and Enid Mordaunt, 'Cohabitation: Lessons from North of the Border' (2011) 23 *CFLQ*, pp.302-322.

²⁴⁸ See Chapter 1.

²⁴⁹ Scotland and Sweden.

²⁵⁰ Australia, New Zealand.

²⁵¹ Australia: a term also taken up in American law reform proposals, such as by the American Law Institute's *Principles of the Law of Family Dissolution: Analysis and Recommendations*

A further basic requirement suggested was a shared household, looking to approaches to this concept in the Fatal Accidents Acts (1976) as already established in English law²⁵². In this respect, the checklist approach is useful to establish whether there is or is not cohabitation, such as is used in social security contexts in the UK, and elsewhere in varying forms worldwide, whether inclusive²⁵³ or exhaustive²⁵⁴, although the Commission also noted the American Law Institute's distinctive presumption that even cohabiting parties *without children* are officially cohabitants, but which use of the check list might rebut.

The fact that it was considered by the Law Commission that cohabitants with children should automatically qualify as eligible for application to any new scheme whatever the length of their relationship is not surprising as this is mostly a standard approach in default regimes worldwide, and recommended by the Law Society in 2002 and Resolution - the Solicitors Family Law Association - in 2000, although some jurisdictions impose a shorter period of qualification than for those cohabitants without children, e.g. Manitoba, and some other provinces of Canada .

However, this was the point at which the Commission's scheme began to show its potential complications. It was accepted that qualifying children in the cohabitation context needed to be identified despite the fact that it was conceded that a decision to cohabit where there were already non-familial children would have been carefully taken and therefore be likely to be evidence of commitment. This in turn led to a further issue - as to whether there should be a minimum relationship duration condition in this case and in the case of cohabitants without children at all.

All these points were therefore considered appropriate for referral to the views of respondents to the consultation, a conclusion that eventually began to appear in the Consultation Paper with monotonous regularity, yet when the consultation was compared with the final report the impact of the responses was less than convincing as a basis for the final view taken.

²⁵² *Kotke v Saffarini* [2005] EWCA Civ 221, [2005] 2 FLR 517, a case of partly 'living apart together' which might be relevant in considering any time requirement to establish settled 'cohabitation'.

²⁵³ In Scotland.

²⁵⁴ In Australia, New Zealand and currently under English law.

The next such point was that it was considered that eligibility should have some link to the potential remedy, with a view to 'isolating those cases which might be thought to merit access to a particular type of remedy'. This is because of the preliminary view expressed that any new remedy should be subject to judicial discretion rather than to automatic equal sharing, which in turn has implications for eligibility since this is 'less crucial where a scheme is discretionary'. There is some echo of this approach in the much later comment of Baroness Hale, when she had given judgment in the Scottish appeal of *Gow v Grant* that the Scottish system was more akin to proprietary estoppels than the use of the by then preferred tool of the constructive trust that the Supreme Court had identified in the English appeal of *Jones v Kernott*.

The Law Commission's remedial distinctions appeared to fall into two categories:

- (i) those where commitment suggested a partnership and needs-based approach
- (ii) those where economic impact was significant, for example including future child care costs.

It was considered that there should be a difference in the requirement for a minimum relationship duration, in which case questions arose as to (a) the optimum minimum relationship duration, (b) the relevance of relationship breaks, and (c) any alternative triggers for short relationships.

It was accepted that, in this relationship duration context, that further consideration needed to be given to remedies on death, about which the Law Commission had certain reservations, so that they would prefer to develop the court's existing jurisdiction.

A further point identified was the need to identify the precise end of a relationship, both for remedies on separation, for which long established separate household

case law in divorce could be relied on, and on death²⁵⁵ so that it could be established whether the cohabitation had ended in the parties' joint lifetime.

Some basic exclusions from any category of cohabitant were accepted: for example age - minors, including those of legal age for marriage or perhaps above, as some jurisdictions set; blood relations and family members within the prohibited degrees, where sexual relations would be criminal in cohabitation, as adopted by the social security approach²⁵⁶ although globally the range of prohibited degrees is variously wider than the criminalisation categories. Other exclusions include carers; commercial relationships; concurrent live relationships and moribund marriages, which create some potential problems²⁵⁷, but where a financial claim need not always be barred outright as the court can sometimes take all the circumstances into account under existing law in the case of such concurrent relationships.

It was, however, noted that other jurisdictions took differing approaches to concurrent relationships, so that this was another matter that was therefore left for discussion in 2006, and thus to the view of those responding in England and Wales to the instant consultation.

It was also accepted that those who have contracted a 'non-marriage' should not be excluded from eligibility and in fact perhaps have a stronger claim than most to be included, in that they have shown commitment by trying to contract a valid legal relationship.

By this stage in the Consultation Paper, the Law Commission had raised so many complex potential problems that from the contemporary perspective the practical view must be that if there is now to be workable reform following the 2006-7 failure, and soon, there are even greater arguments for a simpler system - preferably *much*, *much* simpler - rather than one more complex and more detailed.

²⁵⁵ *Gully v Dix* [2004] EWCA Civ 139, [2004] WLR 1399 at [24].

²⁵⁶ DWP, *Decision Makers Guide*, 2006, and later editions, currently 13th edn, Ministry of Justice, 2013, p4.

²⁵⁷ See for example *Jessop v Jessop* [1992] 1 FLR 591, an example of how complex concurrent cohabitation and marriage can be, since this was of both a happy marriage and a happy cohabitation!

Concurrent relationships, for example, are not new, neither in the past - such as that of the novelist Charles Dickens and Nellie Ternan, the subject of Claire Tomalin's excellent biography²⁵⁸ - or now, of which a classic example is the polygamous marriages which must be addressed by social security in the case of immigrants and certain religious sects and their British born children. This is another of those issues which realistically cannot conveniently be labelled 'too difficult', since ultimately in a multi-cultural society, which includes immigrants and asylum seekers, polygamous relationships are likely to be an everyday occurrence with which the law and practice must grapple. It seems ever Eire recognises this, since the latest research from Irish academics is now addressing the impact of polygamy in Family law²⁵⁹.

Cohabitation Contracts and Opt-Out Agreements

Having got as far as considering all the potential problems that would arise in any reform, the Commission was naturally obliged to address when and how cohabitants should be entitled to opt-out of the proposed statutory scheme; also the extent to which opt-out agreements should be reviewable by the courts. They proposed that statute should provide that the courts should be able to enforce cohabitation agreements dealing with property and finance. This is in no way novel since in theory if cohabitation agreements are not contrary to law of course the court will in logic enforce them, particularly if not unfair or in some way vitiated²⁶⁰.

However the consultation paper unsurprisingly took the view that enforceability of such agreements required clarification in order to encourage private ordering and the avoidance of litigation amongst the eligible cohabitants envisaged as participating in the proposed new scheme; and that further such agreements would need to include a valid opt-out indication so as to oust the proposed statutory scheme. The team considered that the status of such an 'opt-out' could have one of three potential

²⁵⁸ Claire Tomalin, *The Invisible Woman*, Penguin, 1990.

²⁵⁹ Avril Cryan 'Legal Responses to Polygamy and the Challenge Ahead for Ireland', paper to be given at the 3rd Triennial Conference of the International Centre for Family Law, Policy and Practice, Kings College London, 6-8 July 2016. And see further Chapter 9.

²⁶⁰ Chris Barton, *Cohabitation Contracts: Extra Marital Contracts and Law Reform*, Gower, 1985; Precedent of such a contract, (2008) 123 *NLJ*, 591. Professor Barton has been writing on this issue for 20 years at least..

consequences, being either (i) merely a factor that a court could take into account, (ii) binding, but enabling the court to ignore it in certain circumstances, or (iii) completely binding subject to the general law.

Suggested examples of a potential opt-out included

- (a) the case of those previously married and with adult children where it was desired to protect the separate inheritance of those children of each party,
- (b) the preservation of inherited capital for other relatives, or
- (c) preservation of money given by parents for provision of an adult child's home.

Thus such agreements would need to be certain, protective of vulnerable parties and accessible, that is, not too expensive or burdensome so that they could be used by those with few assets as well as those having assets of substantial value. It was accepted that this would require protection from undue influence, and clear indication that taking the opt-out step would exclude recourse to the statutory scheme unless the opt-out was vitiated in some way in accordance with the general law.

The position of minors in this context was considered to be a matter for consultation, since in English law a minor may only make valid contracts for necessities, but in other jurisdictions, for example, New Zealand, a minor's general contractual disability is suspended subject to scrutiny of the opt-out contract by the court²⁶¹. In Sweden consent of the child's guardian is required²⁶².

It was envisaged that any such opt-out agreements could either simply oust the statutory scheme (in total or only in part in relation to certain assets) or could make alternative provision for the parties, however that there should be some qualifying criteria for validity, e.g. as in other jurisdictions, writing, signature by the parties, independent legal advice, and possibly witness by a lawyer. Some uncertainty about the issue (and extent) of disclosure of assets appeared to be accepted on the basis that the point of the opt-out was to preserve independence of the parties' assets so that at least full disclosure might be considered burdensome. Again this was thought appropriate for the views of those responding to the consultation.

²⁶¹ Property (Relationships) Act 1976 s 211 (1)-(3).

²⁶² Cohabitees Act (Sweden) 2003, s9.

It appears that New Zealand is the only jurisdiction offering model cohabitation agreements to minimise the expense of private ordering although there are many private collections of skeleton agreements available on the internet which can be used by English and Welsh cohabitants and their legal advisers.

Grounds and criteria for review are well developed in other jurisdictions, such as Australia and New Zealand, but, owing to the long lack of recognition of similar agreements in England and Wales, the Law Commission's team accepted that this would be entirely open for discussion in the case of creating a system for cohabitation agreements in England and Wales. However it was thought that failure to observe qualifying criteria, revocation by conduct or supervening events should enable the court's review, for example. birth of a child, grave and unforeseen change of circumstances, including 'manifest injustice', and the passage of significant time - to address the latter of which a 'sunset clause', time limiting the agreement should be included.

It was also accepted that complications could arise where the parties had entered into an express declaration of trust in respect of certain property as the issue of whether this was a valid opt-out of the statutory scheme or not would need to be clarified.

Consideration was also given to whether there could be a valid opt-in to the statutory scheme by parties who were not otherwise eligible e.g. because they had not lived together for any prescribed minimum period.

The Final Report 2007

Compared to the consultation, this was rather a 'damp squib'. It is a slightly shorter, and more keenly focussed, document, which largely confirms the provisional conclusions of the Consultation Paper, that is, before any work had been done. It includes some revealing rationales for those concepts and principles which had, however, been rejected in forming its conclusions - and those provisionally

expressed in the initial paper - and broadly confirms the proposals which are advanced in the consultation. Some key responses which support the infrastructure of the scheme are summarised or directly quoted and throw light on the conclusions that have been reached in the recommendations.

As a result the Consultation Paper is much the more illuminating of the two, and in particular appears to have steered the research team's thinking throughout the project, so that the impression is more than ever established in the reader's mind that the team had already decided from the start in which direction its recommendations would go. This may be a good support for focus but one must query whether it has perhaps stifled creativity and imagination, in particular by fixing an established perspective too early to allow a real appreciation of the underlying issues driving cohabitation - thus it seems that the position of committed cohabitants did not have the best opportunity to be understood in the round and catered for appropriately in this 2006-7 project.

The Way Forward

While there are many key issues, and good ideas for addressing them, in the Law Commission's 2006-7 work, it is clear that not much detailed thought had been given to some, because of the very multiplicity of those which did, and do still, need such attention. In particular the concept of the ordinary layman finding cohabitation contract templates on the internet is more alarming than the continuing harm done by the ongoing incidence of home-made wills, which have been famously said to have put many solicitors' children through expensive private schools!

Setting up a normative scheme clearly requires articulation of many of these more complex points, but with the benefit of much of the 2006-7 work which is still relevant should not be unduly taxing. This is especially so because time has marched on since 2007, during which period the Law Commission has been considering agreements, needs and ring fencing of property for spouses. In the circumstances careful calibration could clearly now be achieved in accordance with the distinctions between the two classes of partners – those who are married or in a registered civil partnership and those who have elected cohabitation with a different regime, which might vary along a spectrum from separation of assets to some sort of community,

This particular task of detailed articulation is clearly at the very core of any discrete normative scheme, in which simplicity wherever possible obviously claims some priority. This includes the procedural consequences of proposed reform, addressing limitation periods, jurisdiction and anti-avoidance and the retrospective effect. There would also have to be transitional provisions, for which the successful transitional arrangements following the creation of the new Family Court, pursuant to the Crimes and Courts Act 2013, would be a clear model, together with the way that the Rules Committee has managed the change from the Family Proceedings Rules 1991 as amended to the Family Procedure Rules 2010, in force since April 2011, as well as all subsequent amendments from April 2014 made through the recommendations of the working parties set up by the President to handle these much more complex changes.

A key feature of any scheme which took up the Law Commission baton now is that cohabitants are 'family' and as such should be part of the ongoing modernisation of Family Justice. In fact this is already being proposed by certain family practitioners, a core group of whom includes several of the newly qualified Family Arbitrators working under the Rules of the IFLA Scheme – the Institute of Family Arbitrators – pursuant to the Arbitration Act 1996.

Like the Family Law solicitor, David Burrows²⁶³, the group, led by Sir Peter Singer²⁶⁴ has already examined the Rules and found that there is no precise provision which requires TOLATA 1996 applications to be made in any particular court, despite this class of business normally being assigned - as a 'trust' case- to the Chancery Division. This is because the CPR 1998 refers to such an application being made to 'a Court', which could equally well be the new Family Court, where - as already mentioned in the case of *Seagrove v Sullivan*²⁶⁵ - in practice a TOLATA application is already sometimes consolidated, when the need arises, with a purely Family Court application.

²⁶³ See Chapter 1.

²⁶⁴ Formerly Singer, J, of the Family Division of the High Court from which he has now retired.

²⁶⁵ [2014] EWHC 1410 (Fam).

Broadly, it was accepted in 2006 that jurisdiction should follow that in financial relief in divorce²⁶⁶ now called ‘financial provision’ and itself now subject to some European regulations, but that jurisdiction under the Inheritance (Provision for Family and Dependents) Act 1975 depends on domicile, a different concept from the EU jurisdiction rules. Thus it may be time to reconsider how jurisdiction should operate in relation to any potential new scheme on death provision since domicile ‘is looking increasingly antiquated’ since most matrimonial jurisdiction now depends on habitual residence pursuant to the Domicile and Matrimonial Proceedings Act 1973 s 5.

However, while it was considered that in relation to cohabitants’ claims under that Act application would continue to depend on domicile, it was considered that claims on separation should be based on habitual residence, and the applicable law should be English law, the law of the most recent cohabitation, usually called the *lex fori*.

Since the Rome Convention on contractual obligations does not apply to ‘rights and duties arising out of a family relationship’ it was considered that there was freedom when devising the potential new scheme for a choice to be made as to whether to allow foreign law to apply in certain circumstances. From the contemporary perspective it is possible that this should *not* be permitted, since the Institute of Family Law Arbitrators (IFLA) when setting up Family Arbitration under the IFLA Rules with the pan-professional support of the Chartered Institute of Arbitrators, the Family Law Bar Association and Resolution, expressly considered this point and elected to restrict the scheme in its Rules to English Law, although this would not preclude recognition of foreign status, such as nationality, domicile and marriages.

With regard to limitation it was provisionally considered appropriate to provide that claims should be brought within one year of separation but that this should be a matter for the views of those responding to the consultation.

It was also accepted that the potential new scheme should not be fully retrospective but that some provision might have to be made for relationships which had begun prior to its introduction because of the impact on existing property and contractual

²⁶⁶ No longer ‘ancillary relief’.

rights, implied trusts and estoppel equities, and that the comparative experience of New Zealand was looked to for assistance in determining how the transitional arrangements into full application should be handled.

Conclusion

Since overall in 2006-7 it was accepted that generally the scheme envisaged by the Law Commission would be likely both to confer benefits and to impose some costs but to save others, the government's total abandonment of the work in 2011 is both surprising and wasteful, and there seems no reason not to recycle as much of it as is still useful, as Lord Marks' Bill now seeks to do.

However, the very complexity of the Law Commission's vision of how this might work out is a strong indicator of the crucial role of simplicity in achieving success in introducing any reform, since it is clear that many have already fallen at this final hurdle of actually achieving a practical normative scheme to address the cohabitants' overall situation. This is particularly so since cohabitation is clearly *not* the same as marriage or registered civil partnership, but *has* certain practical and ideological similarities which should be accepted as conferring a normative family identity.

The 2006-7 work should in principle therefore be liberally adapted wherever the complexities identified by that 2006-7 team obviously demand, and such adaptation should probably err, if at all, on the side of simplicity and in many cases on excising unnecessary detailed prescription. The team resisted the 'marriage clone' approach, but was in favour of protecting vulnerable cohabitants and children and eliminating their hardship on relationship breakdown. It rejected an undesirable system of 'registered cohabitant' alongside marriage and registered civil partnership, but permitted opt-out on the basis that valid private ordering had made alternative arrangements which were not manifestly unfair at the same time as considering it had obviated any impact on the institution of marriage.

Further comment on how this vision might be realised is more conveniently reserved for Chapter 9 in which are discussed the Conclusions and Recommendations of the current project. With a view to encouraging some movement towards a discrete

normative scheme which might be accepted by the profession and the average cohabitant client alike, an example of rather simpler draft legislation than has so far been put forward is then found in the Appendix.

Meanwhile, before considering any other jurisdiction's apparently successful reforms in relation to cohabitants' rights which appear in Chapters 6-8, the next chapter, Chapter 5, will look at some potential reasons for the choice being made between cohabitation and marriage, an issue to which the Law Commission did not devote much attention while working on a possible English reform.

Chapter 5 The role of choice between marriage and cohabitation

Introduction

This chapter critically reviews what is known about choices made between marriage and cohabitation by couples in intimate relationships and, although evidence is sparse since little work has been done in this area, examines the potential impact on any reform of cohabitants' rights. This issue is clearly important in the context of any subsisting case against such legislation in England and Wales, particularly since the Law Commission 2006-7 work missed another opportunity in this respect through giving the matter little coverage.

The prime aim is to establish the reasons driving a choice for cohabitation, assuming a choice is actually made, rather than a couple's simply drifting into one or the other potential relationship. A secondary aim is to evaluate how this might affect whether there should be cohabitation reform at all and, if so, what form it should take.

While earlier investigation appears to indicate a clear case for legislation to articulate cohabitants' rights in a discrete normative scheme, two further investigative tasks must be undertaken before the precise nature and scope of such a scheme for England and Wales can properly be extrapolated from the evidence:

- (1) what is the role of choice between marriage and cohabitation?
- (2) what is the extent of the remaining impact, if any, of the hostility which has been long identified to provision in English law for cohabitants' rights, despite the ongoing efforts of supporters of legislative reform which have, most recently, now been unsuccessful for a decade and a half since the papers of Resolution (in 2000) and the Law Society (in 2002) each proposed their own schemes.

However, more recently there has apparently been such change in official attitudes – for example the enactment of the Marriage (Same-Sex Couples) Act 2013 which goes way beyond the Civil Partnership Act 2004 – that the answer to the second of the above questions certainly cannot be presumed.

In fact, former resistance to cohabitants' rights which the British Attitude Surveys cited by the 2006-7 Reports of the Law Commission seemed to have at last displaced must have been one of the longest running opposition lobbies of all time. Literature had already begun to pour out well before the Law Commission's 2006-7 work, stretching from the strong opposition of Deech in 1980²⁶⁷ through immovable opposition to the plight of Mrs Burns in 1984 and sterling work in 1999 on comparative clarification of the impact of trusts on cohabitant property by Mee²⁶⁸. He in fact, did not take sides at all but appeared simply to accept that the 'problem' could be addressed by doctrinal provision in the common law which he rehearsed in detail in his monograph.

This was coincidentally when the timeline of encouraging academic comment, in particular by Barlow and her various teams of colleagues, began to gather momentum, with Barlow and Lind's creative 1999 article²⁶⁹, and the papers of Resolution and the Law Society, although the literature mostly tails off by the time of Baroness Hale's comments in *Jones v Kernott* in 2011 and *Gow v Grant* in 2012. Resolution continued to publish material supportive of Lord Lester's aborted 2008 and 2009 Bills, in particular an associated consultation paper before the first Bill²⁷⁰, although none of these attempts to advance the matter were any more successful than in the pre-2000 a period.

1. Marriage or cohabitation?

The key question in relation to the first investigation appears to be: *Why* do people not marry but prefer to cohabit?

²⁶⁷ Ruth Deech 'The case against legal recognition of cohabitation' (1980) 29 *International and Comparative Law Quarterly* pp.480-497

²⁶⁸ John Mee, *Property Rights of Cohabitants*, Hart, 1999.

²⁶⁹ Anne Barlow and Craig Lind, 'A Matter of Trust', (1999) 19 (4) *Legal Studies*, 468, pp.469-485.

²⁷⁰ Resolution, *Living together, Shared Home, Shared Rights: Reforming the Law for People Who Live Together*, 2008.

This question was to some extent addressed by the Law Commission in Part 2 of their initial Consultation Paper No 179 in 2006, which is entitled 'The Social Context', and also in Part 5, however in a somewhat inconclusive and dismissive manner.

Why do people not marry but prefer to cohabit? – The evidence

Treatment of this question in the consultation paper is largely based on statistics and trends from the literature, such as Kiernan²⁷¹, Kiernan and Smith²⁷², Kiernan²⁷³ and Murphy²⁷⁴ and the various ONS statistics, starting with the 2001 Census²⁷⁵ which track the relative numbers and classifications of persons in the age group 16-59 living with a partner outside marriage, in the process recording that 25% of children in the Millennium Cohort were born to cohabiting couples and 15% to couples 'not living together in any co-residential relationship'.

However, at the same time, these statistics were used to conclude that 'marriage remains the most popular form of partnership' with 10 million married couples recorded in the 2001 Census, and 7.6 dependent children in these families, leaving only one in six dependent children in a cohabiting couple family.

It is therefore difficult to see how these statistics do more than confirm what the Government Actuary has been warning that we should expect by 2030, namely an explosion in cohabiting numbers and a corresponding fall in marriages below the present 10 million, but without adequately addressing the *reasons* for this.

²⁷¹ Kathleen Kiernan, 'The Rise of Cohabitation and Childbearing Outside Marriage in Western Europe' (2001) *International Journal of Law, Policy and the Family* p.1.

Kiernan, K (2004) 'Unmarried Cohabitation and Parenthood in Europe' 26 *Law and Policy* 33, p. 40, figure 2.

²⁷² Kathleen Kiernan and Kate Smith, 'Unmarried Parenthood: new insights from the Millennium Cohort Study', (2003) 114 *Population Trends* 26, figure 1.

²⁷³ Kathleen Kiernan, 'Unmarried Cohabitation and Parenthood in Europe' (2004) 26 *Law and Policy* 33, p. 40, figure 2.

²⁷⁴ Michael Murphy 'The Evolution of Cohabitation in Britain, 1960-1995, (2000) 54 *Population Studies* p.43.

²⁷⁵ ONS (2001) *Census 2001*, Table S004.

To return for the moment only to these particular statistics, together with the work of Haskey²⁷⁶, and Haskey and Lewis²⁷⁷, on the contemporary non-residential phenomenon of 'Living Apart Together', the 'numbers' establish a slightly higher percentage of cohabitants within the population than might appear from the bare statistics alone.

From this and other statistics at their disposal in 2005-6²⁷⁸ the Law Commission appears to deduce that two reasons for cohabitation being preferred to marriage in the potentially 'coupling' age group is

- (1) the older age at which the data establishes that marriages have more recently been taking place, the average age having risen in 2003 to 31 for men and 29 for women, and that is because of
- (2) 'people's tendency to cohabit in their first partnership' together with 'older age when entering into first partnerships'

for which latter perception they rely on the 2000 work of Ermisch and Francesconi²⁷⁹

From this the Commission also concludes that cohabitation has overtaken marriage as a preferred first partnership, but in spite of the fact that their project expressly excluded any consideration of a discrete cohabitant *status*, they do not appear even to have considered cohabitation as a freestanding *state*, apparently ignoring the distinction between the two concepts.

²⁷⁶ John Haskey 'Cohabitation in Great Britain: Past Present and Future Trends – and Attitudes' (2001) 103 *Population Trends* p.4 and p.26; John Haskey, 'Living Arrangements in Contemporary Britain: Having a Partner Who Usually Lives Elsewhere' and Living Apart Together (2005) 122 *Population Trends* p.35.

²⁷⁷ John Haskey and Jane Lewis Living-Apart-Together in Britain: Context and Meaning' in (2006) 2 *International Journal of Law in Context* p.37.

²⁷⁸ Office for National Statistics, (ONS) (2005) *General Household Survey 2004*, table 4.11; Office of National Statistics (ONS) (2005) *Social Trends* p35, p.24; Office for National Statistics, (ONS) (2006) *Social Trends 36*, figure 2.12 and *General Household Survey 2004*, table 5.3.

²⁷⁹ John Ermisch and Marco Francesconi, 'Patterns of Household and Family Formation' in Richard Berthoud and Jonathan Gershuny (eds) *Seven Years in the Lives of British Families*, Policy Press, 2000.

However, while their brief clearly restricted *their* project, this was not necessarily helpful in precluding any in depth consideration of *why* cohabitants are cohabiting rather than marrying. This would have been a valid inquiry if the Commission was going to consider making such limited investigation as they did, because the answer to what seems to be a vital question might have had significant influence on their legislative proposals, as indeed it is likely to do so in the present project.

Following this somewhat inconclusive trawl of statistics, the Consultation Paper then looks at class in relation to cohabitation and concludes that data on socio-economic status shows that, while cohabitation began as a middle class syndrome, Ermisch and Francesconi identify it as one which has now 'become a classless phenomenon, at least as far as its prevalence at the outset of a relationship is concerned'.

The Commission considered that this was supported by the British Social Attitudes Survey of 2000, although the Consultation Paper goes on to deduce that the ultimate destination of these cohabitants - that is whether into continued cohabitation, separation or marriage - is influenced by economic circumstances. This is backed up by data on renting through the private sector versus owner occupation of homes, apparently suggesting to the Law Commission the relevance of the fact that cohabitants apparently earn less and that this in turn may be because of their younger age (than married couples) and/or reflect their desire to emerge from the relationship quickly if they wished to separate.

Anecdotally, the latter reason has always apparently been the main driver for cohabitation rather than marriage, and this does seem to be borne out by the many reported cases where a cohabiting relationship seems to have started happily only to end up in (usually) the female cohabitant suing the man for a share of the home. This was a pattern which began in the early 1970s with such cases as *Eves v Eves*²⁸⁰ in 1975 and of course the notorious *Burns v Burns*²⁸¹ in 1984 and further into

²⁸⁰ [1975] 1 WLR 1338.

²⁸¹ [1984] Ch 317.

the 1990s, and 2000s, for example *Windeler v Whitehall*²⁸² in 1990, *Oxley v Hiscock*²⁸³ in 2004, right up to the most recent *Jones v Kernott*²⁸⁴ in 2011.

Thus these conclusions of the Law Commission's, in so far as they go, seem to be largely speculative, despite the sound basis of numerical and statistical data on which the deductions are based. But the Consultation Paper then seems to make assumptions for which not much sound data is offered at all: for example, that 'it is increasingly common for a couple to cohabit prior to marrying for which the same address of the parties when giving notice of marriage is relied on - since in 2003 78.7% of spouses did this whereas in 1970 the equivalent figure was 10%.

The Commission relied on *Haskey*²⁸⁵ for their information that 'the median duration of pre-marital cohabitation [is] 27 months' and their conclusion that 'Cohabitation... may be consciously viewed by one or both parties from the outset as a trial which may lead to marriage, or the parties may drift into cohabitation and from there to marriage'.

If these conclusions were any basis for not examining cohabitants' reasons for not marrying any further, this seems a rather shallow investigation, as even without a brief for addressing a cohabitant's *status*, and believing that cohabitation was only a transient *state*, the Commission might obviously have been assisted in their work by knowing more about why people do cohabit rather than marry.

Nevertheless, the essential transience of the phenomenon seems to be a common conclusion amongst specialist professionals and not only in the UK. Eight years later in 2014 a key session of the 2014 annual conference of the AFCC²⁸⁶ concluded without obvious empirical support, that most cohabitants were young, poor and in transient relationships²⁸⁷. Moreover, although the session had been examining

²⁸² [1990] 2 FLR 505.

²⁸³ [2004] EWCa Civ 546, [2005] Fam 211.

²⁸⁴ [2011] UKSC 53.

²⁸⁵ *Haskey* n272.

²⁸⁶ Association of Family Conciliation Courts, the leading organisation uniting American family justice across all states.

²⁸⁷ Rachel Kennedy, Joyce Woodford & Dawn Kuhlman, 'From Chaos to Co-Parenting: Helping Unmarried Parents To Work Together', Session 69, AFCC Annual Conference, Toronto, Canada, 28-31 May 2014.

ways of helping separating cohabitant parents to work together over contact with their children on the basis that half of all children born in the USA were born to unmarried parents, it had apparently not occurred to the presenters that a reason for any undocumented transient relationships might equally be prior broken relationships, including dissolved marriages, and that the lack of commitment to the ruptured cohabiting relationships might be previous adverse experience in failed relationships, which had produced the children now requiring the contact which was to be promoted.

This conclusion is, nevertheless, also supported by American population literature, for example by Oppenheimer²⁸⁸ (2003) and Bianchi²⁸⁹ (2014), neither of which sources were available to the Law Commission, Oppenheimer as they did not appear to have considered that particular Oppenheimer resource, and Bianchi as it postdates the Law Commission work.

It is of course a pity that UK statistics have not so far captured an equivalent numerical demographic picture for British cohabitants, but even in so far as obviously escalating numbers do assist the argument for legal recognition and provision for cohabitant families, numbers alone are obviously not the entire story – a conclusion which it was possible to discern at the outset of study of this topic - and the Law Commission barely touched on other elements.

One suggestion for the rise in cohabitation and fall in marriage is that the former ‘shotgun weddings’ pattern notable in the past has now been replaced by cohabitation²⁹⁰. Others suggest that cohabitation is often a routine preparation for marriage, particularly for second marriages²⁹¹ or is the preferred choice as a first couple relationship.

²⁸⁸ V K. Oppenheimer, ‘Cohabiting and Marriage during young men’s career development process’ (2003) 40 *Demography*, pp127-149.

²⁸⁹ S.M. Bianchi, ‘A Demographic Perspective on Family Change’ (2014) 6 *Family Journal of Theory and Review*, pp.35-44.

²⁹⁰ Anne Barlow, Simon Duncan, Elizabeth Cooke, Geraldine James and Alison Park, *Cohabitation, Marriage and the Law*, Hart, 2005.

²⁹¹ Haskey, n276, n 277..

Only in 11 short lines at page 39 of the initial 2006 consultation paper, on which their project was based, does the Law Commission concede that some couples, whom they identify as 'maybe' less than 10%, appear consciously to select cohabitation rather than marriage, at the same time simply noting, but not detailing, significant literature on this point, such as Barlow *et al*²⁹²: Barlow in a variety of teams being the leading commentator on cohabitation in England and Wales over a long period.

However the Commission does also concede that cohabitation has become 'an established part of British society' and later in the consultation paper that couples both appear to believe in the 'common law marriage myth' - that is, believing that they have or will become married after a period on account of their cohabitation²⁹³. They also consider that the legal impact of marriage is far down their list of priorities when couples are arranging their weddings²⁹⁴. Both of these research papers were perhaps regarded as supporting the concession that cohabitation is now an established incidence of adult living arrangements.

It is fair to say that the Commission does record a hope that that the *Living Together* campaign, on which Barlow *et al*'s 2007 research was published in the same year as the Commission's final report, would alert cohabitants to the necessity of formalising their relationship and disentangling 'the legal aspects of marriage' from the other 'religious or cultural facets of the institution' which they might consider less 'necessary or desirable for their relationship'. Sadly since 2006-7 the *Living Together* campaign has proved to be the triumph of hope over experience expected by those aware of the similar project some years ago sponsored by NatWest Bank for the law reform society JUSTICE.

However the report does go on to recognise that some individuals deliberately choose *not* to marry so as to retain their legal independence, but does not explore any further *why* that might be, although it does recognise that in some cases that might not be a choice but a default position because one or the other party might not

²⁹² n290.

²⁹³ Anne Barlow, Carol Burgoyne and Janet Smythson, *The Living Together Campaign: an Investigation of the Impact on legally aware cohabitants*, Ministry of Justice, 2007, since available at www.justice.gov.uk, last accessed 3 November 2013.

²⁹⁴ Chris Barton and Mary Hibbs, 'Perceptions of the Affianced' (2001) *Family Law*, p.197.

be free to marry, for example, as in the 1980 example of *Watson v Lucas*²⁹⁵, a housing case in which the woman who had cohabited with a married man for a lengthy period was held to be a member of his family for the purposes of her rights in their rented property, or because one party - the stronger financially - might be unwilling, owing to the financial responsibility thus undertaken. This situation has, of course, since somewhat changed following the *Radmacher v Granatino*²⁹⁶ decision of the Supreme Court because such concerns of the richer party can now be addressed with a pre-nuptial agreement, a trend which has kept much of the Family section of the legal profession in work ever since.

There is at least significant literature on such disincentives, for example Hale²⁹⁷ in 2004, MacLean and Eekelaar²⁹⁸ in 2005, and the Gingerbread Policy Seminar debate in 2011, which was held at the Athenaeum Club on this very topic on the motion 'No man in his right mind should marry. No woman in her right mind should cohabit'. As a result it probably must be conceded that there is a strong suspicion of financial motive in deciding to cohabit rather than to marry, as was established to be the situation in the 1995 case of *Atkinson v Atkinson*²⁹⁹ where the parties actually admitted their financial motive in not marrying!

There is also some reference in the Commission's 2006-7 work to concurrent relationships, other than those which may exist in a case where one party is apparently openly not free to marry, as in the example of *Watson v Lucas* already mentioned. In this respect, the Commission identified in the initial consultation paper such cases as *Jessop v Jessop* where there were concurrent live relationships involving two separate families, the existence of neither being known to the other party in either relationship. The Final Report acknowledges the principle, as generally accepted in other jurisdictions having a scheme for financial relief on cessation of cohabitation, that such relationships should qualify on eligibility for cohabitants' rights schemes, and as in fact Australian law expressly allows³⁰⁰.

²⁹⁵ [1980] 1 WLR 1493, CA.

²⁹⁶ [2010] UKSC 42.

²⁹⁷ Baroness Hale, 'Unmarried Couples in Family Law', (2004) *34 Family Law* p.419 at p. 422.

²⁹⁸ Mavis MacLean and John Eekelaar, 'Taking the plunge: perceptions of risk taking associated with formal and informal partner relationships (2005) 17 *CFLQ* p. 247 at 257.

²⁹⁹ [1995] 2 FLR 356.

³⁰⁰ See Chapter 8.

Nowhere, however in this range of reasons contemplated by the initial consultation paper does the Law Commission investigate in any detail precisely *why* in each case a decision might be made by a couple, or one of them, that they shall not marry but shall instead cohabit. In particular no focus has been trained on whether recognition of cohabitation for purposes more extensive than those already existing at the time of the Law Commission's work would impact in any way on marriage, although in their 2007 final report it is conceded that neither in Australia - where fundamental reform had preceded the Law Commission's work - nor in England and Wales had *any* connection ever been established between cohabitation law reform and an associated drop in marriage figures.

Possible reasons for a preference for cohabitation over marriage

Of the various reasons acknowledged, either explicitly or by implication, in the Law Commission's two reports, the most significant appear to be

- (i) treating cohabitation as a temporary or preparatory stage to marriage;
- (ii) believing that established and stable cohabitation over a period carries the same rights and obligations as marriage, that is, 'the marriage myth'³⁰¹;
- (iii) risk aversion to the responsibilities of marriage;
- (iv) a preference for legal independence or 'autonomy', connected or unconnected with (iii); or
- (v) religious objections to divorce, either by of one of the parties to a new relationship which can thus only be an unmarried one, or of a party to whom one of the parties is still formally married, and that party's existing spouse refusing a divorce.

Nowhere, however, has any consideration apparently been given to the extensive feminist literature on the nature of marriage and the feminist objections to it, nor to the nature of the commitment which some cohabiting couples nevertheless apparently *do* have to their relationship, although this possibility is acknowledged in sections 2 and 5 of the initial consultation paper.

³⁰¹ Rebecca Probert, 'Common Law Marriage: Myths and Misunderstandings', (2008) 20 *CFLQ*, p.1.

This disregard of the feminist perspective is despite the fact that the concept of a separate regime for cohabitants – that is, preserving their autonomy but recognising their commitment - is ultimately rejected in section 5, a conclusion which seems to hint at the impact of the extensive consideration of the importance of marriage and the need to support it.

However reference *is* then made to the literature *against* any recognition of the analogous nature of cohabitation to the functionality of the marriage relationship - despite the validity of this analogy, which is strongly supported by the long standing work of Barlow and her teams at different times over many years, and which seems to suggest that the functionality role of cohabitation has simply not been given serious consideration by the Commission's 2006-7 project. Barlow's work over time has made this functionality very clear and cohabitation's essential characteristics are also clearly the driver for the Australian and New Zealand, Scottish and even Spanish approaches³⁰², besides traces of this recognition existing in English law in the periodic housing cases such as *Watson v Lucas* already mentioned.

Surprisingly, the Church of England did not oppose reform, despite the fact that it might fall short of Biblical ideals, although some other religious bodies did and continue to do so³⁰³ and there was significant adverse response recorded in section 2 of the Final Report from members of the public.

Categories (i), (ii) and (iv) of the possible 'anti' reasons set out above are relatively easy to understand, but the 'autonomy' objection of category (iii) possibly requires further investigation, and (v), religious objection, may be a topic where opinion has moved on in various ways in the last eight years, and which also has connections with the second investigative task – that is, whether there is *still* such serious general opposition to reform as to preclude, or at least seriously limit, the potential design of any new normative scheme for cohabitants' rights. Thus the next topic, not addressed by the Law Commission at all, must be the highly elusive 'autonomy' argument for choosing cohabitation rather than marriage.

³⁰² See Chapters 6-8.

³⁰³ For example the Catholic Church, including the present Pope.

What is the ‘autonomy’ which cohabitants apparently prefer, so as to lead them to avoid marriage and prefer cohabitation?

For an answer to this question, first recourse should probably be had to the feminist literature on the subject, a leading commentator in which is Professor Rosemary Auchmuty, who is basically opposed to state regulation, whether by marriage or civil partnership³⁰⁴. It seems that this may reflect a strongly held belief, in the gay communities as much as amongst feminists, which, it seems, have always traditionally preferred private ordering including resolution of any disputes. This was apparently on the basis that both groups were always a minority and therefore depended on community solidarity, which could thus not afford internal dissension, especially where their communities were small, so it was more important to rely on one another’s support than to seek external enforcement of any rights they considered they might have against one another.

For many feminists - of either sex, since it appears that neither feminist belief nor feminist scholarship is necessarily uniquely restricted to women – the prime question seems therefore always to have been ‘Why would anyone want to marry in the first place?’

At least one male writer, Haffner³⁰⁵, has taken up this theme.

While there is a strong tradition of antipathy to marriage in both first and second wave feminism - which had its roots in the differential treatment of women in marriage until the comparatively recent post 1960s social and legal changes - academic researchers in this area point out that many women who have been married and divorced are very clear that they would not marry again.

There are also indications that people in general have developed an inertia, even if not an antipathy, towards marrying, as when most women now work, earn and are

³⁰⁴ Rosemary Auchmuty, ‘Out of the Shadows: Feminist Silence and Liberal Law’ in Carl Stychin and Vanessa Munro (eds) *Sexuality and the Law: Feminist Engagements*, Routledge, 2007, pp. 91-124, reprinted in Leslie J Moran, *Sexuality and Identity*, Ashgate, a volume in the International Library of Essays in Law and Society, general editor Austin Sarat; Rosemary Auchmuty, ‘What’s so special about marriage? The impact of *Wilkinson v Kitzinger*, (2008) *Family Law Quarterly* 475, pp 475-6.

³⁰⁵ Julian Haffner, *The End of Marriage: Why Monogamy is not Working*, Random House, 1993.

separately taxed they cannot see what difference it makes to be married except in relation to inheritance tax. While for IHT to be relevant there must be enough money available to protect for this tax to impact at all, it is now fair to say that with rising property prices and an IHT limit which does not keep pace even with periodic adjustment, this approach may be changing, especially if the government does in fact continue to legislate for significant marriage tax incentives.

Nevertheless, it is difficult to comprehend such an incentive actually making a real difference to a decision as to whether to marry or cohabit that any reasonable person would actually marry for a relatively limited tax incentive.

The same reservations about marriage, however, might also apply to any normative regime for cohabitants' rights, since recent research still being undertaken by Auchmuty has indicated that civil partners who entered into a civil partnership under the Civil Partnership Act 2004, and then were amongst the earliest to dissolve their partnership, were amazed and dismayed to find that the Family Court had the power to alter their previously amicable and mutually agreed division of assets and financial responsibilities, which they had apparently expected still to be able to do on dissolution of their civil partnership because that had been expressly promoted by the government in 2004 as 'not gay marriage'.

While these early civil partnership financial provision awards were no doubt made in individual cases because the agreements in question did not make proper provision for the needs of the weaker partner financially, and were perfectly proper in relation to the relevant statute and the judicial discretion in determining whether to uphold such agreements when they were unfair, there is some evidence that the belatedly discovered power of state intervention in any legally formalised relationship *is* now regarded as a deterrent by some individuals who might have entered either marriage or civil partnership, particularly the latter³⁰⁶.

³⁰⁶ Anecdotally, the reason for antipathy to state intervention in civil partnership appears to be historic, because same sex relationships traditionally depended on mutual support in their communities, for example because of limited meeting places available in small towns or other regional centres for those in such minority relationships. Thus a culture of 'getting on with one another', and thus private ordering in relation to any disputes, was a normal feature of such communities, particularly until same sex relationships became socially acceptable in the early days of the new millennium when legislation was finally contemplated in the Civil Partnership Act 2004.

If this is so, it may mean that Auchmuty's current research project has inadvertently revealed the most credible reason for a choice between marriage (or civil partnership) and cohabitation, namely a desire to exclude state intervention in personal relationships and the formation of the contemporary family.

If that is the case then neither formally legislating for cohabitants' rights for those neither married nor in registered in civil partnerships, nor amending the Civil Partnership Act 2004 to include opposite sex cohabitants would find favour with either opposite sex or same sex cohabitants.

In that case, if fairness, protection of the vulnerable and avoidance of unjust enrichment is a part in principle of any potential cohabitants' rights scheme, it would appear that the New Zealand opt-out scheme³⁰⁷ would be the fairest one to follow, since this provides protection but enables a couple to reject that default scheme if they prefer arrangements of their own - a result which would have been achieved for *married* couples in English law if the Law Commission's 2014 Report on Marital Agreements and attached Draft Bill³⁰⁸ had been acted upon by the government; and this could easily have been adapted for cohabitants in relationships of either sexual orientation.

Indeed, if avoiding state intervention in their personal relationship is at the root of the preference for cohabitation rather than marriage, then certainly it seems there is a strong argument for some default scheme which can be opted out of, otherwise it seems that cohabitants seeking an alternative to marriage have stumbled on a new 'myth or misunderstanding', namely that entering into a registered civil partnership provides all the benefits of marriage without the label, but *none* of the downsides of dissolution, which naturally does provide legal control over breakdown of their relationship since the Civil Partnership Act 2004 s 72 *does* of course give to the court the same powers as the Matrimonial Causes Act 1973 on divorce!

³⁰⁷ See Chapter 8.

³⁰⁸ Law Commission, *Matrimonial Property, Needs and Agreements*, Law Com 353, published 27 February 2014.

It is not clear how those registered civil partners who so misunderstood the Civil Partnership Act 2004 had been so misled by their (uninformed) belief that their partnership was *not* subject to any financial provisions similar to those on dissolution of a *marriage*. However, in logic it was probably because their partnership was expressly promoted as *not* being gay marriage: thus as uninformed lay persons, potential civil partners did not make any attempt to check whether ‘all the same rights as marriage without the label’ also meant all the same obligations!

This seems surprising since all Parliamentary Bills are published, and the 2004 Act naturally received wide media attention, so it might be assumed that the registered civil partnership community knew what it was getting. On the other hand if opposite sex cohabitants can believe in common law marriage, despite all attempts to dislodge that belief, there is perhaps no reason to believe that non-lawyer registered civil partners would be more knowledgeable! - especially as it must be conceded that especially in the wake of LASPO 2012 government information for ordinary people has been outstandingly poor, particularly in the context of lack of legal aid for advice and representation.

Consequently it would appear more than likely that individuals of both sexes probably *do* avoid marriage *and* civil partnership in favour of informal cohabitation *because* this permits them to arrange their financial and property affairs as they wish without risk of *any* statutory interference, and that this might well be because the richer party does not want to be compelled to divide assets in any particular manner on separation – at least at the moment.

Identification of this situation may perhaps be a temporary position since following *Radmacher v Granatino* in 2010, it is now likely that most *marital agreements* will now be routinely treated by the court as binding in the absence of any vitiating factor, and therefore *civil partnership and cohabitation agreements* surely being treated likewise. This has certainly caused a sea change, since such agreements were formerly regarded in extensive case law as somewhat foreign to English law. However, despite non-activation of the Law Commission’s report and Draft Bill issued in February 2014, which recommended legislation to recognise agreements which complied with the Commission’s suggested conditions, the courts have been

enforcing such agreements, and the trend has continued to approach solicitors to draft them.

Consequently, whether or not the government eventually enacts the Commission's 2014 Draft bill, this approach of the court to honour autonomous marital agreements, could quite possibly impact on the treatment of cohabitation agreements as well, this is because any such initiative could be seen as a golden opportunity to enforce what governments have for years been attempting to persuade cohabitants to do³⁰⁹, namely to make self-regulating agreements at the start of the relationship, for disposal of their assets on separation.

However - as has been seen in the failure of numerous information campaigns, including *Living Together* - this reliance on education rather than more formal measures has *not* succeeded in its mission: thus it may be that cohabitants will simply continue *not* to make the recommended agreements!

The identification of cohabitants' reluctance - on the grounds that they wish to retain their own financial autonomy or other freedom - to avail themselves of a formal legal status for their relationship by getting married or entering into a civil partnership, therefore seems more of an argument *for* some form of normative regime for cohabitants' rights rather than *against* it. Regardless of the form of couple partnership, the enforceability of marital agreements, and the fact that the large numbers of cohabitants need not have them as their assets would normally remain separate and unregulated by any statute³¹⁰ amounts to a strong argument for having some default position for cohabitants.

This is especially so if, first, the autonomy claimed is the right to retain control over an individual's own financial arrangements through private ordering to the detriment of the state as well as the weaker party financially in the couple; and secondly, the government is serious about reducing the unaffordable costs of litigation on the separation of cohabiting as well as married couples and civil partners, and also to

³⁰⁹ In the *Living Together* campaign and other contexts.

³¹⁰ Unlike spouses under the Matrimonial Causes Act 1973 and civil partners under the Civil Partnership Act 2004.

encourage mediation and other ‘non-court dispute resolution’ methods in family law generally.

This government policy has generated a new acronym, N-CDR, now to be embodied in the Family Procedure Rules 2010³¹¹. To provide cohabitants with a default position an opt-out option might not be at all unfair, since clearly for an individual to claim a committed cohabiting relationship – that is the ‘autonomy constituency’ justification for not marrying or entering into a civil partnership - while declining to enter into a self ordering agreement is illogical and mutually incompatible, and appears to be the logical basis for the ultimate opt-out regimes legislated for in such jurisdictions as New Zealand³¹².

2. A case against cohabitants’ rights?

The key question in relation to this second investigative task appears to be:

Is there any remaining impact of the formerly long standing case against cohabitants’ rights?

This question was addressed in the Final Report of the Law Commission No 307 at 1.35 *et seq* and in more detail at 2.31 *et seq*.

Treatment of opposition to reform is, however, only very briefly and sketchily addressed in these sections although they repay detailed study since they do not appear to amount to evidence for objecting to *any* reform. Precise objections were to any scheme:

- (i) replicating the reliefs for married couples under the Matrimonial Causes Act 1973 or the Civil Partnership Act 2004 – thus not excluding differentiated legislation such as that in the Family Law Act 1996 Part IV;
- (ii) permitting automatic claims to a share of property by any cohabitant *per se* – in practice an unlikely result in law even, for example, of an extension to cohabitants of either the 1973 or 2004 Acts, which would be likely to restrict any such rights to existing judicial discretion under those statutes because of the overriding

³¹¹ President of the Family Division, *Twelfth View from the President’s Chambers*, 2014, www.judiciary.gov.uk/publications/view-from-presidents-chambers/.

³¹² See Chapter 8.

discretionary jurisdiction which is a distinctive feature of English family law. Thus a discretionary principle would be likely to be inherent in any reform – so in that case it is hard to see where any ‘discretionary’ decision giving automatic property rights to a cohabitant could come from;

(iii) weakening the role of marriage or setting up a ‘cut price’, ‘reduced’ or other inferior marriage clone – obviously a major absorption in 2006 but unlikely in practice a decade later when full marriage, on the same terms as opposite sex couples, was extended to same-sex couples in 2013.

The Commission also received some comments which indicated that a separate status of cohabitant was probably not especially desired by any individual or constituency, although that had been the effect of creating practical equality in some jurisdictions, both civil and common law.

This particular objection was broadly expressed to be in case there was a threat to marriage from the cohabitation alternative, although it was also noted that research in Australia had indicated that there had been a Nil impact on marriage in that jurisdiction following the inclusion of their own cohabitant ‘*de facto* relationships’ in Australian property relationship legislation. This would appear, in logic, to be because the two states of marriage and cohabitation are essentially different, in that positive decisions are evidently made to elect entry into one or the other for individual reasons on the part of each couple so that neither is in fact a threat to the other.

The Final Report also concedes that the opinion of the greater public in general can best be discerned from the British Social Attitudes surveys, rather than the individual emails received by the Law Commission in response to its consultation paper, which could not compete for weight with the volume of direct interview methodology in the BSA surveys, in support of which the last such survey then available to the Commission was cited.

Successive surveys had in fact shown a rising percentage in support of *accepting* cohabiting couples and their families as a recognised form of social unit, *and* in accepting some sort of reform, especially where the parties had children.

It would therefore appear to have been broadly established that reform which benefited cohabiting families *would* be acceptable to the wider public, although there might be some slight dismay emanating from religious groups which were amongst those individually identified in the Final Report. It may therefore be worth looking at what this (even mild) objection from religious groups is likely to mean in practical terms if reform is pursued, since religious belief is also given sometimes for a former partner's refusal to give a divorce to a spouse who is cohabiting with another person so as to release that party from a moribund marriage, and this presumably emanates from the same religious groups as might also still oppose cohabitants' rights.

What part does religion play (if any) as a hurdle to cohabitants' rights reform?

It is not evident from such quotations of communications as appear in either of the Law Commission's 2006-7 Reports that *religion* as such is really the stumbling block for any respondents to the consultation: while there may be some remaining pockets of resistance to legal recognition of cohabitation as a normative family form, there are firmer indications that tradition or culture is a much more likely hurdle to be cleared for comfortable acceptance by the public at large.

For example, in section 2 of the Final Report, which details some of the responses (adverse, positive and hybrid in nature) to the initial consultation, it is not recorded that the Church of England had sent in any objections on purely religious grounds, since they have merely stated that while the Church supports 'marriage as the best context for nurturing children' owing to its 'greater potential for a stable, committed and healthy environment' the Church is also 'sympathetic to reform that addresses the effect of relationship breakdown on children and those who make sacrifices for them'. Moreover it goes further in stating that there is 'strong Biblical precedent not only for upholding standards but also for introducing laws to address situations that fall short of Biblical ideas' and that 'the Church of England recognises that there are some issues of hardship and vulnerability for people whose relationships are not

based on marriage and that these need to be addressed by the creation of new legal rights³¹³.

On the other hand, the question must be asked to what extent is opposition to any perceived threats to marriage based not on religion, when the established Church now recognises divorce, and even in some cases remarriage in church subject to certain conditions, but on culture and tradition.

This is the approach of some of the most scholarly of the philosophical writers currently publishing on this theme, for example Grayling³¹⁴ whose approach is that 'Religion is a pervasive fact of history and should be addressed as such'. He goes on to prefer Humanism which 'has a rich ethical outlook, all the richer for being the result of reflection as opposed to conditioning or tradition'.

The tenor of his brand of philosophy is that religion, for many people, is really a traditional comfort in which they cannot, based on scientific discoveries, seriously believe, but that they accept the comfort just the same, so that the true thinker relies on humanism whose 'roots lie in rational consideration of what humankind's cumulative experience teaches; and that is a great harvest of insight'.

De Botton³¹⁵ takes up this theme in rejecting the supernatural claims of religion but pointing out the contributions of the great world religions to the many good principles by which we should live. These thoughts strike a chord with the approach of the (now secular) Spanish state, formerly so rabidly Catholic, to the appropriate principles in their 1978 Constitution, including to the problem of where to place religion in the post-Franco democracy, which they have so neatly dealt with in that new Constitution³¹⁶.

³¹³ Statements from the General Synod of the Church of England, and the Church's Mission and Public Affairs Council, February 2004.

³¹⁴ Anthony Grayling, *The God Argument: The Case Against Religion and for Humanism*, Bloomsbury, 2007

³¹⁵ Alain De Botton, *Religion for Atheists: a non-believer's guide to the uses of religion*, Penguin, 2012.

³¹⁶ See Chapter 7.

However religious and philosophical ideas of today are not the only potential influences on the moral infrastructure of a socially acceptable concept of cohabitation outside traditional marriage. The background to marriage in the Middle Ages was not exclusively or even mainly Christian, so that our Established Church, in what is claimed to be still a predominantly Christian country, is intellectually not even the strongest claimant to rule on what is acceptable to Christianity as the state religion, even if our diverse population was not now living in a religiously and culturally pluralist society.

Brundage³¹⁷ has explored the origins of religious thought in England in the Middle Ages and concluded that the basic beliefs of the Church of that time drew on many non-Christian sources. Christ himself said little about sexual relationships and it was not a core of his moral teaching, so that post-early Christian orthodoxy took many ideas and practices from other sources, such as Judaism and even paganism, a fact which Grayling periodically repeats in less scholarly newspaper articles. Brundage also shows in his study of the period 550AD to 1500 that Christian ethics have never been uniform or static, and that it also took a while for the Church to organise and take over regulation of sexual behaviour, especially extra-marital and non-marital relationships in the period before the Reformation.

Moreover, a system of recognised and regulated *concubinage* existed in Justinian's time, and Justinian actually legislated for protection of cohabitants and their families in recognising this status, a system which was not dead in Medieval Europe when Anne Boleyn came upon the scene in the 1520s at the court of Henry VIII of England.

Much has been written about that sovereign's divorce, but little on the fact of the continued existence of *concubinage* in that century which might at the time have raised the query of whether the divorce from Catherine of Aragon would have been strictly necessary, had it not been for Cromwell, the need for money from the dissolved monasteries, England's military concerns with the Protestant League against the alliance of Spain and the Holy Roman Empire and Anne's own

³¹⁷ James Brundage, *Law, Sex and Christian Society in Medieval Europe*, University of Chicago Press, Chapters 1-5 and 6-9, pp, 117-118.

preoccupation with the theological tracts of the time promoting the reformed religions.

Perusal of some contemporary documents suggests that the apparently pejorative label, 'The Concubine', by which Anne was widely known, was not entirely vulgar abuse of that haughty lady who unwisely made herself unpopular with some factions of the court, but a purely factual description. 'Concubinage', including registration of such relationships at the town hall), also persisted in France in modern times prior to the establishment of the PACS ('Pacte Civile de Solidarite') system, and has not in fact been abolished but merely superseded by the superior PACS model.

Thus the Church, which gradually took over regulation of the former, somewhat more flexible, adult relationships through canon law in the later Middle Ages, can therefore look back to a period since Biblical times when its doctrines turned more flexibly towards the tenor of the comments quoted above from its contemporary Synod and Mission and Public Affairs Council. Indeed there appears to have been more fuss in the Church over women bishops than cohabitation, and it is fair to say the Marriage (Same-Sex Couples) Act 2013 raised even more elevated concerns, so that some front line Christian church groups of various denominations remain active campaigners on the issue, since same-sex relationships are not, and, as far as it is possible to see, never have been, sanctioned by any world class religion, not only not by Christians and Muslims.

Conclusion

Accordingly, it does not appear that religion as such is any realistic bar to a normative scheme for cohabitants' rights, nor that there is a potential public outcry likely if such a scheme were introduced, although religion may certainly preclude some cohabitants from marrying a new partner if a previous spouse will not agree to a divorce, and that cohabitant is not minded to make use of s 1(2)(e) of the Matrimonial Causes Act 1975 to obtain one without consent. As to the influence of any of the other reasons for cohabitation being preferred over marriage - whether to

preclude or impact on the form of any reform – evaluation of the role of any of these potential hurdles belongs properly in the concluding chapter of this project³¹⁸.

³¹⁸ Chapter 9.

Chapter 6 Scotland

Introduction

This chapter evaluates the apparently successful Scottish scheme introduced for Scottish unmarried cohabitants by the Family Law (Scotland) Act 2006, and critically reviews its background and prompt execution.

The chapter's primary aim is to examine Scotland's potential contribution to the development of cohabitants' rights reform in England and Wales. The Scots scheme is likely to be of particular interest in that Scotland's statute is so far the only such scheme within the United Kingdom, or indeed the British Isles: although it was stated at the time of the Law Commission's 2006-7 project, that Eire was also considering such reform, nothing further appears to have been done to further this.

Moreover, much has been made by aspirant reformers - particularly in the wake of the Scottish referendum which decided against departure of Scotland from the UK Union - of the fact that some illogicality is seen in the existence of two entirely separate systems of law in relation to cohabitants in such close geographical and jurisprudential proximity. This is a highly relevant practical point, since not only is Scotland located immediately adjacent to the counties of the North of England, across a barely defined land border, but its distinct legal system enjoys the same final appellate court as English Law, in the Supreme Court at Westminster. This has inevitably now led to two distinct results when the law addresses cohabitant relationships in the UK's highest appellate court, so that the result is different depending on whether a cohabiting couple who separate live north or south of the border. The Justices of the Supreme Court are applying two completely different statutes when cohabitants' appeals arrive before them: the Trusts of Land and Appointment of Trustees Act 1996 in English cases and the Family Law (Scotland) Act 2006 in Scottish disputes.

Distinct characteristics of the Scottish and English legal systems

Although some unity between UK jurisdictions might be expected in modern times, considering the constitutional ties occurred as long ago as the Act of Union of 1707, there is in fact a very simple explanation for this division of legal systems, which in all probability did not even occur to any member of the three government ministries at Westminster which have still not moved to introduce cohabitation legislation in England. This is because most members of the Cabinet have no legal background at all, let alone as practitioners or academics: indeed there has not been a legally qualified Lord Chancellor and Minister of Justice in that post since before the last two ministerial reshuffles, when first Chris Grayling (with a background in the media) and now Michael Gove (with a background in journalism) were appointed by the Prime Minister to serve respectively in the coalition government of 2010-2015 and most recently in the Conservative government which took power in May 2015.

At least the Labour government which ordered the English Law Commission's work in 2006 always included a legally qualified Lord Chancellor, the last being Lord Falconer of Thoroton, who is no stranger to law reform.

What is this key difference between Scotland and England and why should it be important? The distinction is, of course, that Scotland has always enjoyed a separate species of legal system from England and Wales, a fact which most ministers should know, although they might not appreciate the nature of the distinctions, which is that, unlike that of England and Wales, which is a common law system – indeed the *first* common law system spread by England to its colonies long ago - Scots' law is *not* a pure common law system, but one which owes much to the influence of civil law systems such as that of the French, with which country Scotland had close connections in the Middle Ages at the time that the common law was developing in England and Wales, but Scotland allied itself frequently with France, England's main enemy at the time.

Clearly when the Plantagenet and later Tudor English sovereigns were battling with both countries – the unruly Scots on their northern border, and their old enemy, the French kingdom, at their southern extremities on either side of the Channel, Scotland

and France sought solidarity in a defensive alliance with each other against their perceived common enemy, England.

This was not all however. Such was the closeness between Scotland and France, from the signing of the treaty known as the Auld Alliance in 1200, that by the first half of the 16th century Scottish peers, who ruled Scotland as regents for three successive minor Scottish sovereigns, held land and even French titles in France. At this time, while English Kings and nobles from Normandy, Anjou and Aquitaine, had also held continental territories in mainland France for three centuries, by the time of the accession of Queen Elizabeth I in 1558 England retained nothing but Calais of its formerly extensive French possessions. Thus while English common law was being progressively developed by a series of strong Kings with able ministers, the leaders of Scotland, 'the Lords of the Congregation', spent time on their French lands and inevitably absorbed the influence of French law and government.

Only in the fourth year of the 17th century were Scotland and England finally united under one King, James VI of Scotland and I of England, coincidentally the only son of Mary, Queen of Scots, the third of the minor Scottish sovereigns whose youthful accession to the throne as babies had generated the series of regencies by Franco-Scottish peers who were thus inevitably under French influence and, through residence on their French lands, familiar with French law. Moreover it was not until the first decade of the 18th century that the political fusion of the Act of Union came about, far too late for England to impose any changes on the entirely distinct Scottish culture let alone its law.

Because of certain characteristics which are more akin to a civil law system than a common law one, some call Scotland's legal system a 'hybrid' or 'mixed' one, since it adheres to elements of both common and civil law systems.

To this day, everything about the Scottish legal system is foreign to English law - its courts, legal personnel, terminology³¹⁹ and substantive law - particularly in Family Law, where Scottish law has always sparingly awarded 'aliment'³²⁰, not the routine 'maintenance' through periodical payments that is a feature of English law, whereas Scotland approaches matrimonial property along the lines of the community enjoyed in France and other civil law jurisdictions, rather than the individual ownership with discretionary re-distribution of property and capital on divorce that is familiar in England and Wales.

Moreover, this discretionary distribution under the Matrimonial Causes Act 1973, which enshrines the post WWII English Divorce Law, has been jealously guarded by English judges who see it as a unique means of providing on marriage breakdown for the needs of the weaker spouse financially in an English matrimonial partnership. On the other hand while the Scots now statutorily protect *cohabitants* in a new 2006 Act (and previously did so by a species of common law marriage by habit and repute which the Act repealed) England and Wales provides no such regime for those couples who live together without being married, who must instead use the Law of Trusts in the Trusts of Land and Appointment of Trustees Act 1996 to establish their property rights, and are otherwise not provided for in any discrete legislative regime although some other aspects of English law recognises them as individuals.

This, therefore, was how in the 16th century it seems that Scotland drifted on sleep walking through a legal system which had absorbed some of the principles which were later developed when France's civil law system was modernised by Napoleon in 1805, and which thereafter spread through Europe in the form of their own national civil codes to all the countries that that activist Emperor had 'liberated', that is, more accurately conquered, systems which those countries later kept after his overthrow.

³¹⁹ For example, a claimant and respondent are known respectively as the 'pursuer' and the 'defender' and Scots junior first level judges are called 'sheriffs' which English people tend to associate with Robin Hood! – and if they have occasion to hear about Scottish sheriffs at all wonder why this office in Scotland is so named since Scotland lies significantly North of Sherwood Forest!

³²⁰ The Scottish word for American 'alimony' and English 'maintenance', originally from the 16th century English exported with our colonists to America, in some of whose legal systems alimony still persists, although in contemporary English law the relevant term is 'maintenance'.

In the same way, it seems that Westminster governments in London did not concern themselves with changing Scottish law to remove the civil law influences it had long before absorbed. There were two opportunities, first following the union of the two kingdoms under James VI of Scotland and I of England in 1603, then secondly, following the Act of Union in 1707, but neither was taken. Thus it is that, even in the 21st century, in comparative law terms Scots law still belongs exclusively to neither the common law nor civil law families of such systems, subtly mixing characteristic features of both.

Contemporary English perceptions of Scotland and Scottish law

It is not known whether, when the Scottish system was seen to be successful, any of this background in Scottish law was known by those ministers in the three governments which were concerned with the task of deciding whether there should be any implementation of the 2006-7 recommendations of the Law Commission³²¹.

However, in the case of the last days of the New Labour government of Gordon Brown, there were other more pressing issues in their last three years of office up to 2010, despite the fact that there was a lawyer Lord Chancellor in post, and that was Lord Falconer, who had already been involved in the major changes of the Constitutional Reform Act 2005, so possibly there was no time to think about the Law Commission's 2006-7 work at all.

In the case of the coalition of 2010-2015, and the following Conservative government which took office in May 2015, the leadership of a legally qualified Lord Chancellor had been lost, and certainly the then Minister of Justice, Chris Grayling, would not have realised the nature of the legal system in Scotland, unless he were specifically briefed by any of the dwindling staff of the Ministry of Justice who might have had the background.

Nevertheless, in theory the government's law officers, the Attorney-General and Solicitor-General - whose responsibility it is to advise the government and who are

³²¹ See Chapter 4.

both fortunately still appointed from the legal profession - should have been able to understand the nature of the compensatory scheme proposed by the Family Law (Scotland) Act 2006. They should certainly have noted its resemblance both to the English law of proprietary estoppel in its remedial flexibility, and to the English Law Commission's similar approach to relationship generated disadvantage. With antennae attuned to Europe they should also have appreciated that the civil law influence in the hybrid Scots system would have had the added advantage of being particularly understandable to European civil law systems, which would at least have imported a positive advantage in an era of much cross border movement and settlement by families which later break up. Even if neither the Scottish Act nor the English Law Commission's recommendations were welcomed in their totality, there were certainly indications that as one small part of the United Kingdom had swiftly achieved legislation in a highly topical contemporary field, England and Wales, albeit with more onerous obligations to a larger population, should not be far behind.

All the same, as was made clear on the release of the Djanogly statement in 2012 that nothing was going to be done in England just because Scotland had legislated, it seems that Westminster did not want to acknowledge any external pressures to change English law on cohabitants' rights, and did not mind also implying that that was particularly so if anyone thought that that pressure might come from *Scotland's* success in introducing a system which had earned a quickly produced and largely positive analysis by leading English academics in the Wasoff research³²².

Certainly, the particularly unappreciative, and impliedly pejorative comment on this positive analysis of Scotland's achievement by Mr Djanogly made sure to give no credit to Scotland for its prompt and innovative achievement, since his statement apparently did not hesitate to make clear that whatever Scotland had done, it was not going to be such as to lead an English government to do anything similar.

The fact that there were other English academics besides the Wasoff team who thought that this was a wrong approach by the government is evidenced by the

³²² Fran Wasoff, Joanna Miles, Enid Mordaunt, 'Cohabitation: Lessons from Research North of the Border, (2011) 23 *Child and Family Law Quarterly*, pp.302-322.

prompt statement, issued the same day from the Law Commission by Professor Elizabeth Cooke, immediately following the government minister's announcement³²³.

This, therefore, is why there is currently, and until any cohabitants' rights reform, a certain awkwardness, in that two distinct systems pertain on the mainland of the UK, depending on where precisely, within perhaps a few miles, a cohabiting couple lived when they fell out and took legal proceedings. Besides the geographical aspect, this situation has also been brought jurisprudentially into keen focus in two recent Supreme Court appeals, *Jones v Kernott* in 2011 and *Gow v Grant* in 2012, heard only a year apart, respectively concerning English and Scottish cohabitants, each under its current applicable law.

As it happened, the contrast between these two cases was particularly fortuitous, enabling comparison of the two distinct systems, since Baroness Hale – the only academic amongst the Supreme Court justices, and a long standing leading Family lawyer – sat on both cases, thus easily taking her opportunity in the second (Scottish) case to include some authoritative comment, actually within her judgment.

It was also particularly fortuitous that this opportunity came, as it did, such a short time after the Court had made what seemed a major fresh contribution to the English law applying to cohabitants in *Jones v Kernott*. Creative as the Court was in its treatment in 2011 of the English law of trusts as it applied to the family home whether of married or unmarried couples, Lady Hale's detailed comments on the potentially superior impact of reform along the Scottish lines could not conceal the unwieldiness of the English trust law as a tool to resolve disputed distribution of assets on a relationship breakdown. Her comments were particularly apt, informed as they were by her hands on experience of the Scottish system in *Gow v Grant*.

A secondary aim of the chapter is therefore to examine, against the background of the apparently successful Scottish scheme, the basis of the abandonment of the English Law Commission's 2006-7 work on potential reform in English Law, since there seems to be nothing in the Scottish scheme to put English lawyers off reform in

³²³ See Chapter 3.

English law and in fact much to encourage an equivalent English scheme, whether more or less similar or completely different. What rather does seem to be indicated is that there is simply no political will for reform in any of the main parties at Westminster let alone the government. Moreover, owing to the weakness of reasons claimed for this English failure to legislate, it seems worth establishing that whatever the Westminster government's real reasons, failure to legislate is not to be blamed on any claimed failure of the Scottish legislative achievement .

The background to Scottish reform

Scotland has always had its own legal heritage, sources of law and influences on both, and is proud of these differences, including its own Family Law (Scotland) Act 1985 dealing with financial provision on divorce, which demonstrates some strong distinctions from the equivalent English law.

It is not thus surprising that the Scots took the earliest opportunity they could to create some of their own legislation when the Scottish Executive decided in 2005 to reform a particular aspect of its Family Law by modernising its treatment of cohabiting families. Amongst other catalysts they have their own Law Commission, separate from England and Wales's³²⁴ and which is taken very seriously in Scotland where Scots have remained jealous of their traditions and way of life, which have in any case been easy for them to highlight and maintain, as it is a country with a small population, spread over a wild, disparate and relatively large rural landscape. Thus they have not had to absorb immigrants and *their* cultures in the same way as has happened in England and Wales (particularly England). The Scots clearly see themselves as essentially separate from England, English Law and the English, whatever the political union within the EU: indeed recent events indicate that the feeling is probably mutual.

³²⁴ Law Commissions Act 1965, a statute of the UK Parliament, setting up the distinct English and Scottish Law Commissions. The Scottish Commission has the equivalent task in Scotland as that in London has for England, to advise the government on the law, in the Scottish Commission's case to review Scottish law.

The Scots' unique discrete statutory regime addressing cohabitants' asset distribution claims on separation thus currently comes from the enactment of the Family Law (Scotland) Act 2006 ('the 2006 Act' or 'the Scottish Act') and is to some extent influenced by the background set out above. As already explained, in comparative law classificatory terms, Scotland is not technically a common law jurisdiction like England, but has a mixed common and civil law system. Despite the fact that it has its own Parliament and Scottish Executive, there is also still some English legislation which applies to Scotland alongside its own civil law influenced principles which endure in some contexts. This is because of certain civil law origins in the *ius civile*, - that is. Roman law - although this *ius civile* did not come directly from the Roman occupation but through the canon law of the Church, since the Roman Empire never had much impact in Scotland which they found unruly - quickly withdrawing behind the wall erected in the time of the Emperor Hadrian under whom construction began in AD122 to mark the northern extremity of their rule. Successive provincial governors from the time of Caesar in 44BC had incessant trouble with the Scots from the moment of their invasion and colonisation of 'Britannia' (as they called England, Wales and Scotland), and never succeeded in subduing the Celts who lived there.

Thus the Scots originally ingested the Roman Law influence, well established by the time of Charlemagne, from their association with France, and the English never did anything to eradicate that, even after they repressed the Jacobite risings of 1715 and 1745, nor, as it happened, in the time of George IV (1820-1830) who actually tried to woo the Scots to a closer relationship with England, by adopting their tartans and appreciating their art and architecture, certainly a contrast of approach with, but no more successfully than, his great uncle, the Duke of Cumberland, who had repressed their rebellion with great severity in the previous century .

As a result perhaps of the historic 'baggage' and (if they had realised that that was what they were objecting to) the civil law influence, it is perhaps not so surprising that the potential for learning any lessons from the Scottish Act was not received by government in England and Wales with much apparent enthusiasm, but a short summary of the Scots methodology and legislative process indicates the merit that has been overlooked.

Nature of the Scottish scheme

Some brief detail of the Scottish scheme indicates the broad outline of the system that Baroness Hale considers good enough that she was able to add, in - the now famous - paragraph 56 of her judgment in *Gow v Grant*, the view that 'English and Welsh cohabitants deserve nothing less'.

The Scottish legislation is an 'opt out' scheme as the parties can avoid the consequences by agreement in life or by will on death if they do not wish its provisions to apply to them. Compared to some other jurisdictions, such as Australia and New Zealand³²⁵, the changes are modest.

Cohabitants are defined in s 25(1) of the 2006 Act as a couple who 'are (or were) living together as if they were' husband and wife or civil partners: and the Act gives statutory guidance in s 25(2) as to how this is to be determined. Moreover this is done in a manner not dissimilar to the methodology historically widely used by UK welfare benefits assessments: that is to say, relevant factors include length and nature of the relationship and of any financial arrangements, although the Act does not refer to the existence of children nor to a minimum qualifying period as most other jurisdictions' schemes do.

Nevertheless, while first impressions of the provisions of the 2006 Scottish reforms are perhaps that they are not as clear and comprehensive as the Family Law (Scotland) Act 1985 is in respect of the law applying to spouses, the 2006 Act is undoubtedly superior to present provision for cohabitants' relationship breakdown in England and Wales, which still relies on the non-specific TOLATA remedies already mentioned, which are all that is currently available to separating cohabitants in English Law,

³²⁵ See Chapter 8.

Framework of the Family Law (Scotland) Act 2006: the policy of ‘easing of certain legal difficulties’³²⁶

In accordance with the original 1992 aim of such reform, which had its origins in a Scottish Law Commission report of that time suggesting that reform was needed, the core provisions of the 2006 Act are not as comprehensive as those in respect of spouses in the 1985 Act, which provides a financial provision scheme effective on marriage breakdown and dissolution, which is based on valuing and dividing property capital rather than awarding maintenance³²⁷.

The 1985 Act is itself not a community of property system as such, although it is not unlike those which pertain in European countries with civil codes. It nevertheless demonstrates some similarities to those systems, which, as already suggested, may owe something to a combination of the historical medieval relationship with France known as ‘the Auld Alliance’ and thus the long established influence of civil law.

The basic principle of the Scottish cohabitation scheme is that, as has been the case for spouses since the Family Law (Scotland) Act 1985 on separation and divorce, maintenance (known as ‘aliment’ in Scotland) is not usual but only awarded exceptionally, so that the financial consequences are normally confined to capital and property division together with maintenance for children only but none for adults: although there *can* be ongoing support under the 1985 Act for a spouse in appropriate circumstances, this is neither routine nor usual unless there are special circumstances and then it would be short term and the 2006 Act, creating the cohabitants’ system, follows the capital and property approach of the 1985 Act save that in the cohabitant system there is no power to order any maintenance payments

³²⁶ This now famous phraseology was initially that of the 1992 Scottish Law Commission report on general reform of Scottish Family Law, which was then preserved in the Memorandum of the Scottish Executive to the Scottish Parliament when proposing the legislation in the 2006 Act. That legislation was presented not as radical reform but as a means of dealing with the Scottish cohabitants’ social problem, which was the fact that the rising number of cohabitant families was not adequately addressed by their own outdated legal provision of recognising cohabitation as a common law concept of marriage by habit and repute, which might be compared to the inconvenience of English Law’s unsuitable remedy of resort to TOLATA 1996. In Scotland, their antiquated law was of the common law marriage by habit and repute was formally abolished by the 2006 Act.

³²⁷ Elaine Sutherland *Child and Family Law*, 2nd ed, (2008) W Green, paragraphs 16-017 to 16-186.

at all.

The 1985 Act is without doubt a clearer, more articulated, system than English Law's Matrimonial Causes Act 1973, as Sir Mark Potter, the then President of the High Court Family Division, identified, when he commented on its 'clarity and certainty in the case of *Charman v Charman* (No 4) (2007). It is therefore no surprise that the 2006 Act, dealing with the breakdown of a cohabitation relationship, makes no provision for maintenance for a cohabitant either during or after cohabitation.

Instead s 28 provides capital orders of 3 sorts:

- s 28(2)(a) (capital order in compensation for economic advantage gained by the defender from the pursuer's contributions, and for the pursuer's economic disadvantage suffered thereby);
- s 28(2)(b) (capital order for payment towards the future 'economic burden' of child care;
- s28(2)(c) (an interim order)

any of which must be applied for within one year of the cessation of cohabitation.

Sutherland is critical of the drafting of these provisions, in that there is lack of guidance on economic advantage and disadvantage in s 28(2)(a); 'untidy' language in s 29(2)(b) which does not make it clear whether periodical payments would be permitted instead of a capital payment, and which also does not cover the position of an 'accepted child' - the equivalent of the child 'treated' under English law as a 'child of the family'); and in all cases she finds that the one year time limit on application from the date of separation is too short, would lead to rushes to litigate and inhibit attempts to settle out of court. Baroness Hale agrees with her on the latter point: see further below.

Sutherland also examines the case law accumulated during the initial five year period 2006-2011 and concludes that judges are frustrated by the comparative lack of guidance in determining economic advantage and disadvantage in s 28(2)(a) cases - especially compared to the 'crispness' of the 1985 Act for spouses and civil

partners - and because there is no guidance as to the relevance of conduct, or of the existence of resources in making an award. It is, of course, possible that this might have been a concern in the minds of the ministers at Westminster when they decided to do nothing until further evidence of the Scottish experience was available, but one that could easily have been addressed in English drafting if the basic principles of the Scots scheme was found a useful prototype..

She also considers - as Baroness Hale does when delivering judgment in *Gow v Grant* - that a s28(2)(b) order should permit periodical payments, and also variation when circumstances change, and that it should be made clear that the carer's loss of earnings should be relevant. Sutherland further considers that the position of caring costs for the 'accepted child' and 'what it means to be a step-parent' require further examination.

She acknowledges that some further guidance on s 28(2)(a) was given by the Inner House of the Court of Session - (on the Scottish leg of the *Gow v Grant* - when that appeal was heard by that Court on 22 March 2011, before subsequent appeal to the Supreme Court. However she also commented that the Court of Session had not approached the matter with 'much enthusiasm' and had thus deprived future courts of useful guidance in interpreting terms. It is possible that the further consideration of the case when appealed to the Supreme Court in London has supplied any such deficiency in enthusiasm by the Court of Session, since - as may be seen below - Baroness Hale, herself a former academic who makes clear in her judgment that she has read the same research as Professor Sutherland, fortunately took the opportunity to address these and other practical issues.

However, Sutherland's³²⁸ main comment is that the initiative for this legislation was so long ago – 1992, over 20 years prior - and that while some of the problems identified could be addressed by statutory amendment, the more fundamental question of what is the right legal provision for contemporary cohabitants is urgent, since she says that some judges have questioned whether the Act's 'modest

³²⁸ Elaine Sutherland 'The Easing of Certain Legal Difficulties: Limited Legal Recognition of Cohabitation Under Scots Law', in Bill Atkin (ed) *The International Survey of Family Law 2011*, Jordan Publishing 2011, pp335-366.

reforms' are *adequate* for the legal recognition of cohabitants in an era of increased 'popularity and social acceptability over the intervening years'. This may be true of Scotland, although the Executive was initially cautious in introducing its reforms as their Memorandum prepared for the Scottish Parliament indicates. On the other hand the Scots have already exhibited superior proactive creativity to that of England and Wales in addressing the matter at all.

Any concerns about the *modesty* of the Scottish reforms also perhaps need to be considered in the light of the fact that as far as English Law is concerned any such progress may be a *policy step too far*, despite all the English evidence gathered, both at the Law Commission and elsewhere, that reform was clearly needed. This seems the more puzzling as it seems that there *were* some valid questions asked by the English government before they adopted their stubbornly negative stance, but these still do not adequately explain the absence of any drive for reform at all, besides which some were duly answered by early research on the operation of the Scottish scheme.

Why did the English government really decline to implement the Law Commission's recommendations and why did they blame that on the Scots?

In fact, there were, apparently, a number of reasons, apart from mere petulance with the Scots, which in the context of the paucity of official statement on the matter seem mainly to be summarised as

- (i) potential costs of legislating for England and Wales, and
- (ii) a belief that the Scottish system was not appropriate for English law.

There are, nevertheless, as strong arguments *against* these two reasons, as it appears have been claimed by the only official statements advanced for maintaining the clearly unsatisfactory *status quo*.

Cost of reform

The 'costs' argument originates in 2008, following the publication of the Law Commission's 2007 recommendations in the Final Report on their work of 2006-7,

when Bridget Prentice, the Justice Minister of the time, announced in Parliament that the government would not take any further action until the likely costs and benefits to the jurisdiction of England and Wales had been evaluated. For this, it was intended to await further empirical research. This research³²⁹ by the Wasoff team - funded by the Nuffield Foundation - sought to capture Scottish practitioners' practical experience of the operation of the new Scottish law over a 3 year period from its implementation.

The study was not restricted to cases which had reached court but was based on interviews with 97 legal practitioners, mostly solicitors, whose clients had consulted them about cohabitation under the new legislation. The project used questionnaires and 19 follow up telephone interviews. It enabled the researchers to do precisely what the Minister had highlighted in 2008 as important for England and Wales, that is, to extrapolate from their research the conclusion that there was no significant likely extra delivery cost in adopting a similar scheme in our own jurisdiction. Although fairly quickly available, this research was surprisingly rejected as inapplicable to a decision about English law, by a further statement in 2011: surprisingly, because the research addressed precisely what the English government wanted to know about costs.

Taking the costs argument first, it is hard to see why, even if the Scottish scheme was thought to be a useless prototype, the Law Commissioner's project was not taken forward in England and Wales, or at least something similar introduced – even perhaps *simpler* if there were thought to be likely Parliamentary difficulties in agreeing detail. At the lowest level of change, perhaps some suitably adjusted version of the outline scheme suggested by the Law Commission's work could have been beneficial. Absence of *any* legislation at all is now particularly disadvantageous.

Given the obvious professional and public unease about both contemporary lack of legal aid for litigation, and lack of either any specific legislation for the large and

³²⁹ Fran Wasoff, Joanna Miles and Enid Mordaunt, *Legal Practitioners' Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006*, (2010) University of Cambridge Faculty of Law Research Paper No 11/03, available on SSRN, was also the subject of a subsequent article 'Cohabitation: Lessons From Research North of the Border' (2011) 23 *CFLQ* pp.302-322.

growing cohabitant constituency to resolve their own disputes themselves, or any clarity of the law on the subject of their legal position on separation so that they might consider autonomous agreements on entering their relationships, there would be some merit in legislation that would go some way to address these concerns, despite the sterling efforts of the Supreme Court in clarifying, in so far as they can, the TOLATA regime which currently governs cohabitants' asset division on separation.

The lowest level requirement, now urgent, is obviously to achieve clarity in some straightforward legislation which might be understood by separating cohabitants with average lay appreciation of access to justice. The level of understanding required is that suitable for addressing litigants in person, either seeking an agreed settlement with their former partners, or the prospect of litigation: moreover this urgent need is highlighted by the most recent cohabitants' case to come before the High Court, *Seagrove v Sullivan*³³⁰ where excess costs had already been run up in attempts to litigate the property aspects in the Chancery Division before the case was consolidated with a Child Law application in the Family Court.

The present basic lack of information is clearly unsatisfactory for the ordinary citizen in both practical and jurisprudential terms, since the present position in the context of current legal aid constraints is broadly of official encouragement to settle all legal disputes by mediation, if necessary without legal advice unless the parties can pay for that privately; and for costs not to be wasted on unnecessary litigation: that is, neither costs of the individuals concerned, nor those of the courts and judiciary. How can the public policy work towards this goal without legal aid, and without clear legislation which a lay person acting as an LIP can understand?

Such a non-court dispute resolution policy clearly needs to be supported with accessible infrastructure, which adoption in some form of the Law Commission's 2006-7 work would at least have supplied. It may be argued that the position has now years later been recently slightly improved by the Supreme Court's clarification in *Jones v Kernott* of the English Law of Trusts as it applies to the family home, whether that home is of a married or unmarried couple. However the latest potential

³³⁰ [2014] EWHC Fam 1410.

for improvement in the processes open to *cohabitants* on separation is because of a judgment of Mr Justice Holman as recently as 3 December 2014 in what may now turn out to be the watershed case of *Seagrove v Sullivan*³³¹ precisely because it addressed the enormous cost of TOLATA 1996 litigation.

However this judgment was obviously directed not at the lay participants in the case, or at other potential lay litigants in the same sort of dispute, but at the specialist professional advisers, the practitioners normally involved where the parties can afford to pay them. Holman J's signposting on the significant Supreme Court judicial clarification *cohabitants* in *Jones v Kernott*, points out that such cases now only require citation of that Court's two most recent seminal cases, *Stack v Dowden* in 2007 and *Jones v Kernott* in 2011, rather than the dozens previously habitually relied on by practitioners .

Nevertheless it is still likely to be the case that the average litigant in person will not be particularly grateful, or well served, to be told that it is only necessary to master two long complex judgments of the country's highest appeal court, especially when one of those is still *Stack v Dowden*, not one of the easiest to understand, even with the sufficient background in Legal Method of a qualifying law degree, from which the average 'LIP' usually has not benefited!

Moreover, *Seagrove v Sullivan* inadvertently came before a Family- judge - rather than the substantive hearing being placed in a Chancery list - because it was consolidated with a Children Act 1989 application, which must be made in the Family Court, so that the TOLATA portion of the dispute was able to be moved from the Chancery Division where the child issues could not conveniently be determined. It was also a case where the judge was particularly outspoken about both the excess paper and excessive cost incurred by the parties in unnecessarily citing to him 32 authorities now overtaken by the analyses of the Supreme Court in the two key cases cited that he actually considered relevant. Thus, he was able to say, it should no longer be 'necessary to look beyond those two authorities', making the remaining 30 largely redundant - though he did also concede, without going into further detail,

³³¹ Ibid.

that some of those *might* be relevant to a particular theme being pursued by counsel for one of the parties.

The judge in this case nevertheless also highlighted that the substantive dispute was only over £500,000 making the costs aspect of the court fight disproportionate, and added that the male cohabitant, a businessman, should have realised this.

A businessman is not, however, a lawyer (unless he also happens to be so qualified) and it is, of course, a giant leap of logic, to suggest that because a party to such a dispute is a businessman, he should, as a layman also be expected himself to research the law, which happily was not necessary in that case since the parties had been able to afford legal advice - unlike many 'ordinary' lay cohabitants, since the Law Commission in 2006-7 identified that cohabitation is a classless syndrome.

It is also important to note that the major strand of the judge's attack on the excess of authority being presented to him was in connection with the overriding objective of both the CPR 1998 and the FPR 2010, that is to decide cases justly *and at minimum cost*, a consideration which should have been firmly in the mind of the government Minister when she made her announcement about rejection of any analogy to be drawn for English law from the Scottish system in 2008.

It is therefore extremely difficult to defend the Minister's 2008 announcement, even more so in 2015 than in 2008, since it is now known that the origins of the subsequent public funding crisis which ultimately resulted in the LASPO 2012 legal aid cuts lay in precisely the same period, and indeed also coincided with the initiative for the most recent official investigations of costs limitation, which was, first, that taken on by Lord Justice Jackson in November 2008, immediately following, secondly, the Master of the Rolls' Costs Review also in 2008, of at least of the second of which the Justice Minister might be supposed to have been aware when she made her statement in September 2008, only two months previously.

As a result of these civil litigation cost cutting initiatives, Lord Justice Jackson went immediately to work on his review, so quickly that he delivered his Preliminary Report in May 2009 and his eventual findings in his Final Report in 2010. In short, it

would therefore seem that the Labour government in which Bridget Prentice was Justice Minister in 2008 was well aware of the ongoing crises in civil litigation generally and legal aid in particular, both of which had been bedevilling access to justice since initiatives in the era of Lord Mackay of Clashfern as Lord Chancellor in the late 1980s when he published his Green Paper³³² which initiated the long period of civil costs reviews which have followed ever since, and indeed have been a matter of government concern since the Royal Commission on Legal Services chaired by Sir Henry Benson, ten years earlier³³³.

It may therefore be safely concluded that despite this plethora of evidence in 2008 that costs saving was at least as urgent as it had been for many years, it was more likely that there was simply no political will to legislate for cohabitants, so that waiting for evaluation of the Scottish scheme in terms of costs and benefits to the jurisdiction of England and Wales was a fairly threadbare excuse, only just credible even at that date. Even then it was not believed by the Solicitors' Family Law Association, Resolution, which went straight into a project to support the first of Lord Lester's 2008 and 2009 private member's Bills in the House of Lords.

How the government stance on the irrelevance of the Scottish Act was maintainable *after* the publication of the Wasoff *et al* research in 2010 is even more difficult to understand, as the Supreme Court has made clear in the most recent of the Justices' seminal judgments, *Jones v Kernott* in 2011, another point referred to by Holman J .

The Supreme Court would no doubt be pleased to agree with his views expressed in the *Seagrove v Sullivan* judgment, since their own collected judgments specifically comment, in the latter of their two key cases to which he refers, on the fact that, in the absence of discrete legislation catering for separating cohabitants, the judiciary has been obliged to fill the gap³³⁴. Particularly apt in that respect is the comment of Lord Wilson in *Jones v Kernott*:

³³² Lord Mackay of Clashfern 'The Work and Organisation of the Legal Profession', Lord Chancellor's Department, 1989.

³³³ Sir Henry Benson, GBE, *Royal Commission on Legal Services, Final Report*, HMSO, 1979.

³³⁴ *Kernott v Jones* [2011] UKSC 53, *per* Lord Collins [57].

‘In the light of the continued failure of Parliament to confer upon the courts limited redistributive powers in relation to the property of each party upon the breakdown of a non-marital relationship, I warmly applaud the development of the law of equity, spear-headed by Lady Hale and Lord Walker in their speeches in *Stack v Dowden* ([\[2007\] AC 432](#)), and reiterated in their judgment in the present appeal, that the common intention which impresses a constructive trust upon the legal ownership of the family home can be *imputed* to the parties to the relationship’³³⁵.

Nevertheless, this is hardly a satisfactory source for the average LIP cohabitant to access in order to discern the likely application of the law in relation to his or her own case, in particular because until the 2007 case of *Stack v Dowden* was clarified in *Jones v Kernott* in 2011, even Holman J could not have made the statement he now has in *Seagrove v Sullivan*, a situation which perhaps might also have been obvious to the Minister at the time of her 2008 statement recorded in Hansard. This is because in 2008 the Supreme Court would have been the first to admit that their reasoning in *Stack v Dowden* – progress as it was – was nevertheless not by any means a final clarification of the law, because they explicitly took the opportunity in *Jones v Kernott* in 2011 to update and - in their own words- ‘to clarify’ that earlier decision.

Moreover, there was certainly no evidence to suggest that any new concerns might have arisen in the intervening two years between the Minister’s statement in 2008 and the researchers’ conclusions in 2010. Similarities of principle and practical application between the Scottish system and the Law Commission’s recommendations had already been confirmed by the Law Commissioner, Stuart Bridge, at the time that the Commission had considered the then only just available Scottish legislation while their English project was still ongoing³³⁶. It might therefore have at least been thought that perhaps the availability of such a scheme in England and Wales might have had a costs neutral impact on existing expense, rather than causing an explosion of unaffordable costs.

Further, this result might not least have been achievable since the commonly used remedies available to cohabitants in England and Wales have always been to resort

³³⁵ *Ibid*, [70].

³³⁶ Stuart Bridge, ‘Money, Marriage and Cohabitation’, (2006) 36 *Family Law*, p.641.

to the standard trust remedies provided by either fully contested TOLATA applications, that is. under the Trusts of Land and Appointment of Trustees Act 1996, commonly called 'TOLATA 1996', or under Schedule 1 and s 15 of the Children Act 1989, neither of which has ever been conspicuously inexpensive in terms of judicial time, court costs and legal aid, even before Holman, J protested about the plethora of lever arch files containing the 30 surplus authorities of which he has been recently complaining.

On the other hand, a discrete system might have actually *saved* costs, in terms of public awareness, consideration by lawyers and clients alike of the developing culture of DR or private settlement through solicitor negotiation, not to mention client satisfaction in avoiding litigation at all.

Indeed this is precisely what Wasoff *et al* concluded in stating that

'reform would not simply create new business. It would, to some extent, displace existing remedies, and provide a more appropriate, productive and possibly more cost effective avenue'³³⁷.

If the costs saving aspect was not readily obvious to the government spokesperson in 2008, it must surely have been so by the time of the next statement, on 6 September 2011, when the then Justice Minister Jonathan Djanogly announced in a written statement that, following the Wasoff *et al* research, there were no plans to take forward any reforms in England and Wales. The subsequent audible silence from the recent coalition government, which in effect confirmed this stance, was equally illogical, since it has been their five years of office, 2010-2015, which has had to contend with the problems of austerity in general, and the implementation of severely truncated legal aid from April 2013 in particular, and it goes without saying that one thing that the present Conservative government could do to save some public money would be to provide support to an easily accessible government sponsored Cohabitants' Rights Bill.

³³⁷ n329.

The Scottish scheme and English law

The second reason for declining any assistance from the Scottish scheme seems to have been adopted by the government because what might have been a valid costs argument eventually appeared clearly not to have force, so that it was soon obvious that it would be necessary to rely on the alternative ground of resistance at which both Bridget Prentice and Jonathan Djanogly had respectively hinted, that is that there is some perception that the Scottish system is in some way inappropriate to form even a signpost towards a similar scheme for England and Wales – or perhaps even a *dissimilar* scheme if the Scots system was not for some reason attractive.

The only result of this is arguably that it has allowed time to show that the very scheme already now established in Scotland *works for the Scots*, and has also now been firmly supported by Lady Hale in the Supreme Court, in judgments in both *Jones v Kernott* and *Gow v Grant*, in the latter of which she had the opportunity to consider the practicality of the application of the Scots scheme in the first appeal to reach the Westminster Supreme Court judiciary under the very same Family Law (Scotland) Act 2006 which is apparently not welcomed on behalf of the Westminster government by the UK Ministry of Justice.

The apparent reluctance to take any inspiration from Scotland is difficult to follow, given that this is a part of the United Kingdom which is not only adjacent to England but in such geographical proximity that there are already certain irritants in different systems in other fields which can vary widely depending on whether a claimant lives North or South of the Border³³⁸.

With regard to the law, while there is a certain divergence in many areas of, respectively, Scottish and English law, and some unfamiliar points of terminology, any study of reports of the cases decided to date under the 2006 Act in Scotland is easy to follow, although it is true that procedural systems and the legal vocabulary in Scotland are different

³³⁸ For example, different, more advantageous, treatment of university fees and prescription charges in Scotland, in respect of which much 'grumbling' can often be heard in the Northern Counties of England, where these benefits are not available!

However it does not appear from any evidence currently available that there is an identifiably distinct division of opinion in either moral or policy terms in connection with potential reform of the law relating to cohabitants, in either Scotland, on the one hand, or England and Wales on the other,. Much has been made in England and Wales of not equating marriage and cohabitation in any way, but Scotland has specifically followed this approach also. The Scottish Ministers said so explicitly in their first announcements of their intention to legislate ‘for Scottish families’³³⁹ .

It seems, therefore, that there must be some other reason for the early rejection by English Ministers of valuable practical insights that might otherwise be obtained from the Scottish reforms, especially as the United Kingdom has not been slow to follow even more fundamental initiatives where other jurisdictions, both common and civil law, have been proactive and innovative in leading.

Further academic evaluation five years from the Act

The tardiness and scepticism of the English government at Westminster in progressing the Law Commission’s recommendations has been widely criticised, both in the media and academe³⁴⁰ . Professor Elaine Sutherland of Stirling Law School in the University of Stirling has looked in more depth at the operation of the Act in a chapter for the International Society of Family Law’s annual survey in 2011 and at the problem of making Scottish law more accessible and appropriate for Scottish people in the annual survey of 2013³⁴¹ . She has suggested both that there should be some amendments to the legislation but that, on assessing the first five years of judicial decisions as to whether they are ‘realising the modest goals set for them’, there should also be a ‘fresh evaluation of the goals the legal system should be seeking to achieve in regulating cohabitation’.

³³⁹ See further below in connection with the original Memorandum by Scottish Ministers to the Scottish Parliament where they set out their stall for Scottish people.

³⁴⁰ Melissa Darnborough, ‘Untidy Lives: A Missed Opportunity for Reform’, School of Law, Manchester Metropolitan University

³⁴¹ Elaine Sutherland, ‘The Easing of Certain Legal Difficulties’, in Bill Atkin (ed) *International Survey of Family Law 2011*, ‘Family Law, Jordan Publishing Limited, p335; in Bill Atkin (ed) *International Survey of Family Law 2013*, ‘Can Family Law Be Made More Accessible Family Law, Jordan Publishing, p333.

Similarly, Frankie McCarthy³⁴² has analysed some of the early 2006 Act cases and commented on the confusion caused by the judiciary's lack of adequate guidance in the Act as to the underlying principles relevant to the distributive orders that may be made under s 28. This article offers three re-distributive rationales based on analysis of the first 15 cases under the Act, which are distinguished as the partnership, compensation and restitution models. However this article dates from 2011 before *Gow v Grant* reached the Supreme Court and the Act found at least limited favour with Baroness Hale who shared Professor Sutherland's criticisms, but overall found the scheme workable. A further article by McCarthy in the *New Zealand Universities Law Review*³⁴³, also in 2011, compares Scotland's and New Zealand's schemes and finds the New Zealand system, which is based on amendments to their Property Relationships Act to include cohabitants, is considered more useful since it approaches the problem from the point of view of existing spousal provision on marital breakdown. Indeed, this possibility is also canvassed in the CFLQ article³⁴⁴.

There are also other new commentators on the 2006 Act who agree with McCarthy's concerns about lack of guidance for judges deciding cases under s 28, for example Malcolm, Kendall and Kellas³⁴⁵ share McCarthy's issues with the uncertainty of outcomes under the present statute. Their monograph, which is practitioner focussed, however at least favours the abolition of the former – more uncertain-outcomes of the old cohabitation doctrine of irregular marriage by habit and repute and at least compares the fact of legislation in Scotland favourably with the position in England, on which they include some coverage in case their readers have a client south of the border. This really highlights the practical concerns about a scheme in Scotland and nothing in England and Wales, since one cannot compare TOLATA, even clarified by the Supreme Court, with the Scots 2006 Act for practicality and user friendliness.

³⁴² Frankie McCarthy, *Cohabitation: lessons from North of the Border?* (2011) *CFLQ* 277. Frankie McCarthy, 'Playing the Percentages: New Zealand, Scotland and a global solution to the consequences of non-marital relationships' (2011) *23 CFLQ*, 277.

³⁴³ Frankie McCarthy, 'Playing the Percentages: New Zealand, Scotland and a global solution to the consequences of non-marital relationships' (2011) *24(4) NZULR* 499-522.

³⁴⁴ See Chapter 8 for the New Zealand statute.

³⁴⁵ Kirsty Malcolm, Fiona Kendall and Dorothy Kellas, *Cohabitation*, 2nd edn, 2011, Sweet & Maxwell.

The Wasoff *et al* team have also written further on their research project in 2012³⁴⁶ in the *Journal of Social Welfare*, although it is unlikely that the Ministry of Justice in Westminster would have had the opportunity to read these later comments on cohabitation law reform. Perhaps the academic and practitioner comments on the Scottish scheme is the basis of the caution exhibited at Westminster. If so, the government has obviously not looked any further into either the background or the ongoing implementation of the 2006 Act in Scotland, which clearly had defined goals and has had some positive results, and which did not really need to be subjected to the perfectionism that the Westminster government has been claiming, especially since what England and Wales has at present with no cohabitation reform at all is far from perfect!

What Scotland was trying to achieve

The ‘goal’ of the Scottish reform is to be found in a recommendation of the original Scottish Law Commission’s Report, which was that any reform

‘should neither undermine marriage, nor undermine the freedom of those who have deliberately opted out of marriage ... [and] ... should be confined to the easing of certain legal difficulties and the remedying of certain situations which are widely perceived as being harsh and unfair.’³⁴⁷

This, so far, is almost exactly on all fours with the ultra-cautious approach of the English Law Commission in 2006-7. This very similar Scottish recommendation was not implemented until after Devolution, when the Scottish Executive set out in the *Family Law (Scotland) Bill: Policy Memorandum*, usually referred to as ‘the Memorandum’, which was presented to the Scottish Parliament on 5 February 2005, that the goal was

‘to provide a clearer statutory basis for recognising when a relationship is a cohabiting relationship; and a set of principles and basic rights to protect vulnerable people either on the breakdown of a relationship, or when a partner dies. The Scottish Ministers do not intend to create a new legal status for cohabitants. It is not the intention that marriage-equivalent legal

³⁴⁶ Joanna Miles, Fran Wasoff and Enid Mordaunt, ‘Reforming Family Law – the case of cohabitation: ‘things may not work out as you expect’ (2012) 34(2) *Journal of Social Welfare and Family*, 167,
³⁴⁷ Scottish Law Commission, *Report on Family Law*, 1992, Scot Law Com Mo 135.2, para 16.1.

rights should accrue to cohabiting couples, nor is it the intention to undermine the freedom of those who have deliberately opted out of marriage or of civil partnership.’

This again is a mirror of the English Law Commission’s approach, in which the Commission, as has already been seen in Chapter 4, was absolutely committed, in 2006-7, to *not* creating a new cohabitant status but providing some practical alternative to the complex and inappropriate litigation which was otherwise the only official way of resolving disputes not addressed by separating cohabitants themselves. These twin points of ‘no separate status’ and ‘no undermining of marriage’ are significant, and should obviously be noted as key positive factors if the Scottish scheme is to be any effective signpost for potential English legislation, since they also appear historically always to have been key non-negotiable issues in England and Wales – whether or not that is now still appropriate, which is entirely another matter for debate, now that much more time has passed and other developments have occurred in Family law and in the perception of the family. Not least of these other and later developments must be included the ONS’ discovery in the statistics from the 2011 Census that the influence of religion has now significantly declined in English life.

But while this overall Scottish stance looks very similar to the English Law Commission’s recommendations towards reform - in particular in not establishing a separate status of ‘cohabitant’ - when the Scottish scheme was finally rolled out, the Scottish Act in fact went further in making provision for some rebuttable presumptions about equal ownership of property during cohabitation, including household chattels (but not motor vehicles, securities and animals) and money (which includes any housekeeper’s allowance), as well as providing for very similar legal redress on relationship breakdown as the English Law Commission’s. They also provided for applications on a partner’s death: in other words, addressing important practicalities, and despite the criticisms about lack of guidance for the s 28 orders, the Act also includes a practical criteria checklist for judges to determine whether there was a ‘cohabitation’ in the first place: Family Law [(Scotland) Act 2006, s 25, a feature replicated in New Zealand.

In effect, it must therefore be recognised that Scotland *has*, therefore, created a

recognisably separate identity for the cohabitants' situation - a manner of living which has legal consequences but does not claim to be a 'status' as such. Indeed it is on the contrary formally stated that as a matter of policy this is neither the intention nor the effect of the reform. Possibly this statement was made with the intention of providing a convenient fig leaf behind which the average Scot, being content with the statement, would not look in detail, and as such a practical strategy designed to push the new enactment through with minimum likely media fuss. Alternatively, perhaps this was intended to avoid other disturbance which might rock the boat on what, on the face of it, already seemed utterly calm waters, since adverse media attention does not seem to have been evident.

This, of course, is fundamentally unlike the public reaction which was generated by the *Daily Mail* in England and Wales when the Family Act 1996 was being debated in Parliament, with a view to giving cohabitants quite modest protection from domestic violence alongside spouses – albeit explicitly on a lower level - an occurrence which seems to have had a lasting impact in England and Wales whenever any further cohabitation reform is contemplated.

What the Scots have *not* done, as was stated in the Memorandum they would *not* wish to do, is to *replicate* marriage in any way, either exactly, or in a reduced 'second class' form. This Scottish scheme and its apparently peaceful reception in Scotland should, therefore, in theory have chimed harmoniously with the expressed intentions of the English Law Commission's approach, although the methods are in no way identical.

Nevertheless, while it cannot be said that there has been no criticism, the academic, judicial and professional comment, either from legal or lay sources, has been of the nature of suggested improvement rather than fundamental objection, and as such what has been done has comparative value for the purposes of considering a potential scheme for England and Wales, Scotland's near territorial and political neighbour.

In particular, Sutherland's contribution to the debate, in the *International Survey of Family Law 2011*, is useful, since she spends only half the year in Scotland annually:

for the other half of each year she holds a similar professorial appointment in the USA, where cohabitants' rights differ according to the individual state, and brings to her expertise in the field her background at Lewis & Clark Law School in Portland, Oregon, a state which does *not* in fact give either the same or similar rights to cohabitants as to married couples, who must otherwise make a cohabitation agreement if they wish to address their situation formally.

The impact in English Law of *Gow v Grant* (correctly on appeal *Grant v Gow*) in the Supreme Court

Anecdotally, both academics and practitioners remember Baroness Hale expressly commenting on the *complexity* which she then perceived of the English Law Commission's recommendations at the time of their 2007 Final Report, and then on the early Scottish decisions where initial impressions were that the Scottish judges were experiencing difficulties of interpretation of Scotland's 2006 Act, such as in the early conflicting decisions on a point of interpretation by two Scottish Judges, Lord Matthews in *M v S* (in 2008)³⁴⁸, and Sheriff Hogg in *Jamieson v Rodhouse* (in 2009)³⁴⁹, as to whether ss 8-10 of the 1985 Act were relevant to determinations under that of 2006, which was only settled by the decision of the Inner House in the *Gow v Grant* appeal there, that the 1985 Act was *not relevant*, owing to the radically different purposes of the two Acts.

However when *Gow v Grant* finally came to the Supreme Court she appears to have had no such concerns, at least about the Scottish Act. While she did not give the leading judgment in the case which was that of Lord Hope, the Deputy President, she agreed that 'the appeal should be allowed for the reasons given by Lord Hope'³⁵⁰ and then elected to 'add a few words because there are lessons to be learned from this case for England and Wales'.

It is in respect of this detailed commentary in her paragraphs 44-56 that she delivers

³⁴⁸ *M v S* (2008) SLT 871.

³⁴⁹ *Jamieson v Rodhouse* (2009) Fam LR 34.

³⁵⁰ [2012] UKSC 29 [44].

significant argument for reform in English law, although both suggesting some potential amendments which might benefit Scotland and drawing attention to some practical problems that might be relevant to a scheme for England and Wales. She went on to highlight both the government apathy in 2008 and 2011, including its finally ignoring the Wasoff *et al* research mentioned above. She further included mention of the Law Commission's much more proactive response, delivered by Professor Cooke, who was leading the Family team at the Commission, but working on other issues by then, at the time of the Djanogly announcement in 2011 of abandonment of their scheme.

Baroness Hale's commentary: 5 lessons to be learned

Baroness Hale conveniently marshalled her commentary in paragraphs 44-56 in grouping no less than five observable outcomes of experience of the Scottish scheme which do significantly build on the 2006-7 work of the Law Commission:

- (i) Need for reform in English Law.
- (ii) Any reform needs to cater for a wide variety of situations, as the Law Commission's exemplar case studies in its Reports did not, for example, include engaged couples who were intending to marry, and that the marriage might never happen, still allowing disadvantage of one partner to arise, even without necessary advantage to the other. The relevance of this was obvious, as Mrs Gow had only moved in with Mr Grant on this basis and had left the relationship the worse off.
- (iii) Lack of definition of cohabitation or length of the period of cohabitation had not proved a problem in Scotland.
- (iv) Compensation principles were sometimes difficult to apply and a provision to enable a court to do what was 'just and equitable', as contained in one of Lord Lester's Bills, might be more appropriate.
- (v) Flexibility of remedy is important – the Scottish system was preferable in this instance rather than the Law Commission's more rigid compensatory approach, though both schemes had recommendations of value: for example a checklist might help the English scheme and the potential for periodical payments assist the Scots'.

Baroness Hale's 3 key points

In respect of the first of these lessons to be learned Lady Hale identified three separate key points which could be extracted in relation to a possible English system, and which considering her background as a distinguished career academic, teaching and writing extensively on Family law, and her subsequent experience in the High Court and Court of Appeal, unsurprisingly could not be better targeted:

1. The need for such a scheme in England and Wales.

The Hale commentary loses no opportunity to highlight this, a relevant point since the Law Commission - while invited by the government, apparently urgently, to undertake the 2006-7 work - was clearly disappointed not to have seen its recommendations adopted³⁵¹. This was, moreover, although their recommendations were broadly similar to those of the Scottish scheme, in that there was no intention to replicate in any way the incidence of financial provision on breakdown of formal marriage in the case of cohabitation breakdown, nor to involve cohabitants, who had chosen that alternative to marriage, in any similar principles of sharing of property nor maintenance of one another if they wished to make alternative arrangements. Instead, the two systems adopted the similar approach of a compensation scheme for economic advantages and disadvantages, although the detail of each was distinct from the other.

2. The fact that the government had not apparently given any weight to the conclusion in the Wasoff *et al* research.

This was that

‘ the introduction of broadly similar provisions in England and Wales would not place significant additional demands on court and legal aid resources’³⁵².

³⁵¹ Stuart Bridge, *Cohabitation: The Law Commission's Recommendations for Reform of the Law*, Family Law Week, www.familylawweek.co.uk, 2007 Archive; Elizabeth Cooke, *Response from the Law Commission*, 6 September 2011 also published in *The Times* and other broadsheets.

³⁵² n329.

She coupled this with the fact that Professor Elizabeth Cooke, the Law Commissioner most recently still in charge of the Family Law programme at the Law Commission, had, on the Minister's announcement that the government would not take forward any reform at the present time, expressed the hope that 'implementation would not be delayed beyond the early days of the next Parliament in view of the hardship and injustice caused by the present law', which was 'uncertain and expensive to apply', 'not designed for cohabitants' and often giving 'rise to results that are unjust'³⁵³. She also drew attention to a further useful research item in the 'Miles *et al*' article in a leading Family law journal³⁵⁴ on the Law Commission's approach to cost effectively addressing quantification of retained benefit which was the core of their system.

3. The fact that there had already been ample justification for change in the law.

She found this justification in the 'long standing judicial calls for reform - dating back at least as far as the case of *Burns v Burns* in 1984 - and in 'the Law Commission's analysis of the deficiencies in the present law and the injustices which can result'; the demographic evidence of births to cohabitants outside marriage, and by the widespread belief in the non-existent status of 'common law marriage', so that 'there was no need to wait for experience from north of the border to make the case for reform'³⁵⁵.

The other two points made were (a) that any definition of cohabitation should not be too prescriptive since the Law Commission's Reports' example case studies did not include some obvious cohabitation contexts, such as those of couples who were only cohabiting as they were engaged to be married, e.g. Mrs Gow who only agreed to move in with Mr Grant if they were engaged and were ultimately to marry, a situation which she said was widely supported by research of Barlow *et al*³⁵⁶; and (b) flexibility of remedy and ability to address a situation in a way that was flexible and fair, as to which see further below.

³⁵³ Elizabeth Cooke, n181, Chapter 4.

³⁵⁴ This was in fact the Wasoff *et al* article in CFLQ, cited in n329.

³⁵⁵ Gow v Grant, UKSC 29 [50].

³⁵⁶ *Ibid* [51].

These three main points which emerge from Baroness Hale's first additional 'few words' are a powerful summary in themselves of the rationale for considering whether there should be some harmonisation with new law in a part of the United Kingdom which has not only grappled with what appear to be identical social and demographic pressures to those found in England and Wales, but in doing so has achieved a result, whereas the English Law Commission has, for some reason, not had its recommendations received with any official enthusiasm. This in itself seems worth closer examination in that appeals from what are now two widely different systems in relation to cohabitants arrive at the same highest court, the Supreme Court in London, which cannot be convenient or appropriate. This must be especially so, for example, when potential appellants under the two disparate systems may reside respectively in either Northumberland or the Scottish Borders and live no more than a dozen miles apart, which is little distance justifying determination under the completely different systems of law which will apply to their respective circumstances when both are UK citizens and citizens of the same EU member state.

Indeed, if there are arguments for harmonisation of *marital* property systems within the European Union, because of the professional, employment and therefore family mobility which contributes significantly to the child abduction problems addressed by the Hague Convention with the aim of preventing adverse impact on children and their families, there must be no less potential adverse impact on children and their families in disparate *cohabitation* provision. Such cross border problems were often articulated in international property cases by Lord Justice Thorpe, when Head of International Family Justice. Again, this must be especially so when in Scotland there is a coherent scheme, albeit that it has room for improvement, but a few miles south of the border in England and Wales there is *none*.

Thus besides the argument for a scheme for England and Wales - now that Scotland has legislated - there must be some argument for at least some basic similarity of provision, even if detail differs, as indeed it does between English and Scottish law in some other respects, just as there are distinctions between different legislation either side of the English Channel.

The second of Baroness Hale's observations on the Scottish experience was that the worked examples in Appendix B of the Law Commission's Final Report did not identify *all* the likely cohabitation cases which could commonly arise, and thus require judicial attention in any scheme which attempted to provide better than the fragmented provision already available under existing English law.

This seems to be a further powerful argument for a very simple umbrella system for England and Wales which merely provides basic protective remedies in a normative framework, so that a wide variety of circumstances could potentially be covered, although it has been shown in New Zealand that an intention to provide very wide coverage can have its own problems.³⁵⁷ Put another way, this would address Lady Hale's suggested 'flexibility' requirement both as to actual remedy, as in proprietary estoppels, and as to its practical articulation, for example in an ability to make either periodical payments or capital orders.

In addition to acknowledging the common example of the young couple where the child carer suffers disadvantage capable of financial compensation under both the Law Commission's and Scottish schemes, Baroness Hale flags up the case - demographically equally common in contemporary society - of the mature couple such as Mrs Gow and Mr Grant whose positions post-cessation of cohabitation can quite easily be sufficiently impacted upon by one of them having given up a home, and either all or part of an income, and the other not being so affected.

In particular Baroness Hale articulates the potential for a widow's occupational pension being lost by cohabitation as much as by remarriage. Here, Lady Hale's well known interest in Equality and Diversity issues enables her to bring to the evaluation of any cohabitants' rights scheme her valuable experience in indirect discrimination issues alongside her expertise in Family law.

Baroness Hale's third 'lesson' is that there is probably no need for concerns expressed in the Law Commission's work about difficulties in establishing whether

³⁵⁷ See Chapter 8.

the parties involved were cohabiting or not, nor about the optimum period of cohabitation for couples without children to be able to qualify for remedies. She says at paragraph 52 of the judgment that ‘people have not disputed whether they were cohabitants, though they have sometimes disputed when their cohabitation came to an end’, and suggests that it might reduce disputes for the Scottish system to drop the requirement to bring proceedings within one year of the cessation of cohabitation, and for the Law Commission’s scheme to omit any initial qualifying period before a claim could be made, in support of which she refers again to the Wasoff et al research, and to the researchers’ subsequent article in *Child and Family Law Quarterly*³⁵⁸. Baroness Hale’s fourth observation, the most crucial, both of her valuable comments on the occasion of this first Scottish appeal to the Supreme Court, and in any potential updating of the Law Commission’s English ‘advantage/disadvantage’ model, is that it appears to be entirely true that the compensation principle, although attractive in theory, can be difficult to apply in practice because of the problems of identifying and valuing those advantages and disadvantages’.

She relies for this conclusion on the fact that Lord Lester’s 2009 Bill, which did not pass beyond a second reading in the House of Lords in March of that year, favoured a much wider discretionary power to do what was ‘just and equitable’ in the particular context whereas the Law Commission had, in its 2006-7 work, already seen the problems associated with micro-analysis of every ‘past gain and loss over the course of a long relationship’ by ‘focussing on the end of the relationship’. As she says, the case of Mrs Gow and Mr Grant ‘illustrates the problem very well’ since, while it is *not* possible - as well as being disproportionate - accurately to reflect every advantage and disadvantage in terms of payments made and benefits in kind received, besides that not being the way in which ‘living together in an intimate relationship is all about’, it *is* possible to assess net advantage and disadvantage if the parties’ positions are examined at the point of entry and exit from their relationship, which appears to be the approach that is permitted by the Scottish legislation.

³⁵⁸ n329.. However, it should be noted that this issue of how best to establish when a cohabitation relationship has *begun* has been found to be a problem in New Zealand, as to which see further at Chapter 8: there seems a simple remedy for this in England and Wales for which see Chapter 9.

Baroness Hale's final point, and conclusion, is in essence a hint that an approach to the ultimate disposal under either the Scottish or any potential English scheme could perhaps be more akin to that in a case of proprietary estoppel than to the more exact analysis demanded by an interest under the concept of trust to which English claimants must currently still apply their energies if they seek to establish any compensatory award to redress the disadvantageous impact of unmarried cohabitation. In short, she says, the order should fit the circumstances - which is precisely the unique approach of proprietary estoppel - and overall approves the flexibility of the Scottish scheme, which largely permits this, over the rigidity of the Law Commission's proposals, which in effect propose that 'the losses should be shared equally'. Nevertheless, she likes the Law Commission's structured 'factors to be taken into account' and would also like the Scottish system to permit a periodical payments order for 'the rare cases where it is not practicable to make an order for a lump sum to be paid by instalments' .

Her overall conclusion, in the now famous paragraph 56, is that '... a remedy such as this is both practicable and fair. It does not impose on unmarried couples the responsibilities of marriage, but redresses the gains and losses flowing from their relationship' and repeats the comment of the researchers: 'The Act has undoubtedly achieved a lot for Scottish cohabitants and their children. English and Welsh cohabitants and their children deserve no less'.

The Scottish Philosophy behind the 2006 Act

Despite criticism of the long period of gestation since 1992, the philosophy behind the 2006 Act is clearly that of the Memorandum of March 2005, presented by the Scottish Executive to the Scottish Parliament and archived on their website³⁵⁹, following which the Bill it supported, which had been introduced into the Scottish Parliament on 7 February 2005, was enacted the following year.

It seems clear from this Memorandum that the Scottish Executive had determined

³⁵⁹ Scottish Executive. Family Law (Scotland) Bill, Policy memorandum 2005 ('the Memorandum'), www.scottish.parliament.uk, last accessed 27 December 2013.

'that action should be taken' in the interests of 'Scottish families' and 'all of Scotland's people' which are expressly referred to in the Memorandum, and that they had then proceeded expeditiously to achievement of the task they had set themselves. The only further comment relevant here appears to be a congratulatory one, for the fact that a small jurisdiction, serving a population of approximately only five million, should have made this legislation a priority and achieved its introduction so speedily when all the resources of the Westminster government had not, apparently, been able similarly to address clearly urgent demand south of the border. The Scottish system may not be perfect, in the eyes of either all academics - Scottish or other - or practitioners, including the Scottish judiciary which seems to have identified some practical complexity; but this is not uncommon in relation to any new legislation, especially of a radical nature. There are in fact also many English and Welsh statutes which have undergone later polishing after their initial introduction, and some that have undergone much fairly fundamental amendment. Not to achieve perfection at first introduction is not a fundamental flaw sufficient to preclude any such introduction at all, or unconstructive criticism from jurisdictions which have not achieved a similar reform.

The 2005 Memorandum thus set out the aim to 'provide legal protection and safeguards for children and adults in today's family structures'. It articulates support for a commitment to 'legislate to reform family law for all of Scotland's people' and made clear that the role of government was seen as enabling rather than prescriptive, but that it was sought to reduce anomalies, to clarify the law and to respond to the reality of family life and contemporary family formations, in particular because children were often the powerless 'extras' in the family dramas in which their childhood and upbringing proceeded. This approach cannot in principle be criticised since it addresses those issues which governments are supposed, by their very existence, to address in a liberal democracy.

The Memorandum did also indicate that it was firmly based on data obtained in research³⁶⁰ in which a significant section of the public indicated, as in England and Wales, that unmarried cohabitation was no longer regarded as unusual or socially

³⁶⁰ Scottish Executive, *Family Formations and Dissolutions: Trends and attitudes among the Scottish population*, <https://www.scotland.gov.uk/cru/resfinds/l/f43-00.asp>.

deviant; and indicated that, as in England and Wales, that Scotland had also suffered from the 'common law marriage myth' which had in certain circumstances been addressed at common law through the process of recognising irregular marriage by 'cohabitation with habit and repute'. Thus, although the impetus for the Scottish legislation was based in the - by 2005, somewhat elderly - 1990s Scottish Law Commission research, the Scottish Executive appeared to obtain up to date attitude survey data before taking forward the initial concept of addressing social change in Scotland. It is difficult to see what else they could, or should, have done without delaying matters for further Scottish Law Commission research to update their original early 1990s report.

Rather, in proceeding expeditiously to provide some relatively simple reform, the Scottish Ministers appear to have taken the obvious pragmatic decision, that some prompt reform was the way forward, even if further refinement might be required. Limited fieldwork in connection with the operation of the Scottish legislation indicates that there is indeed some evidence that the Scottish legal profession - which is very small, like the Scottish population in relation to the much larger population of England and Wales - has shared views and experiences about the operation of the 2006 Act in practice and does not have an overall negative opinion of its application, albeit that there are suggestions for practical improvements. This limited fieldwork which it was possible to undertake appears to support Baroness Hale's suggestions for amendments, but no one has said that that is a justification for wholesale condemnation of a system which was not initially 100% perfect, nor for dismissal by English ministers in London of any comparative value of the Scottish system as an indicator for the validity of reform in England and Wales.

This is not the place to examine the jurisprudential basis of recognition of the former Scottish concept of irregular marriage which the 2006 Act has now overtaken, but it *does* seem that the deficiencies of that situation was one of the reasons for the formality of enacting the Scottish legislation, just as the French ultimately replaced their former long standing practice of recognising *concubinage* with the formal PACS system. Moreover, while the Scottish Executive may have formally said in their Memorandum that they did not see the creation of a separate status of cohabitant, as an alternative to marriage, as a formal part of their scheme, it seems that they

have in fact recognised a 'state' of living in such a relationship even if not a formal change of status. This too might well be of interest in ultimately considering the optimum provision for England and Wales. This reassessment of the position in England and Wales is clearly what is now required.

The underlying theory of the impact of the 2006 Act on this prior state of irregular marriage is therefore worth examining because of its potential relevance to the common law marriage myth in England and Wales, which is in fact one of the most important core mischiefs of the lack of any normative regime for cohabitants' rights in English law. The not dissimilar position in Scotland must be looked for in the pre-2006 history.

Cohabitation in Scotland before the 2006 Act

Looking at this historical background, it is fair to say that in Scotland there was, perhaps, more reason than in England and Wales for an erroneous belief in common law marriage since, prior to the 2006 Act which abolished it, Scotland has long enjoyed a *custom or culture*, enshrined in the common law of that country, of *recognising* for certain purposes a state, if not a status as such, of 'marriage by cohabitation with habit and repute'. However, this was more recently felt by some academics and practitioners to be undesirable, owing to the necessary legal process in order to establish such a state in any particular circumstances, and because of the fact that jurisprudentially it was more properly a part of the Law of Succession rather than the law applicable to either marriage or cohabitation.

Thus it seems that in the eye of the ordinary Scot there *was* a concept of irregular marriage attached to a practical state of cohabitation, but that in reality it had status in law only in the certain circumstances to which it in practice applied and was otherwise no more 'common law marriage' than those 'common law marriages' in which the English public affects to believe.

For example, in No 6 of his *Commentaries*³⁶¹ Professor Kenneth Norrie is critical of the initial decision of the Scottish Executive, in their response to their 1999 consultation setting out proposed changes arising from Scottish Law Commission work, to retain the concept of marriage by habit and repute, 'on the basis that it continues to serve some useful function' – to which the author of the Commentary immediately adds the - presumably rhetorical - request 'Perhaps someone can explain what that useful function is, for it is beyond me'.

It appeared that at the time of Professor Norrie's originally writing this Commentary - July 2000 - there had been two recent cases³⁶² in which the Court of Session had been asked to grant a 'declarator' of marriage on the basis of cohabitation with habit and repute, which in one case was granted and in the other refused in the cases of *Ackerman v Logan* in 2000³⁶² where habit was established, but repute missing, and *Vosilius v Vosilius* in 2000³⁶³, where habit and repute were both existing,

The Commentary goes on to illustrate, through the facts of the cases, the author's conclusion that this concept was illogical and unfair, and to point out the close relationship of the doctrine to the Law of Succession in respect of which 'the law is attempting to ameliorate the otherwise harsh and unfair position that cohabitants would otherwise find themselves in – that of having no claim against the estate of the person with whom they have spent 'a considerable period'. In other words, the concept was little different from the provision for cohabitants available, where the criteria of that statute can be met, under the English legislation contained in the Inheritance (Provision for Family and Dependents) Act 1975.

Professor Norrie's update to this situation, immediately prior to his publication in 2011, thus much approves the impact of the passage of the Family Law (Scotland) Act 2006 in stating

'Marriage by cohabitation with habit and repute was partially abolished by section 3 of the Family Law (Scotland) Act 2006. It survives only to preserve the validity of marriages contracted abroad which, for some technical reason, are otherwise invalid'.

³⁶¹ Kenneth Norrie, *Commentaries on Family Law*, University of Dundee Press, 2011.

³⁶² (2000) EX 2000 SLT 37.

³⁶³ (2000) Fam R 58.

This is also replicated by provision in English law for recognition of such marriages by the common law where formalities might be defective for good reason, such as in cases like *Taczanowska v Taczanowski* in 1957³⁶⁴ where the Marriage Act 1949 could not be complied with owing to wartime conditions. This was a case where the parties were both foreign nationals who could also not be expected to comply with local law owing to one being a member of occupying forces but nevertheless other requirements of a valid marriage - such as the vows and the presence of an episcopally ordained priest – were present.

His commentary continues:

‘The major importance of the 2006 Act is that it rendered irregular marriage entirely pointless by creating proper claims for financial provision for cohabitants, both when the couple separate and when one dies. These claims do not depend, as irregular marriage depended, on the parties being economical with the truth. Whatever flaws there are in the 2006 Act, the legislation is far more principled and far better reflects today’s society than does the old common law doctrine, which had long outstayed its welcome’.

In fact it thus seems that the old common law doctrine of recognising irregular marriage by cohabitation with habit and repute is no different from the same common law doctrine which would also permit English law to recognise an irregular foreign marriage in appropriate and unusual circumstances, such as where a religious marriage was contracted with irregular formalities in occupied territory in time of war as in the case mentioned above.

The post 2006 situation of cohabitants in Scotland

Thus it seems possible that vernacular social familiarity with the old Scottish common law practice of recognising *marriages* effected by cohabitation with habit and repute may have had some influence on the reform now benefiting Scottish cohabitants, not least as it is recorded in the Memorandum of March 2005 that research had shown that some Scots believed that after 10 years cohabitation the

³⁶⁴ [1957] 2 All ER 583.

parties had the same rights as married couples³⁶⁵. However, the main driver appears to have been the Memorandum itself, in which the Executive recorded that its 1999 consultation document *Family Matters: Improving Scottish Family Law*³⁶⁶ ‘focussed on the need to consult further to refresh thinking, and, in particular, to canvass opinion on which a settled view had not been reached’. Included in this category of issues were “provisions for cohabiting couples’.

It would appear likely, therefore, that both Professor Norrie’s 2000 condemnation of marriage by cohabitation with habit and repute, and his 2011 update, both mentioned above, had something to do with response to these consultations, since the Memorandum also mentions that the 1999 consultation document *Family Matters: Improving Scottish Family Law* ‘picked up the outstanding Scottish Law Commission proposals relevant to addressing the legal vulnerabilities experienced by families in Scotland today’ .

The Memorandum goes on to set out the key data relevant to legal safeguards for cohabitants, showing the demographic evidence for reform, and concluding that 38% of cohabiting couples at the 2001 census had children (10% of Scotland’s 1,072,669 children therefore living in a cohabiting couple family) although it was conceded that there was ‘no robust data’ to identify how many of such couples were legally married elsewhere.

A particularly interesting feature of the Memorandum is that it records that while ‘the available evidence suggests that cohabitation has moved from a minority to a dominant family type in the UK’ it also records that cohabitations rarely last long term’.

Nevertheless the Scots have legislated as they have because of research information available to them, in contrast to the approach in England, where, on the one hand the English Law Commission has recommended reform although not dismissing short cohabiting durations as counter arguments to legislating for breakdown of relationships, but on the other hand the government at Westminster

³⁶⁵ n360..

³⁶⁶ Scottish Office, Consultation paper.

<https://pure.strath.ac.uk/portal/en/publications/...scottish.../export.html>.

has obviously perceived no pressures in the Government Actuary's predictions on rising numbers of cohabiting families towards 2030, as set out in the legal professional press, for example. Jordan's Family Law Newswatch in 2009, which commented in September of that year on the Family and Parenting Policy unit's report issued in the same month³⁶⁷, projecting a likely doubling of the numbers, then 2 million, a figure which could even be conservative since 10 years ago the number - in the absence of accurate data - was thought to be about 1 million.

It would therefore seem that the Scottish Executive has done what the Westminster government *should* have done, i.e. taken a policy decision in accordance with research available to them and in accordance with what they perceived to be acceptable to contemporary culture and society, since in Scotland the Memorandum states that

'the policy objective is to introduce greater certainty, fairness and clarity into the law by establishing a firm statutory foundation for disentangling the shared life of cohabitants when their relationship ends...The Scottish Ministers consider that the legal vulnerability arising from the current absence of systematic regulation sits uncomfortably alongside the increasing number of cohabiting couple and the increasing number of Scotland's children living in cohabiting-couple families'.

It is notable that the Memorandum continues

The Scottish Ministers aim to provide a clearer statutory basis for recognising when a relationship is a cohabiting relationship; and a set of principles and basic rights to protect vulnerable people either on the breakdown of a relationship or when a partner dies'.

This is exactly what was needed in England and Wales in 2008, or at the latest in 2011 – not complete dismissal of all the indications that legislation south of the border was urgently needed.

Further content of the Memorandum in fact considers the alternative of 'information and raising awareness' but rejects this course as 'unlikely to result in all cohabiting couples making adequate private arrangements, leaving a significant number of

³⁶⁷ National Families Parenting and Policy Institute, *Families Since the 1950s*, NFPPU, 2009.

cohabiting couples and their children without legal protection'. This does not suggest that Scotland, in 2005, was placing any reliance on the success of the concurrent English approach to 'education', that is the Westminster Government's *Living Together Campaign!*

Similarly, any alignment with marriage is rejected in the Memorandum, since it is stated that the Scottish Ministers 'are clear that marriage has a special place in society and that its distinctive legal status should be preserved'. Registration and an alternative status for cohabitants were alike rejected but 'a list of factors that a court shall have regard to in determining a legally relevant cohabitation' is mentioned (and, as already mentioned, then appeared in the 2006 Act). It is not inconceivable that these clear statements, directly addressing potential objections from the stricter Scottish churches and also from any more conservative sections of society, were the direct cause of lack of objections to what, on the face of the legislation, appears to give more or less the same practical results to cohabitants as to spouses. It is unclear, in these circumstances, whether the question really needs to be asked as to whether it matters if the Family Law (Scotland) Act 2006 *does* provide much the same practical end result for separating cohabitants as for divorcing spouses, when the Scottish Executive expressly states an aim to benefit 'Scottish families' in general and 'all' of 'Scotland's people'

Conclusion

In the circumstances the Scottish scheme appears not to be in any way an adverse comparable for a potentially successful scheme in English law. Of course improvements can be made especially with the benefit now of almost a decade's experience, and comparative evidence from other jurisdictions as well, none of which the English Law Commission undertook. Their reports look much more like scoping documents than law reform proposals.

The Scottish scheme does not appear to endanger the status of marriage at all, nor to impose on cohabitants any matrimonial obligations or rights, yet it protects the vulnerable, both adults and children, in a compensation based scheme, which - though distinct - resonates with that devised in England and Wales by the Law

Commission.

While not appropriate to replicate the Scottish Act in any detail –English law would not benefit from any clone but would be potentially enhanced by import of comparator ideas - it is a powerful signpost to potential reform for cohabitants in England and Wales, especially as certain amendments are suggested by both academics and the Deputy President of the UK Supreme Court who - besides having had the experience of hearing the first appeal to Westminster under the 2006 Act - has a long standing academic background in Family law.

The principles of the Scottish scheme appear to be both practical and inherently unobjectionable, and of value in comparative terms in the study and development of other such potential systems. Above all, as generally in English Family law in England, it preserves some discretionary element in addressing the relationship generated advantage and disadvantage which the inappropriate TOLATA 1996 provisions are unable to deliver: although in paragraph 55 of her judgment in *Gow v Grant* Baroness Hale reviews - with practical examples - the remedial scope of the flexible Scottish scheme which permits precisely the same range of outcomes in the order awarded as in the common law remedy of proprietary estoppel under English law.

These critiques have been further developed in the modest fieldwork which it has been possible to undertake in respect of each of this project's exemplar jurisdictions³⁶⁸ the first of which - the EU state of Spain - is the subject of the next chapter, Chapter 7.

³⁶⁸ For which see Chapter 9.

Chapter 7 Spain

Introduction

This chapter examines a European comparator to both the Law Commission's recommendations for reform in English Law and to the Scottish scheme also rejected by the English government – Spain, like Britain, is an EU member, but unlike Scotland not a recent convert to the legal as well as social recognition of cohabitants' rights. Spain provided for this in its new 1978 constitution drafted upon replacement 40 years ago of its former ultra-right wing Fascist regime by the modern liberal restored monarchy it still retains.

The primary aim of the chapter is critically to examine provision in the Spanish legal system, on which Spain's membership of the EU and signature to Hague Conventions also impacts through the general influence of the European Union philosophies and the spread of human rights law and practice.

A secondary aim is to look at what lessons could be learned from this particular European comparator, and to analyse how and why the Law Commission's 2006-7 project apparently missed the opportunity to draw guidance from the success of radical Family law reform in Spain, in which coincidentally the largest European diaspora of British expatriates resides in the sun of its southern and Mediterranean coasts. This area of substantial British residence stretches from the Costa de la Luz in the Atlantic South West - near the border with the Portuguese Algarve and adjacent to the still British territory of Gibraltar – and extends Westwards to the Costa del Sol, Costa Tropical, Costa Blanca and Costa Brava, which run in a virtually continuous largely beach and golfing orientated strip from the Rock in the South West all the way up the Mediterranean coast towards the eastern Pyrenees border with France, north of Barcelona.

In this large coastal resort territory may be found a substantial number of Anglo-Spanish lawyers. Sometimes these are located in small Spanish firms where the expertise tapped by British expatriates may be limited to a single partner with some knowledge of English law and its interaction with their own local Spanish regime.

Alternatively, they will sometimes congregate in much larger firms where whole departments may be devoted to the complex interface between the personal law of the British expatriates living locally – which will usually be English law – and the Spanish law of that particular region, which now also applies in some circumstances.

As a consequence of this significant concentration of British residents, as well as of the relatively new but now well established approach of Spanish law to cohabitation, Spain was thought to be a better EU comparator in the present project than, for example, France, which 60 years ago could have instantly claimed priority as a more suitable choice, owing to the long standing British expatriate residence on the Cote d’Azur of the South of France.

For at least a century many London lawyers - both solicitors and barristers from several sets of Chambers at the Tax and Chancery Bars – enjoyed large practices advising the wealthy British residents who habitually congregated on that strip of the French Mediterranean coast, following in the wake of the early English devotees of the temperate seaside climate. Initially these were winter sun sojourners, who had noticed Lord Brougham’s discovery in the 1820s of this pleasant alternative to disagreeable English winters. However in the 1960s, the availability of much cheaper property and lifestyle in equally sunny Spain opened up a new mass market along its much longer Mediterranean coastline, while the development of low budget air services also established a substantial English population in the Canary Islands’ offshore province of Spain, thus moving the need for the bulk of European expatriate legal services away from France.

Spain, the English and Scottish schemes and the influence, if any, of Eire

It has been seen in Chapters 4 and 6 that both the Law Commission in England and the Scottish Executive in Scotland researched existing normative regimes in other jurisdictions worldwide while in the course of the respective work addressed in those chapters. Such research might have been expected as a natural preparatory review of existing provision in both common law and civil law systems. However in the Law Commission project the particular research was somewhat superficial, in fact little more than scoping, and the team did not look below the fact that Spain had some cohabitants’ rights provision in some of its provinces and took no more notice of

Eire's contemporaneous plans than to observe that the Republic (which of course has a land border with the UK) had plans. The team seemed to have completely overlooked the methodology of Spanish law, which relies not in the first instance on the provincial cohabitants' rights which they had noticed but on the overarching Constitution for its principled provision, together with some freedom to make detailed law regionally. The Commission completely missed the fact that this suits Spain's historic and cultural background which has been more mixed even than England's recent multi-cultural immigration.

Spain is of course a civil law jurisdiction, having taken its national law in modern times from the Napoleonic Codes introduced by the French Emperor following his conquest of Spain in the Peninsula Wars of the early 1800s, and thus even more alien to English law than the mixed common law and civil law system of Scotland. However, so is virtually every other potential EU comparator, although some - for example Germany - also have more mixed origins and influences. It was therefore really self-selecting as a comparator in the present project, largely as other candidates were not very suitable at all.

Had Eire already embarked on its cohabitants' rights programme which was projected as long ago as 2006-7 but has only recently been much progressed, that might have been an additionally useful comparator since, as well as having the land border with the UK, the Irish Republic is an English speaking EU member: but as there was then no Eire cohabitants' legislation clearly this was not an option at the time.

While the Law Commission in London briefly noted Spain as one of several potential comparator jurisdictions, Scotland's Executive apparently looked more closely at France as a potentially useful to them, possibly because of Scotland's closer historic links with that country. However, neither in Scotland nor in England was much more than passing reference made to other European jurisdictions, which seems an oddly missed opportunity, given the concurrent EU harmonisation initiatives, which are the obvious drivers for addressing the conflict of laws problems created by UK-EU family mobility.

In the contemporary context of both employment and recreational ease of movement across borders, such mobility within Europe has developed significantly despite the fact that while the Channel has historically been a political and juridical, as well as geographical, boundary between England and Wales and Europe, in modern times the UK is a party to the European Union which has written that freedom of movement into its founding treaties.

Thus despite the fact that England and Wales is a common law jurisdiction and most European states, whether EU members or not, operate in a civil law context, there is clearly a strong motive for considering the relevance of the treatment of Family Law in Europe when considering any English law reform, including the discrete topic of cohabitation, although previously more attention has traditionally been paid to the jurisdictions of the Commonwealth common law systems from which English law has in the 20th century drawn much inspiration, in both doctrinal study and practical application of Family Justice.

Of the jurisdictions in the European Union of potential comparative value to England and Wales - other than Scotland, already a natural frontline comparator, since it is part of the United Kingdom - Spain has a stronger claim to consideration for the present project than the majority of other Western European states, most of which automatically disqualify themselves owing to the difficulty in accessing their law libraries and reading these resources either personally or through court translators.

On the other hand Spain's language is easily accessible for reading its documents in original texts, only French is more likely to be read by English legal researchers, unlike the languages of the Low Countries, Germany, Central, Eastern and Northern Europe with which few English legal researchers are familiar unless they are specialists in the law of those countries³⁶⁹. Unlike those of the other states and European regions mentioned, Spain's constitutional and legal texts are also readily available to read in solicitors' firms and barristers' chambers in England. Moreover, apart from Anglo-Spanish practices in London, there are also substantial resources

³⁶⁹ As it happens, the present researcher also reads and writes Spanish and is familiar with most regions of Spain and with Spanish legal practice, thus saving the cost and inconvenience of using court translators.

in Oxford owing to several decades of Spanish Studies at Oxford University, long keenly supported by Queen Sofia of Spain.

Further, as a recently politically modernised state with a relatively new democratic constitution and a substantial British expatriate residential and commercial community, Spain also has useful parallels to offer in relation to some of the issues which appear to have caused potential reforms to stall in England and Wales.

The Law Commission in London chose, in their case, to tabulate - in some detail - both *all* the other worldwide jurisdictions where they were aware of legal provision for cohabitants, and briefly to note the relevant statutes in those jurisdictions. Two separate appendices were included in the initial summary of such regimes in the preparatory document required for the obligatory statutory consultation which, owing to the Law Commissions terms of work, they were obliged to conduct before embarking on any potential law reform project.

In the first of the Law Commission's 2006-7 reports, the initial consultation paper, were thus listed in Appendix C³⁷⁰, 33 separate jurisdictions where statutory schemes were provided for which eligible couples automatically qualified without the need to enter into a contract or to register their relationship with the state authorities, although some permitted couples to inform the state of their opting out or to do so by entering into a formal contract instead. These 33 jurisdictions included Argentina; Australia - 8 separate states each with its own statutes, including the Capital Territory; Canada - 7 provinces each with its own separate provisions; Croatia, Hungary, Mexico, New Zealand, Norway, Portugal, Scotland - *and Spain*.

In Appendix D³⁷¹ the Commission noted a further 37 jurisdictions which provided 'opt-in' statutory schemes for registered partnership, into which a couple could opt in by complying with the criteria, the consequences of which varied from jurisdiction to jurisdiction. These 37 jurisdictions included Argentina - Buenos Aires and the Rio Negro region; Australia - Tasmania; Belgium; Canada - 5 provinces; Denmark, Finland, France, Germany, Iceland, Luxembourg, Netherlands, New Zealand,

³⁷⁰ Schemes for Cohabitants in Other Jurisdictions.

³⁷¹ "Opt-In" Regimes in Other Jurisdictions.

Norway, Scotland, Slovenia, Spain - 10 provinces; Sweden, Switzerland, USA - 5 states. In this category of registered partnership, some schemes applied to same-sex and opposite sex couples, but others to same-sex couples only.

Thus, in 2006 the Spanish entry in the Appendix C list comprised provision in only six of the 50 Spanish provinces in which the Commission was aware at that time of the enactment of statutory provisions for cohabitants, and in the Appendix D list of registered partnerships there was provision in 10 such provinces - although there is now, nearly a decade later, legislation of some sort in *all* Spain, including its islands, covering both types of partnership.

In accordance with the Spanish system of delegation by the Constitution of local law making powers to 17 autonomous local areas - within which sit the 50 provinces and two autonomous cities - the Constitution lays down the principles to protect cohabitants, as in other areas of the law, but local laws then define their own customised local implementation, which must reflect the provisions of the Constitution, but may otherwise vary in detail.

Thus Spain was firmly situated within the Law Commission's comparative consciousness, although they also belatedly included their noting of plans to legislate in the Irish Republic - the EU member state of Eire. Although Eire's plans were not then well advanced, and have indeed only more recently been progressed, the Commission's noting of the Republic's intentions should have thrown Spain into stark relief as an obvious comparator to inform English reform, the reasons being as follows.

First even the prospect of Eire following Spain's reforming lead should have been of significant interest to the Commission's investigative team. This is because everybody knows that Eire, like Spain, was a formerly extremely conservative and inherently religious state, which had in 2006-7 only relatively recently relaxed a previously rigid approach to the moral compass in their concept of law.

Secondly, had more than a moment's passing attention been given to the news about Eire at that time, it might have been realised, even at that stage of the

Commission's work, that legislative thought in those two EU states of Spain and Eire was potentially of keen relevance to the project in *England and Wales*: the reason for that being that it was then - and still is - anecdotally said that there would be bound to be religious objection to cohabitants' rights in English law, and in particular that the religious perspective of the *Welsh* strict 'chapel' lobby would be likely to be so hostile to legislation protecting cohabitants that it could be a significant hurdle. Clearly ignoring a hint of sudden social radicalism from a second previously strictly religious community, this time the Catholics of Eire, was at the least inattentive on the part of the Law Commission team.

Obviously, given the ONS' discovery of a diminution of the importance of religion in England and Wales in the 2011 Census, this situation has now moved on since 2006-7, so it is possible that there is no longer any strictly religious objection as such to recognising the cohabitation phenomenon in English Family Law. Nevertheless, it may be as well to look at the possible impact on the potential cultural conservatism which no doubt may continue to exist to some extent in England and Wales, a problem which Spain has clearly addressed very effectively in its 1978 constitution, which drives the approach to cohabitation in that country.

Accordingly, while the thorough tabulation details of foreign systems in the 2006 Law Commission consultation document does at least indicate an awareness of significant reform outside England and Wales, and not simply in the obvious close comparator of Scotland, which brought its Family Law (Scotland) Act 2006 into force in 2007 at the time of the English Law Commission's final report, it seems regrettable that no advantage was taken at that time of the very useful comparative material available from Spain about its reconciliation in the 1978 constitution of so much historic religious and cultural 'baggage'..

The reason for this is that while historically Spain has suffered precisely the same invasion of multi-cultural influences as now must be addressed in English law, and has endured much past religious and cultural conflict, in the past 35 years it has coordinated its approach to family formation through the 1978 Constitutional principles, while preserving the right of local autonomous authorities to legislate for their own local population.

This has thus neatly overcome not only the legacy of the warring religious factions of Christianity, Judaism and Islam in the originally fragmented minor kingdoms of medieval Spain, but also the ensuing extreme Catholicism which resisted both the Reformation and the Age of Enlightenment in Europe, and culminated in the victory of the Fascist Franco regime in the Civil War of 1936-9, which thus preserved such long standing Catholic conservatism for the 36 years of Franco's rule from 1939 to his death in 1975.

Unfortunately, no advantage appears to have been taken of what could have been this otherwise valuable awareness by the Commission of not only Spain's reform but also Eire's intentions, since the Commission apparently did not look beneath its comparative tables at the essence and process of radical reform in those two jurisdictions where strong religious objections traditionally discriminated against even stable cohabiting relationships if they were outside marriage.

If the investigative team had even scratched the surface, by for example reading the Spanish Constitution³⁷², their observation of Spain's handling of potential religious objections might have provided some useful signposts for addressing any such religious, cultural or other conservative lobbies in England and Wales. Had they then delved a little deeper - since there are practising Spanish lawyers readily available in London - it is of course possible that this might have had some influence on the otherwise extremely narrow and conservative approach of the 2006-7 project, albeit that the Commission's entire work at that period was already constrained by the terms of the original brief, which excluded the initial briefing's long list of issues that they were *not* to consider. However, with the benefit of a 2015 perspective - and the discovery in the 2011 Census of a reduced regard for religion in England and Wales - the current project is now not so constrained.

It is perhaps understandable that the London researchers' thoughts did not immediately turn to the - by then long standing but little generally noticed - equality provision for cohabitants in traditionally Catholic Spain, which had its origin in the immediate work on the Spanish Constitution of 1978, produced between 1978 and

³⁷² Available in English, www.congreso.es.

1981 but which was already rolling forward within the local legislative powers of the semi-autonomous provinces, of which the notoriously independent Spanish Basque country and Catalonia were always in global news .

At least the 1978 post Franco constitution should have been within the contemplation of the Law Commission's 2006-7 work, since while this prompt initiative had been originally generated by the death in the winter of 1975 of General Francisco Franco, once the Nationalist hero who rescued the country from communism, but had then as Head of State installed a third of a century of strict religion and conservatism, the 30 years up to 2006 also coincided with significant commercial as well as ideological expansion in Spain, during which it was also playing its full part in the European institutions at Brussels and Luxembourg, which could hardly be overlooked by the English Law Commission.

By 2006 the prompt introduction of the 1978 Spanish Constitution had long already made it clear that Spaniards had only been collectively waiting to emerge from the straitjacket of the past, which indeed they had done immediately on the institution of the democratic restored monarchy of Juan Carlos I, grandson of the King deposed in the 1930s, and since recently succeeded, as an even more modern monarch, by his own son, Felipe VI.

It is possible of course that, from the perspective of English law reform, Spain might simply have been seen as no different from any other European jurisdiction with a civil law jurisprudence, and therefore possibly of no great relevance to England and Wales. However it is perhaps surprising that, as in the EU neither strongly Presbyterian Scotland nor the staunchly Papist Republic of Eire was at that stage apparently raising any objections to cohabitants' rights reform, this did not serve to raise antennae in the Law Commission team to an awareness of the potential impact of social trends in England and Wales which might also favour reform, even amongst the more conservative - including religiously observant - sectors of society. Spanish and Irish developments might have at least given pause for thought in relation to the apparently well flagged policy concern in both London and Scotland not to take any action which might appear to undermine marriage.

EU messages on potential religious issues in English law cohabitation reform

With the benefit of hindsight, it is probably easy to see how the Law Commission initially missed the relevance of Spain. However it is harder to see how it still missed this once they also knew of potential reform in Eire, especially as together the apparent abandonment of the historic Catholicism of both should have been sending a relevant message of some sort, despite the fact that while Spain was now presenting in its Constitution as a secular state Eire was in fact formally retaining its religious links to the Catholic Church.

It is also of course possible that the Law Commission team was simply dismissive of the Irish news or that news even distracted such attention as might have been trained on Spain, rather than acting as a catalyst to highlight important religious radicalism in the EU, both because 'the Irish problem' has been a thorn in the side of England since the time of King John, and not least in the even more memorably recent 20th century. Thus it must be supposed that Eire's law reform activities were hardly a headline paradigm shift to have any impact on an English project, and in any case because the apparently endless religious issues in Ireland have been so frequent and such a running sore as to be hardly 'news' - thus perhaps it was seen as a side issue of no relevance to England and Wales if, even on the UK's doorstep, the Catholic Irish Republic were suddenly contemplating radical social reform. It was probably a mistake not to pick up this strong Irish support for Spain's pragmatism in putting equality issues before traditional religious adherence, since Eire had issued formal announcements of its intentions³⁷³ despite the fact that

³⁷³ By the Law Reform Commission of the Republic of Ireland which in 2006 through its Working Group reported to the Ministry of Justice and the Tanaiste (Irish Deputy Prime Minister, which the Law Commission also mentions in its final report (2007). However since 2006-7, the Irish Parliament has passed the Civil Partnership and Rights and Obligations of Cohabitants Act 2010, following the report of the Law Reform Commission report, Rights and Duties of Cohabitants, 2010, LRD 82-2206, www.lawreform.ie, Republic of Ireland. Their 2010 Act mainly provides for same-sex civil partners, but also for long standing cohabiting relationships where the parties have not entered into a civil partnership or marriage. The key point about this Act is that there is no difference made in its provisions between rights and obligations given to same-sex or opposite sex *cohabiting* couples although there *is* a difference made between the rights and obligations of opposite sex married couples and same-sex civil partners. Eire has, of course, since also voted for same-sex marriage, though only in 2015, so presumably is now on a similar equality wave length to Spain's.

nothing else was being done to progress formalised cohabitants' reform in the Republic until 2010, by which time the Commission's 2006-7 project was long over.

At the least, it might be supposed that the English Law Commission should have been looking in its 2006-7 project towards any available guidance from the EU generally, in which Eire - within the British islands even if not part of the UK – should in suddenly following Spain's modernisation lead, should have alerted the Commission to what they could have learned by training their intellectual telescope on 30 years of post-Franco Spain.. However the Commission seems to have fallen victim to some sort of selective blindness in respect of potential relevance of either the EU in general or either of these traditionally religious states, which is odd in a formal Law Commission project where structured law reform planning might be thought to be informed!

Thus Spain was merely included in the Law Commission appendices and Eire received only a passing mention in the text. The significant signposting which, it seems, the Law Commission also missed in passing so quickly over developments in these two relevant Catholic EU states was that news of the potential for *Irish* reform to protect opposite sex long term cohabitants was that for Eire - a fiercely Catholic community at least as religiously orientated as Spain - even to *consider* such legislation was a powerful social integration indicator, perhaps a really significant 'wake-up call' for law reformers everywhere when Spain had also already begun to take such steps in 1978 – realistically as soon as they could under the new constitutional monarchy following Franco's death.

First, it is one thing, even for a Catholic country, to legislate for same-sex civil partnerships - especially on the crest of a trend towards a wave of Western European equality legislation - but quite another for any such religiously and culturally conservative society to go further to protect those who could be married in the traditional manner of such religiously driven societies.

Secondly, even to think of including, as Spain did from 2004, same-sex relationships - which are disapproved of by every world class religion - suggests a deep level of social policy re-thinking of which note should perhaps have been taken in England and Wales, even if further investigation into Spain's progress in this respect was ignored; although it must be conceded this would possibly have been an understandable oversight on the part of the Law Commission at the time, since Spain would have been seen, in the Law Commission's perception, as

- (a) across the Channel in Europe, rather than geographically closer to the United Kingdom and England and Wales, as at least Eire clearly is, even if it is still not a secular state (unlike Spain which is), and
- (b) a civil law jurisdiction, so perhaps without much relevance either to England and Wales or the United Kingdom.

However neglect to tap into Spain at the time is a pity since, despite a small (recent) economic downturn exodus, the English expatriate diaspora in Southern Spain is now even larger and more widespread than has been the case at any time in France, and there are significant commercial links which drive these expatriate links, providing much Family Law work for Anglo-Spanish lawyers in both Spain and England which could have informed the Law Commission, as will be seen below in relation to the structure of Cohabitants' Rights provision in Spain which even in 2006-7 already had enough provincial legislation in place to provide the Commission with exemplars that would have much benefited the scheme they eventually put into their Final Report³⁷⁴ .

Thus it is strange that the Commission apparently did not notice the full impact of the fact either that the famously Catholic jurisdiction of Spain had already for 30 years apparently been simply ignoring their formerly conservative religious views in favour of passing radical legislation for cohabitants who but a short time before would have been seen as 'living in sin', and that Catholic Eire was suddenly following in Spain's footsteps. Both being member states of the EU had something to contribute to the debate in England and Wales, and whereas Eire in 2006-7 as yet had nothing to

³⁷⁴ See Chapter 4 for the Commission's 2007 recommendations.

show but intention, Spain had a constitution 3 decades old and actual legislation in several provinces while other provinces were slowly catching up. Moreover, while Spain had begun reform 3 decades before and thus had an established system, the recent sudden change of heart and mind in Eire in following the other previously strongly Catholic EU state was potentially more of an impact on England and Wales being, like Scotland, geographically closer to home in sharing a land border in the British islands although not the national and EU entity of the UK member state..

The impact of the established Spanish system and Irish activity in following their lead might have been even more obvious if the Law Commission team had stopped to consider current political events: this was the time when the contemporary English law equality drive, then at its height, had most recently resulted in the Civil Partnership Act 2004 in England and Wales, a development which would have already been leading within government policy to the Equality Act 2010, a realisation of the long held aim of consolidating the disparate threads of anti-discrimination law which had initially spiralled into English Law piecemeal through the impact of the European Court of Human Rights.

While the actual implementation of the Irish reforms was still in the future at the time of the English Law Commission's 2006-7 work, Irish conceptual development was well publicised at the time, and the policy must have been clear.³⁷⁵

It does therefore seem strange that the English Law Commission did not give greater prominence to the likely importance in 2006-7 of Eire's already published intention to legislate than simply mentioning their intention. As Eire's Act, eventually passed in 2010, also now provides a cohabitants' redress scheme³⁷⁶, the only conclusion that could have be drawn was that in following Spain's lead even Eire too had

³⁷⁵ At the signing into law of the Irish Republic's 2010 Act by the President, Mary McAleese, the Minister for Justice and Law Reform, Dermot Ahern, said that it was 'one of the most important pieces of civil rights legislation to be enacted since independence'. When he added 'Its legislative advance has seen an unprecedented degree of unity and support within both Houses of the Oireachtas' - the Irish Parliament - no one politically aware could fail to be struck by the fact that even religiously conservative Eire had united behind a measure which looked behind their own previous moral condemnation of those who chose not to marry - and any concerns they might have had about any threat to the status of marriage - but had instead focussed on contemporary tolerance of diverse social norms.

³⁷⁶ Described as a 'safety-net' for financially dependent long-term cohabitants at the end of a relationship.

recalibrated its equality criteria. While the Act itself was not passed until three years after the Law Commission finished its 2006-7 work, it is really surprising that the team did not see this coming,³⁷⁷ so as at least to take time to consider the potential philosophical importance in England and Wales of both Spain and Eire apparently having addressed their formerly overriding religious cultures.

Why did Scotland's reform research take no interest in Spain?

Unlike the Law Commission in London, the Scottish Executive did not undertake a trawl of other jurisdictions' provision when they set about their own reforms, preferring merely to refer in its Policy Memorandum to the research which the Scottish Executive had published³⁷⁸ in relation only to a smaller group of such regimes as they had selected to review, namely those in France, the Netherlands, New Zealand and Australia, commenting that 'this international comparison of the legal position of cohabiting couples reveals a complex and varied picture'. The fact that Scotland did not look towards Spain at all is unsurprising since, apart from the fact that Ireland was not yet into cohabitation reform as early as 2005, Scotland's obvious connections are historically in Europe towards Protestantism not Catholicism, and in some respects³⁷⁸ more towards common law than civil law systems, especially in the colonial context towards New Zealand, substantially settled by the Scots.

Nevertheless Scotland's narrower focus was probably not disadvantageous to the development of their own statute, since the Policy Memorandum makes clear that the Scottish Executive had already decided in principle on a normative regime which did not at all resemble marriage - an approach which differs sharply from the Australian federal statute of which the New Zealand statute is a fairly close cousin. Thus the choice of comparator European jurisdictions, such as France and the Netherlands, objectively made sense for Scotland, since if England and Wales were not necessarily introducing their own normative regime for cohabitants, some comparative lessons from Europe - especially the European Union - could in some ways be a more logical template to review for ideas than those of the more distant

³⁷⁷ Despite the fact that the Law Commission's 2007 final report specifically refers in its section on developments in other jurisdictions to the title of the Irish Law Commission's paper recommending reform, 'Rights and Duties of Cohabitants'.

³⁷⁸ See Chapter 6.

Australian and New Zealand common law systems with which England and Wales has ongoing connections, albeit that New Zealand has had a Scottish connection since its earliest European immigrations two centuries ago.

Moreover, owing to Scotland's historic 'Auld Alliance' with France, Scottish law already manifestly has in some respects an approach to marriage, divorce and family property ownership which has some resemblances to that still found in the civil jurisdiction of France, although Scotland also shares some common law tradition with England, as do the two leading southern hemisphere jurisdictions of Australia and New Zealand.

The relevance of Spain to English cohabitants' rights reform

Despite Scotland's closer connections with France, and its own relevance to English law reform, since it is a geographically close jurisdiction within the UK, the more significant EU comparison for English law is clearly still with Spain, which only in the last quarter century had the chance to legislate for cohabitants' rights, following a long period of restricted Catholic tradition and political dictatorship up to 1975.

Nevertheless the post Franco Constitution still places Spain well ahead in Europe in accepting cohabitation as a recognisable family form alongside marriage.

This historically early equality based acceptance of cohabitation owes its priority in time to the late transformation of Spain from dictatorship to democracy, which enabled the Spanish to legislate from scratch - with no antecedent legislative history to take into account - and to pass radical legislation from a position where previously adultery was a crime and cohabitation a sin which was also seen as socially deviant, so that first principles have now had a place in Spain of which there has been no equivalent in any other jurisdiction in recent times, except possibly the post-Soviet legal systems of Eastern Europe, where unfortunately there is again a language as well as cultural barrier for most English legal researchers.

The opportunity has also uniquely existed in Spain, as nowhere else in Europe, to begin afresh with a new constitution because of the long planned restoration of the monarchy as a democratic institution, bringing with it a 'Parliamentary Monarchy' Constitution of Spain for which Franco had in his lifetime coached the potential new

young monarch, Juan Carlos, passing over his father, the legitimate heir of the previous King deposed in the Civil War³⁷⁹.

Cohabitants' rights in Spain

The new Constitution explicitly set out to provide 'an advanced democracy', and guarantees equality, 'human dignity', respect for human rights as in both the Universal Declaration of Human Rights and the treaties to which the Spanish state has signed up³⁸⁰. Moreover, Article 14 further spells out the right to equality before the law so that Spaniards 'may not be discriminated against in any way on account of birth, race, sex, religion or opinion or any other social opinion or circumstance'. Article 18 guarantees the inviolability of the home and 'personal and family privacy'. Further, unlike the position during the Franco regime which stretched from the end of the Civil War in 1939 to his death in 1975, Article 16 guarantees religious and ideological freedom and articulates a secular society on the basis that there is no State religion, but that the State 'shall take the religious beliefs of Spanish society into account' and maintain 'appropriate cooperation with the Catholic Church and other confessions'.

Thus Spanish Law, in the Civil Code, follows the Constitution in providing appropriately for all its citizens, therefore protecting cohabitants as well as spouses in accordance with the wide constitutional principles of equality and liberty. While there is no specific national legislation, as that has been left to detailed local provision by the regional governments, the Civil Code broadly regulates most areas of personal or family law. However, since Spain is divided into 'provinces' and also into areas of local government into which provinces are grouped³⁸¹, the local governments³⁸² constitute the level for making detailed regional laws in respect of some matters, including cohabitation.

³⁷⁹ The legitimate heir, Juan Carlos' father, - King Alfonso III's eldest son, Don Juan de Borbon - having long been seen as likely to be even more reactionary than conservative and therefore not suitable for a reformed monarchy, although the Franco regime had probably not anticipated the extent of the social change that would follow in the first three years of that constitutional monarchy.

³⁸⁰ Article 10.

³⁸¹ Such as Andalucia in the South and Catalonia in the North.

³⁸² Called 'juntas'.

This is neither unexpected nor unusual, since following the new Constitution in 1978, the established system of leaving a great deal to local government to be administered through the town halls continued, much as in France, from which Spain obtained this framework through the establishment of the Code Napoleon in those countries occupied in the Napoleonic Wars.

Accordingly, detailed legislation was established exclusively provincially at different dates and often not at all quickly. For example, while some provinces legislated more promptly, the Canary Islands passed its cohabitation laws relatively late in 2004 and the region of Rioja in the North of Spain – the last to legislate - did not publish a full regime until 2010. There are thus regional variations, but they all operate on the basis of cohabiting couples being '*parejas de hecho*', which literally translates as 'couples of fact', or '*de facto* relationships', which is the term used in Australia, where there has been such statutory provision regulating what they term 'un-formalised' cohabitation since 1985.

Owing to the equality principles of the Spanish Constitution, the regional laws apply to couples of both opposite sex and same-sex, both of which are obliged to register their relationship with their town hall, whereupon the precise law which will govern that relationship will depend on the region in which the cohabiting couple lives. This centralisation of the role of the town hall also proceeds from a tradition, as in France, where until the PACS regime³⁸³ was introduced the town hall was central to all and any registrations. In France a pre-PACS system of registered 'concubinage' was widespread, leading to certain *ad hoc* recognition of cohabitation, not unlike the piecemeal recognition of 'living together as husband and wife' in English welfare law, which has always been an irritant to pro-cohabitant rights lobbyists in England and Wales.

An example of the wide differences in level of detail in the various regions' provisions relating to cohabitants is that of Andalusia in the South, an area where there are many British residents. In this autonomous region there is detailed provision for personal and family relations, 'inscription' - that is, town hall registration -

³⁸³ '*Pacte Civile de Solidarite*' .

dissolution and inheritance, and also for regulating the obligations of the public administration. These provisions cover in detail not only the all-important local registration of the couple's relationship, including in relation to cohabitation agreements in the couple's life time, including division of pensions, but also consequences on death.

An advantage of the registration system is that it also imports tax benefits, on a par with married couples. This appears to be a particularly neat way of establishing the commencement of a cohabiting relationship, which has been a concern to the Law Commission in England in articulating any reform in English law because - unlike in marriage or civil partnership - there is no cohabitation ceremony. The requirement to register in Spain is not technically an 'opt-in' to cohabitants' rights, since the Constitution already guarantees those, so that cohabitants' do not need to register to obtain such rights in law, but in effect only to obtain the concomitant advantages, similar to obtaining the 'passport benefits' on making certain welfare benefit claims in English law.

Neither Spaniards nor established English residents would find such registration in any way abnormal or onerous since the town hall has always been a central actor in Spanish life. Registration therefore fits well with the Spanish approach: for example, Spain had compulsory registration of '*escrituras*' -- real property ownership certificates - evidencing transactions in property, also effected at the town hall, long before the English Land Registration Act 2002 imported our own compulsory property registration. Spanish people are therefore entirely familiar with such town hall involvement from a variety of previous contexts.

Some regions have taken this local law making to extremes and require proof that a couple has been together for a period, for example one year, before registration is possible, which is similar to the position in some Australian states, and also - as in most jurisdictions in relation to marriage - that the parties are single. Some require that at least one is on the local electoral roll. The application to register must then usually be made by the couple together as for the Civil Partnership Act 2004 in English Law, and not unilaterally. A registered couple will then be jointly liable to third parties for household bills and expenses.

In the event of death of a cohabiting partner, a couple who have registered their '*pareja de hecho*' will have enabled the survivor to remain in the home which has been their habitual residence for a year after the death, regardless of whether there is title to the property or not and regardless of the legal heirs' rights, a system which appears superior in practical terms to such limited provisions as exist in Part IV of the Family Law Act 1996 for cohabitants in England and Wales.

Where there is no registration the couple will have the same rights and obligations in respect of children as if they were married, that is, there is a children's right to compulsory inheritance, but the situation of the cohabitants *inter se* in relation to property will not be protected, unless there is a contract between the parties, joint ownership or a business venture which can give rise to a civil claim.

However, this need have little practical consequence as Spanish contract law does not require consideration as the Constitution gives a right to contract as well as equality for cohabitants. In effect a cohabitant in Spain is in a similar position for legal purposes to, for example, the unmarried father in English law who can realistically obtain parental responsibility if he wants it, in that a cohabitant status as such already exists owing to the Constitution, just as an English unmarried father will be recognised as a father, but he will have to take steps, administratively with the mother or by application to the court, to obtain the concomitant parental responsibility.

However the cohabitant in Spain is in a better practical situation in that only an administrative act - that is, registration - is needed to provide full protection without recourse to court as would be necessary under TOLATA in respect of property claims in England and Wales. With the government always pleading such poverty that it says it cannot afford to run HM Courts and Tribunal Services, English Law might advantageously learn from this!

Cohabitants and Children in Spain

The Civil Code makes no distinction between married and unmarried parents, and unmarried fathers in Spain will have parental responsibility from a child's birth

without having formally to obtain it, and this will last until majority (18 as in English Law): Civil Code Articles 154-171. This is the same for adoptive parents as for any father, married or unmarried, successfully claiming paternity.

Where a cohabitants' dispute is about a child there is similarly no distinction between married and cohabiting parents, although there may be different presumptions in different provinces, depending on the default approach to resolution of such disputes, for example, in Catalonia the approach of the judiciary is for shared custody – custody is a word still used in Spain although English Law has abandoned it - but different provinces have different practices.

It should be noted that since the implementation in Spain on 1 January 2011 of the 1996 Hague Convention on Applicable Law, Recognition, Enforcement and Cooperation in Matters of Parental Responsibility or Child Protection, it is normally now Spanish law which is always applied in the case of foreign nationality of families involved in any disputes about children habitually resident in Spain, whereas previously the law dictated by their nationality would have governed. However there remains the possibility that a foreign rather than Spanish law may still apply to non-Spanish parties in a cohabitation dispute concerning property or money in Spain, so Spanish judges may find themselves applying more than one law in a case depending on the issues in it. This is clearly a classic example of the drive for harmonisation in Family law where possible, particularly in Europe.

Cohabitants who marry

The Civil Code has made provision for pre-marriage cohabitation followed by conversion to the married state, in that it is possible to enter into a pre-marital contract or pact while the parties are still living together informally, similar to a pre-nuptial agreement in English Law. These agreements are called '*capitulaciones*' and by Article 9.3 of the Civil Code will be valid, if they modify or substitute the parties' own provisions for those which would normally regulate the intended spouses' relationship, which would generally be community of property, called '*gananciales*': Articles 1.315-1,316. This will normally be the case unless the parties specifically elect separation of property, called '*separacion de bienes*'. Provided they conform to the law of the parties' nationality or of the habitual residence of either at the time

that they contract, such a pre-marital contract will be valid and the married regime, whichever was chosen, will take effect when the marriage is celebrated.

However, if a matrimonial regime is elected prior to the marriage, the actual marriage must take place within one year of signing the contract when it is thus a marriage contract. For it to be valid as such it must be made by deed, that is, executed before a Notary in accordance with Article 1.325-1.327 of the Civil Code.

Nevertheless, the terms of the Constitution must be remembered here, as the agreement can be invalid not only if there is any provision which is contrary to law or 'good custom' - such as in bad faith to defraud creditors - but also if it is contrary to the couple's equal rights. Article 1.333 requires the Civil Registry to record the matrimonial regime which has been elected and also to record any court order or resolution which changes the couple's economic regime. If immoveable property is involved these can be recorded by the Spanish Land Registry in accordance with the *Ley Hipotecaria* - Land Law. Moreover the marriage contract agreeing the matrimonial property regime can be registered where it contains rights over immoveable property.

The requirement to effect such a contract by deed before a Notary is thus readily understood when it is considered that the Notary is a public - government - official: *not* a solicitor or similar, such as might be involved in any contract in English Law. This requirement also enables the crucial terms of the agreement, and its effects, rights and obligations, to be fully explained and understood by the couple prior to signing the document. As the Civil Code establishes the right to enter into such a contract and treats it as binding from the moment it is entered into, the Notary's role is obviously important, and it is for this reason that there is no requirement to obtain legal advice prior to entering into the contract as the Notary has this obligation.

Co-ownership of property

There is nothing in Spain, either in the Constitution or Civil Code or in any regional law, which is similar to the TOLATA claim which cohabitants must fall back on in English law, so that if cohabitants are not registered and simply buy property together they will be subject to the law on co-ownership which is regulated by Article

392 of the Civil Code. This is more similar to English Law tenancy in common than to joint tenancy. Unlike in an English joint purchase situation, in Spain a co-owner cannot be fixed with co-ownership indefinitely. This means that there is always a right to demand dissolution or liquidation of the property. Two rights exist for this purpose, the right of first refusal; and the right of retraction.

The right of *first refusal* in Spanish Law – called '*tanteo*' - is not the same as in English Law, as for example under the Leasehold Reform, Housing and Urban Development Act 1993 where the freeholder must offer the right of first refusal to a lessee. There is no automatic right of first refusal; it must be registered in a particular form, declaring the right, although this is actually quite rare in practice.

The right of *retraction* is more similar to the right of first refusal in English Law, as if a co-owner sells his or her share to a third party without offering it to the other co-owner, the transaction can be challenged, the transfer will be rescinded and the other co-owner must be allowed to purchase at the same price and under the same terms and conditions. Article 1.518-1.525 enables the costs of sale and use of the property to be recovered as in the case of leasehold under English Law, since this is in essence a compulsory purchase. These conditions mean that it is rare for any sale to take place without the knowledge and cooperation of the other co-owner which is quite helpful in the case of a breakdown of a relationship, without the need for registration of home rights or land charges, provided of course both co-owners know their legal rights. As in English Law the cooperation of the mortgagee is required if there is a mortgage over a jointly owned property.

Some comparisons between the Spanish and the Scottish and English approaches to Cohabitation

The Equality approach

On the face of it, the situation in Spain, whereby the law relating to cohabitants takes its cue from the 1978 Constitution's insistence on liberty and equality, appears to be extremely practical, since it completely ignores - and apparently precludes - any discussion, let alone argument, about whether treating cohabitants in a manner similar to married couples is wrong, offensive, difficult or in any way a jurisprudential

or social problem. This must be Spain's major practical contribution to the problems often raised by international family mobility and lack of international harmonisation of key family relationships.

Cohabitation in Spain is therefore not as unlike marriage as in some other jurisdictions, as while cohabitants are not married as such they share much functionality, and the parties can in both cases elect for community of property or separation of assets through contracts, although a *marital* agreement cannot take away the presumption of equality, except by agreeing to a regime of separation of assets.

This seems to meet the adult autonomy aims of the English Law Commission's proposals and also the policy aim in England and Wales of retaining a clear formal distinction between marriage and cohabitation. Thus requiring cohabitants to register their relationship to access some of its benefits - as is the case in Spain - would seem to address the objections of those who consider that creating a separate status for cohabitants would threaten the status of marriage.

The Spanish Constitution has also expressly removed the issue of religion since Spain is now a secular state, while the Constitution requires the State to 'have regard to' or 'respect for' Spanish religions and to cooperate 'appropriately' with the Catholic Church. This seems a most tactful way of handling the religious objection to *any* formal provision for unmarried cohabitants, which is often still said to be the main stumbling block to cohabitants' legislative reform in England and Wales. There seems no equivalent focus on the religious question in either Scotland or Ireland, although the *travaux préparatoires* in both countries - for example, the Memorandum in Scotland, and the two Irish reports mentioned above - simply adopt an eminently pragmatic and practical approach to a matter of legislative reform which is treated like any other.

Spanish co-ownership of property

The Spanish co-ownership of property arrangements are certainly vastly superior to TOLATA and to the expense, stress, uncertainty and delay of litigation under that Act's provisions. On the other hand Spanish cohabitation provisions, being left in

detail to the regions, are not uniform and do not provide as clear a regime as the Scots system has. The requirement to register co-ownership with the Notary, a public official, is a significant advantage, as is the potential of the rights of first refusal or retraction, as this means that the relationship is documented, which has always been another stumbling block in England and Wales - since it has been claimed, with some justification, that there is no defined starting and finishing point indicated by a cohabiting relationship which, unlike marriage or civil partnership, has no ceremony,.

The Spanish 'opt in' approach: a hybrid model?

It is said that Spain has elected for an 'opt in' scheme, relying on a triple approach of Constitutional principle, local regional law and requirement to register the relationship to access its full benefits - unlike New Zealand, for example, where there is a clear one stage default system, but similar to Australia, where the goal is to persuade what their jurisdiction calls 'un-formalised couples' to get under the umbrella of their own 2006 Act.

However the more complex approach of Constitution and local regional law, plus the requirement to register, appears to combine the best of both the opt-in and opt-out methodologies. For discussion of these differences, which the English Law Commission debated at length, and assessment of whether opting in or opting out is more practical, see Chapter 9.

Conclusion

There is much to be learned from the Spanish approach, which clearly adopts the functionality points repeatedly made in England, over a long period, by Barlow and her various teams³⁸⁴. That functionality should work in overseas jurisdictions is not a surprise, since this is the approach in many which blazed an early trail, such as Australia and New Zealand. What *is* a surprise is that it appears to work in previously fundamentally religious Spain without obvious difficulty, both in relation to practical application of the law and acceptance by society, and which in turn seems

³⁸⁴ See Chapter 3.

to have generated no adverse comment or hostility to the equality approach to both formally married and informally cohabiting couples.

The value added point in relation to Spain, as a pointer to what might eventually be consensually achieved in England and Wales, is Spain's previous notably religious character which now, however, appears *not* - as it might have been - an obstacle standing in the way of equal acceptance of cohabitation alongside marriage as a family framework norm. On the other hand, in England and Wales it seems there has always been a major sensitivity about any possible perception of cohabitants as a threat to marriage, although adherence to the long standing definition of marriage set out in *Hyde v Hyde* in 1866³⁸⁵ has recently been almost entirely abandoned with the passage of the Marriage (Same-Sex Couples) Act 2013.

Clearly the enactment of this statute has effected major change, despite the fact that it has been long held, and even respected in the European Court of Human Rights until *Goodwin v UK* in 2002, that marriage has always enjoyed such a special cultural meaning in English Law that the English view of marriage had to be given a special margin of appreciation.

The result of this English law and policy stance seems to have been - so far - that cohabitants could not possibly have any recognised status within the Law Commission's 2006-7 work, in that its brief was specifically *not* to consider any separate status for cohabitants which might even be thought potentially to undermine marriage.

However it does now seem that the question must be asked why, if Spain – and the Republic of Ireland, an equally fundamentally religious Catholic state and unlike modern Spain not a secular one – can entertain the norm of a parallel family framework to marriage, it should still be considered impossible for there to be a normative regime for cohabitants in English law which recognises their *de facto* status? This is the more so as Scotland - equally religiously didactic, but towards the

³⁸⁵ [1866] LR1 P&D 130.

extreme Protestantism end of the religious spectrum - has in effect created a legally recognisable *state* of cohabitation even if it is not labelled as a status as such.

It is possible that there is an explanation for this surprisingly willing acceptance of cohabitation in Spain, despite the fact that this is completely opposite to its historic and cultural circumstances: although, whatever that explanation is does not necessarily detract from the pragmatic success of the provisions of the 1978 Constitution since Spain was also before England and Wales in accepting same-sex marriage, indicating some seriously fundamental acceptance of social norm reconstruction.

it seems that the most likely reason for acceptance of such fundamental changes has its roots in the fact that, in the four decades since 1975, Spain has now become such a secular society that the constitutional position simply raises no queries at all. Those who are religious appear to continue to go to church and to observe the rituals of religion, and those who appear neither to be protesting nor protested against.

Faber³⁸⁶, writing in 2006 in reviewing the then position just over 30 years after Franco's death, suggests that in the first quarter century there was a pact of silence about both the twin Republican-Nationalist and secular-religious confrontations of the 1936-39 Civil War and the subsequent repression of secularity and dissident politics during the Nationalist Franco regime of 1939-1975, but that Spain has now emerged into a modern intellectualism which confronts these past demons dispassionately.

If that can happen in Spain, following the bitterness of both the Civil War and the grudges of the defeated, there would therefore appear no reason that we should do worse in England and Wales where the most spectacular - and non-cerebral - dispute over preserving the distinction between marriage and those 'living in sin' was the *Daily Mail* campaign against giving cohabitants equal protection against domestic violence in Part IV of the Family Law Act 1996.

³⁸⁶ Sebastiaan Faber 'Revisiting the Past, Truth, Justice and Reconciliation in Post-Franco Spain, (2006) *Revista Hispanica Modernerna*, Ano 59 No 1/ 2, June-Dec 2006, University of Pennsylvania Press..

Similarly, since in Eire there has been unity of approach to equality and tolerance for private choices over intimate family relationships, it is now difficult to justify the 2006 government stance on the unique status of marriage which dictated that the English Law Commission should *not* have included in its brief any potential consideration of a separate status for cohabitants, as has been in effect long given to cohabiting couples in Australia and New Zealand.

Associated limited fieldwork with Anglo-Spanish practitioners ³⁸⁷ indicates that despite the umbrella equality provisions of the Constitution, detailed local laws and the requirement for town hall registration in order to claim its benefits - which seems to be a hybrid system, part default and part 'opt in' - there are *still* lawyers' clients, both Spanish and English expatriates, who do not know and/or understand their rights, and - in the case of expatriate British residents - the difference between them in England and Wales and in Spain.

Nevertheless, examination of the Spanish system seems to yield two positive contributions to potential reform in England and Wales.

First, town hall registration - easily linked to council tax and other local government functions - could certainly be an answer to the frequent conundrum, common to most jurisdictions legislating for cohabitants' rights, of how to pin point the formal date of commencement of cohabitation where there is, unlike marriage, no ceremony. Moreover the property provisions, including the role of the Notary, would save many property problems from arising in England and Wales, where it seems the existing conveyancing practices, Land Registry's forms and online registration are *not* necessarily achieving declarations of trust and avoidance of subsequent TOLATA 1996 litigation .

Secondly, the role of the Constitution in Spain - in particular in addressing the former heavily religious culture, has turned out to be so powerful in the cohabitant context that it may be that this is the key, unique, Spanish contribution to the international debate which might find resonance in a scheme for England and Wales.

³⁸⁷ For which see Chapter 9.

While we have no written constitution we do have a relatively new Equality Act 2010 which was meant to collate all anti-discrimination measures but has not addressed cohabitants, despite the identification of potential indirect discrimination identified by Choudhry & Herring in 2010³⁸⁸. We also have a Human Rights Act 1998, so that both of these statutes should potentially be capable of addressing cohabitants' rights, especially since recent 2013 legislation has now closed that gap for same-sex couples, which is further discussed in Chapter 9.

Reform is really overdue, since besides the Law Commission's 2006-7 aborted work, the Law Society in 2000 and Resolution in 2002 and 2008³⁸⁹ and most recently in their 2015 Manifesto³⁹⁰, have been pressing for reform for many years.

³⁸⁸ Shazia Choudhry and Jonathan Herring, *European Human Rights and Family Law*, Hart, 2010.

³⁸⁹ *Fairness for Families: proposals for reform of the law on cohabitation*, SFLA, 2000; *Living Together, Shared Home, Shared Rights: Reforming the Law For People Who Live Together*, Resolution, 2002.

³⁹⁰ *Resolution Manifesto for Family Law*, www.resolution.org.uk.

Chapter 8 Australia and New Zealand

Introduction

This chapter undertakes a survey of cohabitants' rights provision in Australia and New Zealand, and then critically examines the relevance of their historical background, sources, modes of thought, legal styles and other features, which stemming as they do from the common law tradition of English Law, lend themselves more readily in comparative law terms to potential transition to England and Wales than some of the ideas behind either the Scottish or Spanish schemes.

The primary aim is to look at the reform experience in Australia, which began at state level and has had a long timeline since the initial legislation in New South Wales in 1975 before becoming federal in 2006, apparently the vintage year for cohabitation statutes in Australia, New Zealand and Scotland.

The secondary aim is to consider the New Zealand reforms, which came about in a slightly different manner, with an amendment being made to the former Matrimonial Property Act 1976 to create a neutrally named Property Relationships Act, and then reforming that statute to consolidate all New Zealand's married and unmarried couples' legislation in one statute.

This reform, envisaged by the earlier Cabinet policy paper, was thus signalled through this change to a neutral title, and then completed by including cohabitants within the previously existing matrimonial legislative provisions.

A further difference between the process in New Zealand and Australia was because, unlike federal Australia, New Zealand as a single jurisdiction with no federal complications only had to pass one statute and did not have to consider any previous regional legislation. As a single jurisdiction New Zealand is thus also more similar to England and Wales where there is normally no distinction between the Family law applying in England or in Wales, although some of our statutes do may make distinct provisions to apply in the two geographical areas: an example may be seen in the Children Act 2004, which has provided for two different Children's

Commissioners, one for England and one for Wales, and a distinct force of Cafcass officers, one each for England and for Wales.

Australia and New Zealand present further perspectives on legislating to provide a normative regime for cohabitants, and each has done so in accordance with its individual jurisdiction's distinctive personality and character. While there are similarities in the approach of these two southern hemisphere common law Dominions of the Commonwealth, there are in fact distinct differences in their respective systems, although the similarities are greater than the divergences.

One important difference is that Australia, despite establishment of its federal Family Court, still has both state level and federal level statutes, whereas New Zealand, being a single jurisdiction like England and Wales, has never had any local laws differing from the national statutes although in England and Wales, Wales now has an Assembly – which is not at present a Parliament as in Scotland, so that while Scotland can pass its own statutes, in the same way as Australian states, the Welsh Assembly can only pass 'Measures', some of which have had importance in Family Law, such as that mainstreaming the paramountcy of the welfare of the child in all legislation affecting Wales.

Both Australia and New Zealand, however, have a longer culturally established legal recognition of cohabiting relationships than either Scotland or Spain. Whereas Scotland only took a proactive step in 2006 to protect 'all Scotland's people' by legislating - unconnected to any specific event – so as to replace their less than satisfactory common law provision, Spain's was reactive and part of a general equality based initiative on drafting that country's new 1978 Constitution, following the establishment of the democratic monarchy at the end of the Franco era.

This virtually routine equality approach in Spain, within the spirit of the time and particularly chiming with the European Union ethos, enabled inclusion of cohabitants within a specific principle of the new Constitution. This was in effect a contemporary generalised approach to a modernising equality goal, designed to replace the outdated principles of the essentially repressive regime which had followed the Civil War of 1936-39. This constitutional equality principle, stated in general equality

terms in the Constitution, thus permitted later articulation to recognise cohabitation in the local laws of each autonomous region of the country, while also naturally also remaining bound to respect the constitutional principles in relation to cohabitation as in other discrete areas of legislation.

On the other hand, Australia and New Zealand appear simply to have catered for social change by updating their existing Family legislation, along with their concept of the underlying theory of contemporary family life that their societies appeared to have developed in the last two decades of the 20th century – a strikingly straightforward pathway to adapting, as Scotland did, to addressing what the Scots simply called, in plain language, ‘today’s family structures’³⁹¹.

By comparison with the England and Wales, this approach is very attractive as a pragmatic acceptance of what might be considered to be the role of governments responsible for ensuring the rule of law and access to justice for their citizens, in other words legal frameworks that suit the nature and requirements of the society they serve.

These two jurisdictions have apparently not only achieved this this but done so in the manner with which the rest of the common law world has become familiar, that is initially through ongoing awareness in other common law jurisdictions, including that of England and Wales, of the steady delivery of the persuasive authority of Australian and New Zealand reported cases in our courts when our own English law precedents were silent, thus establishing a track record in the judicial development of English law across fields wider than Family law. Secondly, in academe, when cases from these two proactive common law jurisdictions, having first been cited in our higher courts, have then received comment in the scholarly literature of both academics and researchers, Australian and New Zealand Law schools have crafted a reputation for their research and publications. If this ever was surprising to English jurists, when it is considered that originally these former colonies followed our lead, rather than the other way around, it certainly is not now.

³⁹¹ See Chapter 6.

Thus with the different triggers in Scotland and Spain must be compared these much earlier proactive steps in both Australia and New Zealand, where cohabitation had been recognised for some years as a family format which was as valid as marriage, though to begin with their legislation, like that of English law, emphasised the status of marriage as one to be protected.

More recently, however, these two jurisdictions have taken divergent views about upgrading their systems to include same-sex marriage: on 19 April 2013 New Zealand's Marriage (Definition of Marriage) Act 2013 received the Royal Assent, whereas it appears that Australia has not yet legislated effectively on a federal basis, since on 13 December 2013, in the case of *Commonwealth of Australia v Australian Capital Territory*³⁹² the High Court of Australia declared the Australian Capital Territory's statute recognising same-sex marriage incompatible with the federal Marriage Act 1961, although there are same-sex union provisions in four of the states of Australia.

Nevertheless, same-sex marriage apart, the two jurisdictions are fairly close on the treatment of cohabitation in general.

Australia

Australia has had discrete *de facto* relationships property legislation in different states since 1984 when New South Wales was the first state to introduce a *De facto Relationships Act*, but since the amendment of the Family Law Act 1975 spouses and cohabitants, including same-sex couples, the latter of whom are not, however, 'married', can now have their separation disputes determined by the federal Family Court of Australia, although it appears that Western Australia still retains its own Family Court and has not referred its powers in this context.

However Australia has only more recently - in 2006, when the Family Law Act was amended on 22 May in that year - actually consolidated the treatment of married couples and cohabitants into a largely uniform system. Nevertheless, it seems that this has never been treated conceptually as an 'equalisation' of marriage and

³⁹² *Commonwealth of Australia v Australian Capital Territory* [2013]HC 55 (Australia).

cohabitation, not least because Australian law on *de facto* relationships is so flexible that it can even encompass a relationship of more than two persons, since partners in a multiple relationship can also use the *de facto* legislative provisions³⁹³. Thus Mushin J, in the case of *Moby v Schulter*³⁹⁴ is recorded as saying, when applying the *de facto* legislation, 'it is inappropriate to draw parallels between the concept of a *de facto* relationship and marriage'.

The fact remains, however, that it seems that Australia - first at state level, then more recently in its federal law - has been entirely comfortable with cohabiting relationships since at least the last quarter of the 20th century, and that field, as in so many areas of law, has been well ahead of the former mother country jurisdiction in providing legal recognition for cohabitation, while over the same period academics and practitioners in England and Wales have been commenting on the need even for the introduction into English law of some sort of normative regime for cohabitants, and doing it for very nearly as long as Australia and New Zealand have been developing their inclusive Family law.

Such commentators in English law have, nevertheless, been doing so without apparent impact, other than, very lately, when the Justices of the Supreme Court in London have not only taken notice of the gap in our legal provision but recorded their dismay at the lack of *any* progress in law reform in this area, these comments appearing in their judgments in both the English and Scottish cohabitation cases to come before them.

In specific relation to the now unarguable need for cohabitants' rights provision in English law, it must be highly significant that in both these cases some notice was not only taken of the pressing need for a normative regime for cohabitants in England and Wales, but there were actually adverse judicial comments on the lack of such legislation, and this time not only from Baroness Hale but from at least three of

³⁹³ Lisa Young, 'Australia: New Frontiers for Family Law', *The International Survey of Family Law* 2013 Edition, Family Law, Jordan Publishing Limited, 2013, pp.64-70.

³⁹⁴ *Moby v Schulter* [2010] FLC 93-447 (Australia).

the Justices about the lack of English legislation in both the English case of *Jones v Kernott* in 2011³⁹⁵ and the Scottish appeal of *Gow v Grant* in 2012³⁹⁶.

Young³⁹⁷ goes on to say, however, that in Australia the pre-federal legislation at state level 'still operates' and that 'the judiciary have not adopted a uniform approach' in interpreting what a '*de facto* relationship' means. This seems to support the global impression that Australia has a down to earth executive which takes a pragmatic and 'no nonsense' view of its citizens' requirements in relation to law as well as in other contexts, but is of concern in that it suggests a lack of articulated jurisprudential theory underpinning what is nevertheless obviously a practical 'live and let live' equality approach to society (see further below).

Nevertheless, this practical, and sometimes apparently casual, response to society as Australia sees it to be is a national feature entirely in character with the known Australian 'can do' ethos, as typified in one its more famous linguistic expressions 'No worries'. Moreover if there is sometimes an apparent lack of underlying juristic theory, certainly England and Wales, being still in its own glasshouse, is not in a position to throw stones, especially given the significant corpus of scholarship and jurisprudence which has often emanated from Australian sources when more conservative English law lacked provision to address social change .

New Zealand

New Zealand also has *de facto* legislation, having from 1 February 2002 amended its Property Relationships Act 1976 to include cohabitants, so that this statute, formerly the Matrimonial Property Act 1976 - until neutrally renamed during amendment - no longer applies only to married couples Following the *Legal Recognition of Adult Relationships Cabinet Document*³⁹⁸, this renamed statute was then extended to cover same sex relationships by a Property Relationships (Amendment) Act 2005. Thus New Zealand law now recognises married couples, 'civil unions' - similar to

³⁹⁵ [2011] UKSC 53 *per* Lord Wilson [70].

³⁹⁶ [2013] UKSC 29 *per* Baroness Hale [44]-[56].

³⁹⁷ Lisa Young, n389.

³⁹⁸ 2003, www.justice.govt.nz/...relationships.../legal-recognition-of-adult-relationships.

registered civil partnerships in English Law - and *de facto* relationships in one statute.

As New Zealand is not a federal jurisdiction the resulting law appears to be more precise than Australia's. New Zealand law includes, for example, a checklist of criteria which cohabitants must meet in order to be defined as such, and which therefore applies to the whole country, and there is obviously less scope for the lack of judicial consistency in Australia mentioned by Young³⁹⁹.

A drawback of the New Zealand system may be that the umbrella effect of the Property Relationships Act is automatic, so that it is apparently the case that some cohabitants do not realise that, notwithstanding the supposedly clarifying criteria within the legislation, they are automatically subject to the property sharing regime that it provides unless they opt out. New Zealand academics have highlighted this potential downside⁴⁰⁰, and also at the same time the concomitant problem of determining when the cohabitation began in order to bring the couple within the criteria to access the remedies provided by the legislation, and within the minimum period of three years for equality awards .

Both of these downsides are avoided by the Spanish system, and also in France, where the parties are required to register their relationship⁴⁰¹. One wonders why New Zealand, choosing an opt-out scheme, did not also simply require registration of the cohabitant relationship so that there was a record which would avoid these queries, at the same time also alerting the cohabitants in question to the fact that they were subject to the Property Relationships Act unless they opted out. Australia, on the other hand, *does* have registration, although it is not compulsory.

Nevertheless New Zealand's is a very precise scheme which reflects the country's approach to social equality and their Bill of Rights 1990, which appears, from the *Cabinet Document*, to have been the driver to the 2005 legislative amendments

³⁹⁹ Ibid.

⁴⁰⁰ Nicola Peart, Margaret Briggs, Mark Henaghan, Jacinta Ruru et al, Brookers, 2004,2010: Mark Henaghan, 'Discretion, status and money: The essence of family law in New Zealand, in Bill Atkin, (ed) *International Survey of Family Law*, Jordans Publishing, 2011, pp.281-30.

⁴⁰¹ See Chapter 7.

which included same-sex partners, and that the process was conducted in a very similar manner to the Scottish Executive's initiative in Scotland. The small size of the population of both the Scottish and New Zealand jurisdictions no doubt facilitated such precision, which would have been likely to be much easier than in a federal state such as Australia, or in a country such as Spain with several autonomous areas with legislative powers.

The Law in Australia

There are several statutes because the law began at state level but is now federal, although the state level law also remains.

The Family Law Act 2006

Australia's federal cohabitation law dates from the amendment to the Australian Family Law Act 1975 in 2006, which then generated a referral of power from the individual states, resulting in some different dates for implementation as the states completed this over a period of years. Mostly this means that from 1 December 2009 Australia has a federal law addressing cohabitation or, as the terminology is there, 'un-formalised relationships', although there is some variation in date between the different states as to when this federal law applied. For example, South Australia has a later commencement date of 1 July 2010, whereas Western Australia, having its own Family Court, has had its own similar statute, since their Family Court Act 1997, in force since 1 December 2002.

In Australia a cohabitation relationship is defined by the Family Law Act s 4AA (1) as one where 'having regard to all the circumstances of their relationship' the cohabitants 'have a relationship as a couple living together on a genuine domestic basis'. In order to interpret the 'circumstances' mentioned, the Act contains in s 4AA(2) a list of criteria similar to New Zealand's and on the basis of which the couple's qualification to access the remedies provided by the legislation depends: these are common residence, sexual relationship, financial interdependence and support, jointly owned property, mutual commitment, care and support of children, public reputation as a couple, length of the relationship and - as in Spain - by s 4AA(2)(g), whether the relationship is registered.

These criteria were apparently derived from a decision of Justice Powell of the New South Wales Supreme Court in the case of *Roy v Sturgeon*⁴⁰². However, it seems that not all the individual heads must be satisfied, as Young says that ‘the more of the above markers in a relationship, the more likely a court will identify it as a ‘*de facto*’ relationship’⁴⁰³.

The court is obliged, by s 4AA(4), to attach such weight to any individual criterion as is appropriate in the circumstances of each individual case, and it seems from the published guidance of the Family Law Section of the Law Council of Australia⁴⁰⁴ that registration alone is *not* sufficient, and that ‘the federal legislature was not intending that registration of relationships, notably same-sex relationships, be the equivalent of marriage’⁴⁰⁵. However, Professor Bates also gives it as his view that the draughtsman may, in fact, have inadvertently done that in s 90SB(d) which sets out ‘four gateway requirements, that is (i) at least 2 years’ cohabitation, (ii) a child of the relationship, (iii) making substantial contributions of a kind mentioned in s 90SM(a) (b) or (c), or (iv) registration ‘under a prescribed law of a state or territory’. Thus Bates says that registration at state level could give rise to ‘the creation of rights and obligations which are very similar to those arising from formal marriage’.

While this may be true in the Australian state or federal case, this does not seem to be the result in Spain, where registration does nothing but to record rights which already exist and which may be the same as in marriage, since those rights under the Constitution in fact only require a couple to be *treated* equally whether they are married or not, without stating that they *are* married, or that they should be treated as *if* they were married, because what the Spanish Constitution provides is the general equality prohibition meaning that cohabitants cannot be treated less equally than a married couple.

It therefore seems that in logic registration can at least be a useful aid to defining the existence of a cohabiting relationship while it *need* not also be a problem in giving

⁴⁰² [[1986] 11NSWLR 54 (Australia).

⁴⁰³ Lisa Young, n389.

⁴⁰⁴ Law Council of Australia, *The New De Facto Regime: A Handbook, Family Law Section*, 2009.

⁴⁰⁵ Frank Bates, in Elaine Sutherland (ed) ‘*The future of child and family law*’, Australian Institute of Family Studies, CUP, 2012 .

cohabitants' rights to couples, especially as in Australia registration is only one indication of the establishment of cohabitation. This may be splitting very fine hairs, although in England and Wales it seems that hair splitting has been entirely what the debate on cohabitants' rights has been about since 1996 and before! – that is, we would like to legislate for cohabitant protection but are afraid of an adverse reaction to any suggestion that these couples might seem to be being treated in the same way as married people!

It nevertheless appears that in both Australia and New Zealand there is some room for argument as to *whether* the couple qualifies for the purpose of obtaining the remedies provided but, if they do, property and maintenance *are* determined in the same way as for married couples, though it still seems the result may not be precisely the same.

This contrasts with the situation in Scotland where Baroness Hale, adding 'a few words' to the judgment in the Scottish appeal in *Gow v Grant*, says that the experience there is that parties have *not* disputed whether or not they were in a cohabitation relationship, though they sometimes have disagreed about when the cohabitation began.

The qualifying criteria and period of cohabitation appear, however, to be much contested in Australia as appears from *Young et al*⁴⁰⁶ despite the fact that in some states - not all - the parties can apparently register their relationship if they are so inclined, though do not have to if they are not: thus at least the start of the relationship *can* be easily determined.

What is more surprising about the Australian legislation is that it appears from s 4AA(5) to apply to *de facto* relationships which can be valid regardless of the fact that a party may be already married to someone else, or even in another *de facto* relationship with another person, although historically the development of *de facto* legislation at state level was that these relationships were perceived as having 'common elements of marriage' *and* were also historically relevant to some couples

⁴⁰⁶ Lisa Young, Geoffrey Monahan, Adiva Sifris and Robyn Carrol, *Family Law in Australia*, 8th edn, 2013, Lexis Nexis Butterworths,

who were not in a position to marry, but who could still suffer the same economic disadvantage as separated married couples

What is further surprising is that academic commentators in Australia consider that marriage and *de facto* relationships are not precisely the same 'even in the context of this remedial family legislation' and even though the current legislation applies to both. Young says it is 'because they are so similar that the legislation applies equally to both' but that 'of course there will be points of difference, but in practice they may make little difference'⁴⁰⁷.

The Family Law Amendment Act (De Facto Financial Matters and Other Measures) Act 2008

This Act, which came into force on 1 March 2009, provides for finance and property of both same-sex and opposite sex cohabitants to be dealt with under the Family Law Act 1975. This has been achieved by inserting new Parts VIIIA, finance and property, and VIIIB, superannuation, together with some transitional provisions into the Act. Most of these new provisions mirror those already available to married couples in the 1975 Act but some are new and have attracted comment.

There is, for example, also an innovative provision in s 90(k)(1)(aa) which prevents a married person defeating a *de facto* partner's claims by entering into what Bates calls a 'sweetheart deal' with a spouse or ex-spouse. For this purpose there is a strong provision requiring the *de facto* partner to show that the married person either had a purpose to defraud or defeat the *de facto*'s claim or a reckless disregard for the *de facto*'s interest. This, Bates says, is 'more stringent than' the provision already found in s 106B applying to married couples and that this 'given the section's aims, is probably as it ought to be'⁴⁰⁸. Given the religious objections that have sometimes been advanced against protecting cohabitants' interests at all, not least in England and Wales, this superior protection of the cohabitant in Australia from collusion between the cohabitant's partner and the partner's spouse or ex-spouse certainly seems a very different and unusual kind of highly moral tone for a legislature to take.

⁴⁰⁷ n389.

⁴⁰⁸ n389,

This Act also deals, in s 90MX(3), with multiple relationships and superannuation, and further makes provision in s 90SF(3)(s) for taking into account any binding financial agreement that a *de facto* partner has with any past or present married partner, given the fact that a person in a *de facto* relationship can also be married at the same time. Thus spousal obligations have to be taken into account when dealing with the *de factos'* property.

The fact that the Act provides for multiple relationships at all is at first a startling innovation for an English scholar to take on board: however upon closer examination perhaps not so startling if equality in personal relationships is the foundation of the legislation. Multiple enduring couple relationships are, of course, not new in England and Wales, for example, that of Charles Dickens and Nelly Tiernan in the 19th century, the subject of a multi-award winning biography by Tomalin⁴⁰⁹, and such multiple families continue to be discovered upon the death of – usually - the male cohabitant, for example, in *Jessop v Jessop*⁴¹⁰.

One particular provision of the Act which 'intrigues' Professor Bates in relation to this financial legislation is an amendment to s 43(a) of the Family Law Act which has always required the court to have regard to 'the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others entered into for life'⁴¹¹ of which he says he has 'long considered this enactment to be of questionable anthropological validity and of scant effect on the mundane operation of the legislation at large'⁴¹². Not surprisingly s 43 has been amended in relation to *de facto* relationships so that the court is *not* now required to have regard to this principle in any way when dealing with financial matters in connection with such *de facto* relationships.

The Law in New Zealand

New Zealand set about its cohabitants' rights in a different way.

⁴⁰⁹ Claire Tomalin, *The Invisible Woman*, Penguin, 1990.

⁴¹⁰ [1992] 1 FLR 591..

⁴¹¹ Lisa Young, quoting Frank Bates, in 'Australia: New Frontiers for Family Law' *The International Survey of Family Law 2013 edition*, Jordan Publishing, 2013.

⁴¹² Frank Bates, Principle and the Family Law Act: the Use and Abuses of s 43', (1981) *55 Aust LJ* p.181.

It appears from item 4.1 of the New Zealand Cabinet Policy paper of 26 June 2003 that law reform in that jurisdiction set out to eliminate any provision that was 'unjustifiably discriminatory', the definition of a *de facto* relationship being simply one of 'two persons who live together who are not married to each other'. This approach was then further defined by the introduction of a list of factors which could be taken into consideration to determine whether the two persons were living together as a couple and was based on the same criteria in the Property Relationships Act 1976, that is to say as set out in items 4.2-4.9 :

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

Further, item 4.3 records that no one factor or combination of them was to be taken as determinative of whether the parties were a couple and that a decision maker could have regard to whatever might be appropriate in the circumstances.

The Minute goes on to record the Court of Appeal's decision in the case of *Ruka v Department of Social Welfare*⁴¹³ that financial interdependence and emotional commitment were the two essential elements of a *de facto* relationship, not merely factors of importance for the purposes of recognition as a couple for couple status for benefit purposes pursuant to the Social Security Act 1964 s 63(b.)

The Cabinet Document *Legal Recognition of Adult Relationships* , prepared by the Office of the Associate Minister of Justice in the Ministry of Justice in 2003, which

⁴¹³ *Ruka v Department of Social Welfare* [1997] 1 NZLR 154, CA. (New Zealand).

proceeded from the Minute which took the decisions referred to above, records that the 'Cabinet has agreed to amend legislative provisions that are unjust to same or opposite sex *de facto* couples'. The paper goes on to set out the aim of legislating so that they could 'offer sufficient flexibility to respond to a variety of different circumstances'. It then continues '*De facto* relationships are by their very nature hard to define' but envisages a range, from 'little more than a casual relationship' to 'continuing affectionate companionship' and on to 'emotional commitment and financial interdependence'. Moreover the paper accepts that a relationship may 'evolve over time' making it difficult 'to pinpoint a time when such a relationship should assume a new legal significance'.

The paper then continues to make comparisons with the then existing law in relation to spouses, to refer to the fact that the Property Relationships Act 1976 did not generally award property to partners in *de facto* relationships of less than 3 years duration, though the court could do so on the basis of each partner's contribution to the relationship if

- (i) there was a child of the relationship or a partner had made a significant contribution to the partnership relationship, and
- (ii) not to do so would be a serious injustice.

At the time that this Cabinet paper was prepared there was apparently no intention to include in the legislation any minimum period for which the proposed uniform *de facto* relationship must endure before the couple would have the protection of the new Act. However when the new uniform statute was passed in 2005 the usual arrangement in relation to married and heterosexual cohabitants was extended to same-sex relationships so that all couples' property was afterwards divided equally once they had lived together for three years. At the same time the former rules which divided property into 'relationship property' and 'separate property' was abandoned and all property became available for division across all three relationships - married, civil union and cohabitants - unless there were extraordinary circumstances which made that unjust. Only in relation to those relationships 'of short duration' - this is, of less than three years - were the old divisions of property into 'relationship

property' or 'separate property' retained from the original statute which provided for married couples.

However the current uniform law also recognises both the cohabitation element and any married element if the parties have cohabited first and then married, so that a marriage of two years can be treated as one of four if the parties had also cohabited for a further two years beforehand. Thus a married couple with less than three years' matrimony may easily overcome the requirement for a three year relationship if they have cohabited prior to the ceremony of marriage. On the other hand cohabitants, whether of the same or opposite sex, are obliged to prove the requisite 3 years cohabitation through addressing the detailed criteria for determining that their relationship qualifies, which is apparently a routine problem since in the case of informally cohabiting couples there is no ceremony and no registration.

Nevertheless, this is an automatic system into which all couples who are living together are included unless they have opted out, which is permitted but must be effected in due form. *De facto* couples who wish to opt out and to make their own agreements for the division of any property must do so having received independent legal advice, otherwise the agreement will not be valid nor have the effect of removing the couple from automatic inclusion under the Act.

Conclusion: Lessons from Australia and New Zealand?

First of all, the comparative simplicity of the provision for cohabitants in these two southern hemisphere jurisdictions is striking when placed side by side with the more complex systems devised by the English Law Commission, and even in comparison with the Scottish compensation approach. .

This also has the merit of exhibiting some of the characteristics of proprietary estoppel in attempting to deliver a result which deals appropriately with the applicant's detriment from the relationship, in respect of which Baroness Hale in the Westminster Supreme Court - hearing final appeals from both Scotland and England and Wales - has identified proprietary estoppel principles as potentially having more to offer to a discrete regime for cohabitants' property in England and Wales than even her otherwise preferred tool of choice, the constructive trust' identified in the

English case of *Jones v Kernott* in 2011 as the route to resolution of claims in the equity of the family home whether the parties are married or not.

Whatever the reason for legislating for a cohabitants' own discrete normative legal regime, simplicity certainly appeals, both because an overly complex compensation scheme is likely to prove difficult in which to ensure consistency, as is commented on by Young in Australia because their system is so flexible, and because, unless there is going to be a system of registration, ordinary members of the public are likely to be confused about whether the legislation applies to them or not. It is clear that this has already happened in New Zealand where it appears that many people do opt out, but in order to opt out of an automatic/opt-out scheme such a person would have to know

- (i) that there was a system
- (ii) that it applied automatically and when and in what circumstances
- (iii) that it was possible to opt out, and
- (iv) how to opt out effectively in law.

With less and less legal aid available around the world clarity and simplicity of law will become increasingly important.

The second point to note about the southern hemisphere approach is that there is much to be said for the Australian and New Zealand system of treating each possible variant of an adult coupling arrangement equally, whether that be a couple which is married, in a civil partnership or simply cohabiting informally - or, in an Australian state at state level, cohabiting having *registered* their relationship. This adds a further layer of simplicity – rather than, as in England and Wales under TOLATA 1996 and the Civil Procedure Rules in ordinary civil litigation outside the Family Court - ‘a further layer of complexity’, as Resolution regularly complains in the guides with which it attempts to help both the LIP public and the practising Family profession which does not find the Chancery TOLATA process easy work at all⁴¹⁴ .

⁴¹⁴ Resolution, *Cohabitation, A Resolution Guide*, Resolution, 2011; *Resolution Cohabitation Claims Guide*. Jordan Publishing, 2011.

Nevertheless, while simplicity is attractive in itself, circumstances may require this admirable quality to be trumped where necessary, but happily the relative simplicity of the New Zealand scheme also has the advantage of a *discretionary element*, which chimes with the discretion valued in family justice in English law, and indeed in the English doctrine of proprietary estoppels which majors in a disposal that fits the practical and jurisprudential circumstances.

This clearly deflects much of the argument against legislating for cohabitants' rights in England and Wales for fear of confusion of *their* rights with those of married couples. It is fair to say that similar success in providing a unified 'all relationships' statute while still creating a suitable distinction between married and unmarried couples has already been achieved in English law in one discrete area of law, namely the Family Law Act 1996 Part IV. Although this statute only deals with domestic violence and associated home occupation order in relation to both spouses and cohabitants and occupation of the home, it appears to be nonsense to adhere to past theories that similar legislation cannot be achieved in English law in relation to other cohabitants' rights too, especially now this has been done - and apparently done successfully - in New Zealand in the wider context of cohabitants' rights generally,.

Thirdly, of these two jurisdictions of the Southern Hemisphere, by far the simpler scheme also seems to be that of New Zealand, not least as it avoids any debate about whether cohabitants *should* be treated as an accepted family format to which the same legal recognition and remedies on separation should be given, an approach which has been deliberately adopted by the New Zealand government with an apparent calm of response on the part of the population, but which has led to academic and professional disputes in Australia, although curiously this is not referred to in the Australian government's *Evaluation of the 2006 Family Law Reforms* in 2010⁴¹⁵.

Fourthly, it may also be said that the New Zealand approach addresses the true equality which appears to be the social norm now in most advanced societies, many

⁴¹⁵ Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms*, 2010, www.aifs.gov.au.

of which are now also adopting same-sex marriage, which New Zealand addressed straight away but about which Australia has debated, and continues to do so. Moreover most jurisdictions adopting a simple equality approach present that as an equality move without further gloss.

Fifthly, there is clearly some attraction, for pragmatic and theoretical reasons, as well as a rationale of simplicity and practicality, in adopting the Australian and New Zealand style of approaching such legislation on the basis that it should merely be a development of existing Family and equality law rather than a radical reform, since there is as much evidence of accepted functionality in England and Wales, in particular long identified over many years by Barlow and Barlow *et al*, a point on which Professor Barlow and her various teams have written practically every year since 1999 and the same functionality has clearly been used in these two southern hemisphere jurisdictions which have led the way in recognising that close alignment of roles by simply drawing cohabitants into the family fold. This alone appears to justify presenting a unified system, as is most easily demonstrated in the single state, non-federal, jurisdiction of New Zealand.

Finally, for an analysis of the reasons for the appropriateness of provision of some normative regime for cohabitants in England and Wales based on the experience of other jurisdictions, see Chapter 9, as it should now be obvious that this must include reasons, such as equality theory, which appear from the Australian and New Zealand experience to be taken for granted down there 'at the bottom of the world', while they are not addressed at all by the English Law Commission's 2006-7 work. Clearly this omission now needs to be acknowledged, and acted upon.

Chapter 9 Conclusion

Introduction

This chapter marshals the conclusions of the investigation as a whole and identifies and analyses the most relevant points which have emerged from the inquiry.

The primary aim is to review and reappraise the key aspects of the study in an attempt to pick out the lessons of others' successes and errors so as to point to an outline of how reform might be achieved in England and Wales, and for the benefit of that jurisdiction's cohabitants, for whom Baroness Hale has said they 'deserve nothing less'⁴¹⁶ than the Scots have been handed by their Scottish Executive - particularly since this was now time some ago and after a relatively short period of work to achieve what is arguably overall a positive change, while there has been no progress in England and Wales.

The secondary aim is to provide a suggested outline draft of relatively simple legislation which could be introduced, preferably with government backing, so as to achieve likely and relatively undisputed acceptance⁴¹⁷.

The rationale for this approach is as follows.

The search for doctrinal influences

The initial task for the present project was conducted, first of all, through an extensive reading of the available literature, including the 2006-7 work of the Law Commission, from which it was clear that there has never been a doctrinal approach to cohabitation in English law. This is because the parties, when neither married nor registered civil partners, remain single persons in every respect, both while living together and on separation, although there is limited protection of a surviving partner on death through the Inheritance (Provision for Family and Dependents) Act 1975. However, the leading commentators have identified the key 'functionality' of

⁴¹⁶ *Gow v Grant* [2012] UKSC 29 [56].

⁴¹⁷ Such a suggested draft appears in the Appendices at Appendix 2.

cohabitation which resembles other coupling arrangements heading contemporary family structures, without the cohabiting adults either marrying or entering a registered civil partnership.

Secondly, the study engaged in some comparative analysis of systems in other jurisdictions which have already introduced cohabitants' rights, which showed that there is a strong equality principle forming the basis of these schemes⁴¹⁸.

Thirdly, the study has recapitulated the existing less than satisfactory provision for cohabitation in English law and compared the other successful systems investigated with current English law, which basically leaves couples relying on separation on resulting or constructive trusts or proprietary estoppels, unless they benefit from a cohabitation agreement, although there are certain other random provisions which may assist in the absence of a cohabitants' express normative regime.

For example, cohabitants 'benefit' from some provisions owing to the fact that the position of their children is unaffected by the cohabitation of adults heading such a family format, as English law takes no account of the personal status of a child's parents for the purposes of liability for child maintenance, so there is also a possibility of capital and income provision under the Children Act 1989, s 15 and Schedule 1, which, in default of a new discrete scheme, may also provide housing and financial support for it for a former cohabitant up to a child's majority or possibly to the end of tertiary education, as well as providing for the child or children.

However, this is not much of a 'benefit' as such unless a former cohabitant is, in the first place, a parent with care of a child, and it can only apply if the non-resident parent is able to afford such provision. Thus this may not be suitable in some cases, particularly those where capital is not available to provide a home for a child and its unmarried formerly cohabiting carer, and there are many drawbacks of this provision, as with reliance on the trusts or other equitable jurisdictions.

⁴¹⁸ See Chapters 6-8

In default of any better solution in an individual case, property rights on separation of cohabitants are otherwise strict, pursuant to TOLATA 1996 ss 14 and 15, whereupon an application will be heard in the Chancery Division or the Chancery list of the County Court under the CPR 1998 as amended, not in the Family Court under the FPR 2010 as amended, unless a property case chances to be consolidated with a Family Court case and transferred to that Court, as in the recent instance of *Seagrove v Sullivan* in 2014⁴¹⁹. The Chancery process is not at all suitable for separating cohabitants since it was created for other purposes.

There are, however, also some principles of English law which assist cohabitants to some extent. The couple can be recognised in welfare law, and have protection as associated persons against domestic violence and eviction from the shared home under the Family Law Act 1996 Part IV, and a cohabiting couple can obtain certain rights in succession to tenancies under the provisions of Landlord and Tenant law.

The Equality Act 2010 does not explicitly protect cohabitants, but as Family law reform has recently to some extent been driven by equality principles - for example in the provision of same-sex marriage in the Marriage (Same-Sex Couples) Act 2013, presented by the government as an equality statute - in theory they could be. Moreover, since both the European Convention on Human Rights and the Lisbon Treaty protect family life⁴²⁰, there is a respectable argument that cohabiting adults, with or without children should be recognised as a normative family unit, owing to the large numbers in which they now appear in statistics including in relation to their children. Moreover, Choudhry & Herring, relying on work of Glennon *et al* in 2009 have identified differential treatment of cohabitants as indirect discrimination.

Equality is relied on in the cohabitants' rights legislation of Spain, Australia and New Zealand, and European Union jurisdictions' national Family law is similarly oriented, owing to the impact on the EU's functions of the equality and diversity principles of its foundation. Human Rights are similarly pervasive. Accordingly, there appears to

⁴¹⁹ [2014] EWHC 1410 (Fam).

⁴²⁰ As the Lisbon Treaty ('the reform treaty restating the earlier founding treaties') requires the European Union to 'accede' to the ECHR, thus strengthening the application of ECHR Article 8 following implementation of the Lisbon Treaty in 2009,

be a strong case for an equality approach to any legislative reform in favour of cohabitants in English law, although this is not specifically addressed in the 2006-7 work of the Law Commission.

A further guiding principle of English Family law is its unique reliance on judicial discretion rather than on a rigid system of rights. This applies in relation to marriage, civil partnership and child law and there is no valid argument for its not applying also to any reform of the law benefiting cohabitants, providing any such legislative provision included a discretionary element, which currently the common law case law on TOLATA claims does not, despite advances in interpreting such case law in the recent Supreme Court decisions *Stack v Dowden*⁴²¹ and *Jones v Kernott*⁴²².

Thus it would be entirely possible in any reform to preserve a distinction between cohabitation and marriage, which has been an ongoing concern for many years in considering any discrete provision for cohabitants' rights, and probably one of the reasons that no statutory reform has yet taken place, despite several aborted Bills.

Although the once sacred definition of marriage in *Hyde v Hyde*⁴²³ in 1866 has been amended by Parliament in the Marriage (Same-Sex Marriage) Act 2013, there is no reason to suppose that marriage does not remain as sacred a distinct entity within the traditional corpus of Family law, albeit that now two of its essential qualities as set out by Lord Penzance are no longer applicable in modern times, so that any further dilution of its unique quality would not be in any way acceptable. That may, however, not preclude some formal legal recognition of the *state* of cohabitation, although the Law Commission's 2006-7 work proceeded on the basis that no separate *status* was possible or desirable.

These conclusions were gleaned from both the general corpus of literature, English and foreign, on cohabitation and cohabitants' rights and the 2006-7 work of the Law Commission, and the content and analysis distilled from this study is contained in Chapters 1 to 4.

⁴²¹ [2007] UKHL 17.

⁴²² [2011] UKSC 53.

⁴²³ [1866] LR1 P&D 130.

The adverse commentary

From the initial survey of the available literature it was clear that there has been longstanding and outspoken opposition to cohabitants' rights from at least 1980, and obviously before that date, as cohabitation was not then a family norm. However, statistics, as analysed by the Law Commission in 2006-7, indicated that at that time when they were working on their consultation and final reports there was no substantial section of the public opposed to legislation, especially where cohabitants had children. Thus it seems that at that time, now nearly 10 years ago, at least some of this antagonism was finally waning.

There was at one time certainly opposition to giving cohabitants *any* rights in any way similar to married couples, particularly in 1996 during the debates in Parliament on the Family Law 1996, but it seems that this has not survived to any great extent except possibly in certain minority religious and cultural circles.

Jurisdictions with past or present strong religious cultures - for example Spain, Scotland and most recently Eire - have still legislated for cohabitants' rights. Moreover, Baroness Hale, when in June 2014) giving the annual Human Rights Lecture to the Law Society of Ireland⁴²⁴ on the impact of religion and belief in law, clearly indicated how much change there has been in accommodation of religious beliefs in the law, both in our jurisdiction of England and Wales and in others, many of which are now multi-faith, and where some parts of the diverse population often have *no* belief in the standard faiths although there may be reliance on other norms such as Humanism or a general moral code.

It would therefore appear that there is unlikely to be further substantial opposition to cohabitants' rights in English law on specifically religious grounds, although there might be some issue in social acceptance in some minority groups based on disapproval for cultural reasons, since it may still be true that in some sections of society the institution of marriage remains as firmly embedded in English culture as

⁴²⁴'Freedom of Religion', delivered Friday 13 June 2014, www.lawsociety.ie; also available at <https://www.supremecourt/docs/speech-140613.pdf>.

stated by Lord Nicholls in *Bellinger v Bellinger*⁴²⁵ in 2003. This could still indicate some powerful opposition, despite the fact that this statement is now 12 years old and the Gender Recognition Act 2004, Civil Partnership Act 2004, the Human Fertilisation and Embryology Act 2008 and the Marriage (Same-Sex Couples) Act 2013 have all been enacted since, much increasing diversity in personal relationships and family structures in line with contemporary equality and diversity thought and government policy.

The Barlow and Cooke literature in England and Wales

A major contribution to the literature on cohabitation and its acceptance in the home jurisdiction of England and Wales has been made by the prolific published output from Barlow and Barlow *et al*, stretching over a period from 1999 to 2013, also Cooke and Cooke *et al*, especially between 2004 and 2006,⁴²⁶ in particular the 2006 Nuffield Foundation funded publication on potential community of property in England and Wales in which both Cooke and Barlow participated.

This latter work was based principally on married couples but also on some cohabiting partnerships, and has yielded much useful material on both the methodology and content of the team investigation into how the partnerships they investigated organised their finances, albeit that the team's samples were sometimes very small.

However that project was expressly *not* aiming for statistical significance but for a clear picture of how married and cohabiting partners organised their assets and their reactions to the idea of community, a concept which has been much developed in the English law of financial provision on divorce - though not given that name - by the House of Lords when the Law Lords extrapolated the ideas of needs, compensation and sharing, and above of all overall fairness, in the *Miller v Miller and McFarlane v McFarlane* cases in 2006⁴²⁷ which were coincidentally before them at the time that the Law Commission's 2006-7 work on cohabitation was under way.

⁴²⁵ [2003] UKHL 21.

⁴²⁶ Elizabeth Cooke, Anne Barlow and Therese Callus, *Community of Property, A Regime for England and Wales, Nuffield Foundation, 2006.*

⁴²⁷ [2006] UKHL 24.

Cooke *et al*⁴²⁸ make clear that theirs was a positive methodology adopted so as to reach the aim of their project as stated above, and is one that has been replicated to some extent for the current investigation which has also not sought statistical significance but clear indications for a blueprint for recognition of a basic scheme of cohabitants' rights provision in English law.

These two teams led by Barlow and Cooke - although the membership, involving their colleagues, has varied from project to project - have made a major contribution to inquiry into the social reality of contemporary adult relationships in English and Wales and elsewhere, which has much assisted in working out a potential system to recognise cohabitation in English law in a practical manner in the present project, and in planning the limited field work that it has been possible to do. In particular this was designed to follow up the practical operation of cohabitants' rights in Scotland, Spain, Australia and New Zealand, despite the logistical challenges of finding and interviewing suitable practitioners in these other jurisdictions and comparing their experiences with locally based practitioners in the jurisdiction of England and Wales.

The comparative contribution

The methodology for gathering information on, and familiarity with, the jurisdictions from which a comparative contribution could be expected to be useful, was first to research and analyse any literature, legislation and other material, so as to attempt to establish a doctrinal base relating to other jurisdictions which have successfully introduced cohabitants' rights, and then to find practitioners in each jurisdiction who were prepared to discuss the operation of their local systems in practice, including to reflect on their experiences and those of their colleagues in evaluating the positive and negative factors of those systems. The literature, policy, statutory and background analyses in relation to these jurisdictions are in Chapters 6-8.

All the semi-structured interviews, whether in person, by email or telephone, were conducted during the summer of 2014, to take advantage of the non-teaching part of the year from May to October, with the exception of some earlier scoping in the

⁴²⁸ n 426.

previous year with a view to finding appropriate participants and working out how best to approach problems of distance and time differences.

In accordance with the anonymity of respondents which was guaranteed as part of the ethical approval process no particular participant is identified either by name or affiliation, and to facilitate frank evaluation personal details have been kept sufficiently general so as not to provide inadvertent identification.

Scotland

In Scotland gathering this information was relatively easy as the Scottish legal profession is small, Scotland is geographically close to England and Wales and contacts are readily available both within the profession and in academe.

The proposed fieldwork was prepared by reference to the research of Wasoff *et al* in 2011 - a report of a project which interviewed 97 practitioners only 5 years from the Family Law (Scotland) Act 2006. Planning also took into account commentary from leading Scottish academics and an introduction, through a leading Scottish university, to a practitioner practising in a group of Scottish solicitors who regularly do cohabitation work. The practitioner contact was then given a copy of the standard questions prepared to put to each practitioner interviewed, and interviewing was conducted both by email and telephone.

The solicitor assigned to coordinate information for the interviews was a (female) Associate in a medium sized firm with offices in Glasgow and Edinburgh who was able to relay a good deal of communal experience, since owing to the small size of the Scottish profession it is routinely possible for individual lawyers to collate a variety of experience on an ongoing basis, because if one has a case of particular general interest information is regularly shared in various ways.

The main surprise from the semi-structured interviewing process was that, contrary to the view of the Scottish system from outside that jurisdiction - whether by judges such as Baroness Hale in the Supreme Court, by English and international academics, practitioners and any other researchers or commentators - Scottish

practitioners are *not* entirely happy with their system as introduced by the Family Law (Scotland) Act 2006.

They do not consider that the compensation scheme works, since for one thing - although Baroness Hale did not find it difficult to apply - Scottish judges, especially at first, *have* found it too complex. It seems that there is also a specific problem in that it is in fact possible that the compensation provisions can work so as to give a cohabitant *more* than a spouse would obtain on divorce under the Family Law (Scotland) Act 1985! This was unsurprisingly felt to be 'wrong', although it is clear from the Scottish Executive's original statement of policy in their Memorandum for the Scottish Parliament that there is no animus against cohabitants in Scotland despite the country's stern religious background, because Scottish government policy has moved into the 21st century in making provision for 'all' Scotland's families⁴²⁹. Practitioners agreed with academic comments that there should be longer than one year from separation in which to make a claim, also with Baroness Hale that there could be a more flexible format for awards so that both capital and income payments could be made, and again with Baroness Hale that there *are* difficulties in ascertaining when a cohabitation had begun.

Overall, practitioners were not only not happy with the Act, but surprised that others - such as those mentioned in Baroness Hale's judgment - admired its achievement: comment was that it was 'defective' and required amendment, and there seemed to be both universal agreement that early amendments were now desirable and astonishment that outside Scotland the system was thought to be a success, as that was not the label that would have been attached locally.

However Scotland appeared to have achieved one other positive result not always found in other jurisdictions, as it was thought that most people were now aware of the Act as there had been publicity at the time that it came into force. Moreover Scotland's population is small and widely spread - at present approximately 5.5m - and perhaps there is national pride in devolution to their Parliament which may generate a more substantial universal interest in local legislation away from

⁴²⁹ See chapter 6.

Westminster. This seemed to confirm Wasoff *et al* in 2011 which also indicated that practitioners had received plenty of client inquiries.

The major contributions from Scotland are therefore:

- (i) Scotland has achieved establishment of a discrete system preserving the distinction between marriage and cohabitation;
- (ii) Scotland has achieved this without apparently raising religious issues from stricter sections of the kirk;
- (iii) Scotland achieved legislation through its own Parliament and brought it into force as soon as Scotland had that power, and
- (iv) Scotland, a separate legal system within the United Kingdom, has quickly made its scheme operational despite the concept's being completely foreign to England and Wales, and thus was able to bring its first appeal to the Supreme Court at Westminster in 2012, enabling useful practical comparisons to be drawn with English law, which at the stage that the first appeal arrived at Westminster had still made no similar provision.

Such a practical comment reached official status when in her judgment in *Gow v Grant* Baroness Hale openly compared the Scottish system in a positive manner with the persistence of a complete lack of legislation in England and Wales. It is thus perhaps not surprising that there are detailed provisions of the Scottish system which need refinement since the legislation was passed very quickly and - as commented upon by Sutherland⁴³⁰ - was based on early 1990s' work of the Scottish Law Commission.

Spain

In Spain, gathering information was much more difficult as local law is different in every province and autonomous region or city, although the Spanish Constitution enjoins equality for all its citizens, which means that there can be no discrimination against cohabitants as against married couples even if local law is different in detail.

⁴³⁰ See Chapter 6.

With no academic input available, since cohabitation has not attracted much interest in Spanish universities, the lawyers found most suitable to consult in the circumstances were Anglo-Spanish practitioners, and the most useful in a medium sized firm based on the South Coast (Costa del Sol) near Malaga, in the Province of Malaga which is located in the autonomous region of Andalucia, an area with many British residents. The firm approached had 21 qualified Anglo-Spanish lawyers and a chain of offices: these were situated in the Marbella area in the Province of Malaga, in Nerja in the Province of Granada, some distance along the coast east from Malaga and Marbella, and which is also another centre of British residency, and in Tenerife, Canary Islands, which has a similarly substantial British residential presence. Besides these south coast and Canary Island locations, the firm had an office in Madrid, the capital of Spain, which deals with commercial law only.

The firm's clientele was partly British, partly Spanish and partly of other nationalities; partly married, partly cohabitants and some fiancé(e)s. The firm also had much contact with the British Consul-General in Malaga. Their practice included general law as well as Family law and they had ongoing experience of cohabiting, married and engaged clients, including those who wanted marital or cohabitation agreements, which such clients saw as protective of their financial positions.

The two lawyers involved in the interviews were the English, female, Senior Partner, with an English qualifying law degree and Call to the English Bar, who had prepared some useful background notes to compensate for lack of any possible contact with an academic in the region of Andalucia; and a senior female Spanish practitioner who, apart from working in Family Law, is also particularly experienced in Spanish property law. For preparation, these two lawyers were sent the standard questionnaire, and the semi-structured interviewing was conducted by email, telephone and in person, when the Senior Partner was in London to attend court and conferences on behalf of clients.

There were surprises as in Scotland, although different ones. First, all cohabiting clients of this Spanish firm, working in areas with a substantial Anglo-Spanish client base, were unaware of, and/or confused by, the impact of the law on their situations, which was sometimes even not entirely clear to the lawyers, owing to the

implementation in Spain of the 1996 Hague Convention on - *inter alia* - Jurisdiction and Applicable Law, which although apparently only applicable to child law cases sometimes also affected their parents, as Spanish courts may decide to apply Spanish law rather than the national law of adult foreign residents before them.

As in other jurisdictions - including England and Wales - cohabitants in Spain also believed that they were married after two or three years of living together, and generally did not consult the firm until they had been living together for one or two years. However, even if such clients realised that any detail of the local law on cohabitation might apply to them they did not know its extent and did not understand how it applied, or - if they were British - whether English or Spanish law applied. They also did not realise that in Andalucia the law only covered certain aspects of the cohabitants' relationship, although one of those is the registration of the relationship which seems to be such a positive feature of the Spanish system. They also did not know that if there was a compensation claim of any kind for money or property to be recovered from the other cohabitant, proceedings would be civil rather than in the Family court, although this was not the case in some other provinces of Spain.

From this it was clear that the position in Spain is not as straightforward as it might at first appear from the fact that the Constitution guarantees equality for cohabitants as well as married couples, since the variation of local laws can lead to conflict of laws between different provinces of Spain, as much as with the law of other EU or other overseas jurisdictions. The practitioners agreed that the Constitutional provision is a good one since the Civil Code must follow the Constitution but considered that the law applying to cohabitants was still in its infancy and, because of the proliferation of different local detailed law, would benefit from greater harmonisation internally within Spain as well as in the EU.

The major contributions from Spain are therefore:

- (i) the strong equality ethos which has brought cohabitants into the legal fold through the equality provision in the Constitution, an approach which chimes with the equality and human rights aspects of English law in relation to the family and to EU principles;

- (ii) endorsement in local law of the functionality aspect of cohabitation as a family form;
- (iii) the concept of the Constitutional umbrella equality provision, which is however *activated* by local registration, providing definition of the individual cohabitation's existence – a concept which avoids the problem of lack of the ceremony which gives marriage and civil partnership a firm commencement date.

Australia and New Zealand

These are two very different jurisdictions in some ways although the differences in their cohabitants' rights is not as wide.

First, there is a state and federal level in Australia, but New Zealand is a single jurisdiction, in some ways not unlike England and Wales.

Owing to the distance and substantial time difference, finding suitable academics and practitioners to interview was more difficult than in other cases. However this was achieved by email and telephone, and was assisted by the presence in the United Kingdom of leading Australian and New Zealand academics at conferences where they could be accessed in person.

In Australia a suitable firm could not be found and the local interviewing was therefore with a female academic from a leading university who also has wider professional duties in an international context which also occasionally made her available in London, so that interviewing was possible by both email and telephone, and also in person. Moreover in England and Wales a dual English/Australian qualified practitioner was found working in a large international law firm in London so that contact with him was possible not only by email and telephone but also in person.

In New Zealand a female practitioner was located with recent knowledge of academic Family work in a leading New Zealand university and also a general Family practice in a small rural firm in the South Island. Owing to the distance and consequent time differences interviewing was only possible in her case by email.

Following issue of the same basic documentation as for practitioners in the jurisdictions already covered, preparation for interviews in these jurisdictions was also based on the the New Zealand and Australian literature, including the Australian Government's Evaluation 2010 of the 2006 Act and the New Zealand Ministry of Justice's 2003 Cabinet Document and some earlier preparatory discussion - when he was in England - with a former Australian Law Commissioner, which was then followed up by email.

The first interview, also by email, was then scheduled with a senior male academic specialising in Family law in a leading New Zealand university, who indicated that there were, in his opinion, two problems with the Property Relationships Act provision for cohabitants. The first was establishing when the cohabitation had begun as the couple did not always register. The second was in that some couples did not realise that they had come under the provisions of the Act since this would only be determined when they took proceedings if they did not register their relationship, and did not opt out by making a private agreement. This replicated an earlier discussion with another senior female member of staff of the same university, which was able to take place in England when she was attending a conference.

This interview was then replicated with the leading Australian academic, who said that lack of client awareness that the Australian federal statute - the Family Law Act, as amended in 2006 - applied to most cohabiting couples was sometimes a similar problem to that reported in New Zealand, as ordinary people did not always realise that the Act applied to them in time to opt out with a private agreement. She said that the rules for '*de factos*' - as cohabitants are termed in both jurisdictions - were perhaps even more complicated in Australia than in New Zealand. As a result more magistrates had had to be taken on as the courts were clogged with cases since much time was spent initially working out if the parties before the court were '*de factos*' or not. However, once that stage was over she was of the opinion that the law was working well and was appropriate as cohabitants had the same rights as married couples.

She said that the law in Australia is now mostly federal although it was still possible to apply under the state law if that was appropriate for some reason. The general

public was probably on the whole well aware of the law as such, because there had been state laws for many years so the 'new' Act was not new as such, since it had only been an enactment federally of provisions which would have been known at state level.

The New Zealand practitioner, practising in a small rural firm, gave a very similar account of the smooth working of their Property Relationships Act although she considered that the position was much easier in New Zealand as there was one jurisdiction with no state level courts, a small population spread over a larger area with few cities – in fact similar to Scotland's profile - and, as in Australia, everyone knew about the amendments to the Property Relationships Act as it had simply been amended some years previously to include cohabitants and there had been sufficient publicity. The problem in New Zealand as in Australia was in individual couples not realising when the Act applied to them.

The overall impression of these two jurisdictions was therefore that their systems worked in an equal no nonsense manner, with each form of couple, married or cohabiting, receiving the same treatment under the Act.

The major contributions from these two jurisdictions is therefore

- (i) the 'no nonsense' approach to *inclusion* of cohabitants in *existing* Family law rather than starting from scratch with an Act applying only to cohabitants and generating all the old questions about how similar (or not) they were to married couples;
- (ii) 'inclusion' even going as far as changing the name of the New Zealand umbrella Family statute to the 'Property Relationships Act' to accommodate cohabitants in neutrally labelled legislation - which appears to have been accepted in a 'taken for granted' manner in New Zealand, although it seems there was some early debate in Australia about the advisability of this, which is echoed by further discussion by a dual qualified practitioner in London of Australia's provision (see below);
- (iii) the use of registration to define the start of cohabitation, although this is optional in Australia which is surprising as Australia was first to have a discrete *De facto* Relationships Act, in New South Wales in 1985; and

(iv) the checklist approach to identifying whether there is cohabitation, in which registration is not determinative.

Of the two, the New Zealand system appears to offer most to a potential scheme for England and Wales since it is a single jurisdiction state not unlike both Scotland and England and Wales in its outlook and values, though more similar to Scotland in size of population and to England and Wales in geographical extent. The retention of some discretionary element as well as the checklist approach is also a useful practical element.

A view on Australia from England and Wales

In London the male dual qualified Anglo Australian lawyer, normally working in a large 20 partner specialist international firm in Central London, was on holiday so that to start with interviewing took place by email and telephone. He no longer works in Australia but solely in England and is glad to do so as - like a small number of commentators in Australia - he disapproves of the equality of married and cohabitant couples in Australia and New Zealand, since he considers that there should be a conceptually and jurisprudentially distinct and different system for marriage and cohabitation, and that this should be the way forward in England and Wales.

He, too, agreed with the problems about determining when a cohabiting couple is within the Australian Act. He also considered that cohabitants should learn to manage their relationship with cohabitation agreements since such contracts would resolve all their problems without resorting to litigation or legislation and that this should be the way forward in England and Wales where - as we have not yet legislated - it is not too late to manage the cohabitant's legal position in that manner, unlike in Australia and New Zealand where legislation has now been effected which can clearly not be reversed, and was in his opinion too extensive in including cohabitants in existing married and civil partner provision.

This was a lone voice amongst the southern hemisphere practitioners *and* a conservative one in relation to England and Wales, and was of significance in that the solicitor's firm handles a good deal of international litigation and legal advice.

He did add that he was not averse to legislation in England and Wales, as once he had been, but considered it needed to be effected once further work had been done on the financial provisions under the Matrimonial Causes Act 1973 and Civil Partnership Act 2004 for married and civil partnership couples - if that latter status was to be retained - so as to effect further clarification of financial provision on divorce or dissolution.

However he added that it was his impression in England and Wales that there was little demand for a discrete system for cohabitants, as his firm had one partner whose workload was devoted to cohabitant issues but who was not fully employed since so few clients came to the firm with those issues, whereas he considered that, as the firm was well positioned to be consulted if there was such work, so that if there was demand for advice that partner should be so overloaded that further provision would have to be made for clients, which was, however, clearly not the case.

Literature compared to practitioners' views and experiences in limited fieldwork

Although the fieldwork possible with the overseas comparators was limited, this was valuable because of the completely different insights obtained from interviews compared to the impressions formed from the literature and other available materials, a situation which illustrated a factor also common in English Family law generally, namely that the reality in practice is often quite different from the black letter law.

The limited comparative work also clarified that no existing cohabitants' rights system is seen as perfect by its practitioners, whether academics or practising lawyers, who all still wanted some improvements. This is encouraging, as there does now seem an opportunity to legislate for England and Wales and the signposting resulting, even from fieldwork in this project - which was numerically less extensive than that of Wasoff *et al* in 2011 - was nevertheless highly instructive as to how such a system could work for English and Welsh cohabitants. The in-depth semi-structured interviews proved to be a genuinely illuminating elaboration and

clarification of the earlier library work, and as suggested by the leading qualitative methodology literature they proved a rigorous investigative tool.

Contribution of Human Rights literature and humanism

A major contribution to potential reform is the contemporary culture of human rights and the growth, alongside the decline of the former influence of religion, of a humanist approach, which still imports a moral code which may be reflected in law and which in turn reflects culture, but in less confrontational a manner than in the past. This careful management of religion can be seen in both the Spanish and Irish Republican Constitutions which both now serve a secular state - in Eire this separation of church and state has technically been in effect since 1973, highlighted in Baroness Hale's 2014 Human Rights lecture to the Law Society of Ireland, though it has taken longer for the influence of religion to become less marked in practice in Irish legislation as Eire is not yet a secular society and is as yet very new to its liberalising legislation, unlike Spain which has been working on their system for 40 years and the practitioners still consider it is in its infancy!

The new Equality Act 2010 in England and Wales and the fact that Britain is a signatory to the Convention on Human Rights clearly both have potential influence on any likely reform to articulate cohabitants' rights.

The present Bill now once again before Parliament

The private member's Bill introduced into the House of Lords by Lord Marks of Henley-on-Thames QC has now retraced its formerly completed steps to second reading, so as to go into the Committee stage which it would have reached by June 2015 but for the May 2015 election. The text of the Bill is still as introduced, which to a great extent replicates the recommendations of the Law Commission's 2006-7 work, and is available at www.parliament.uk.

However, based on the present project, the text of this Bill still also seems overly complex, as was anecdotally the impression of much of the practising profession when the Law Commission scheme was first published in 2007. That 2007 scheme certainly frightened off the government of the time from any impetus for implementation, although with the benefit of hindsight it is clear that the subsequent

delays of both successive governments from 2010 in considering adoption of the recommendations were excuses for inaction which might have had many reasons other than those given at the time. One must ask: is there not a simpler way?

A simpler way

The simplest way towards cohabitants' rights which would cater for their practical needs would be to legislate with reference to the Matrimonial Causes Act 1973 and Civil Partnership Act 2004 to include in the provisions applying to spouses and registered civil partners therein some additional provisions to apply to those in a committed family relationship which does *not* qualify under the Marriage Act 1949 for the core provisions of the 1973 Act or under the Civil Partnership Act 2004.

This could quite easily be done by a much smaller number of amendments than the provisions of Lord Marks QC's Bill which, while it attempts a worthy comprehensive approach, in fact adds yet another extra layer of complexity which does little to dilute the current confusion in the inappropriate Chancery litigation which cohabitants currently face to unravel their property division if they cannot achieve that themselves by agreement. A long Bill of 18 pages and many thousand words is also likely to generate much argument when it reaches the committee stage where it may stall like its various predecessors.

An Alternative Draft Bill

This could better be based on what has been learned from the present inquiry, including from comparative sources, and appears in the Appendix after this chapter. The comparative simplicity is instantly obvious as while the Marks' Bill is not only 18 pages and over 8,800 words the alternative version suggested is 4 pages - 14 pages shorter - and 1,322 words. If cohabitant LIPs are to adopt the 'DIY' solutions to their disputes which are encouraged, with or without Non-Court Dispute Resolution, a simple statute is essential, which could no doubt be bought at a low price in an equally simple annotated version from one or more of the standard legal publishers.

The main provisions should be as follows:

1. Definition of cohabitants as persons over the age of 16 who, whether of the same or opposite sexes, live together as a couple in an intimate relationship and,

not being within the prohibited degrees of relationship in relation to each other, as set out in the Marriage Act 1949 and Schedule 1 Part 1 of the Civil Partnership Act 2004, who are neither married nor registered civil partners and where one or more of the following conditions also applies to them –

- (a) Sharing a household as a couple whether or not they share financial interdependence
- (b) Being the parents of a minor child living with them or of whom either person in a couple is a parent of such a child having contact or spending time pursuant to a child arrangements order under section 8 of the Children Act 1989 or in respect of which minor child there is in force in that parent's favour a parenting agreement in lieu of such order and the other cohabitant would be a step parent if the parties were married or in a civil partnership
- (c) Being the natural parents of an unborn child when they cease to live together in the same household
- (d) Having their names appear on the electoral roll at the same address and council tax is paid by one or the other on the basis that at least two adult persons live in their household or the parties are validly exempt from payment of such tax or it is paid by someone else on their behalf for example a landlord
- (e) Leading a joint social life in the manner of a couple as if they were married or parties to a registered civil partnership
- (f) Where there are no children, having lived together continuously for two years, such period to be determined without regard to any periods up to a period of six months during which they have not lived together as a couple.

2. Definition of former cohabitants to exclude those who later marry or enter into a registered civil partnership

3. Definition of cohabitation established both by the Act's definition and by existing local government council tax and electoral roll registration but provision also included to enter into a cohabitation contract which should be registered with the Family Court in the same manner as a Parental Responsibility Agreement pursuant to s 4 of the Children Act 1989, thus enabling the couple to opt out of the financial and property provisions, which should normally apply after two years, and follow those of s 72 of the Civil Partnership Act, which in turn follow those of the Matrimonial Causes Act 1973: except that provision would have to be made to

exclude the pension order provisions of the latter which could not conveniently apply to cohabitants although a *Brooks v Brooks* type pension order could still be made.

4. A power to apply to the court up to three years from the date of separation for any of the CPA 2004 s 72 remedies available to civil partners which should give statutory form to the court's discretion in relation to the principles of meeting needs, delivering compensation and sharing the relationship property and financial fruits as appropriate to the circumstances of the case, together with the overall concept of fairness, as have been developed in *Miller* and *McFarlane* and succeeding cases in relation to financial provision for spouses and civil partners.

5. A statutory provision requiring the court on any application for financial relief so to exercise its discretion in relation to considering those principles and all the circumstances of the case in such a way as not to discriminate against any couple on the basis that they have chosen to found their family within a cohabitation relationship instead of through marriage or civil partnership although the court's consideration of all the circumstances of the case might indicate a different outcome from that which might apply in the case of spouses or registered civil partners.

6. Existing provision for domestic violence protection and occupation of the home in the Family Law Act 1996 and in relation to Wills and Intestacy to subsist unless and until amended since this is a level of detail not immediately urgent and likely to provoke argument

7. A power for the Lord Chancellor to make consequential and any further amendments as expedient by secondary legislation

8. The suggested draft should be only an outline suggestion of how a possible draft might look as it is made clear both by Maclean⁴³¹ and McLeod⁴³² that Parliamentary drafting is a specialist skill which should be left to its usual practitioners and that further work is always required to such initial drafts in order to deliver the legislative content that is desired by the originator(s) of any proposed legislation.

This would nevertheless have the result that:

(i) Without recourse to specific registration - which the Law Commission rejected in 2006-7 but which is a feature of successful regimes in Spain and

⁴³¹ Mavis Maclean with Jacek Kursewski, *Making Family Law*, Hart, 2011, Preface and p.97.

⁴³² Ian McLeod, *Legal Method*, 9th edn 2014, Chapter 17, Palgrave Macmillan, 2013.

Australia and New Zealand - the parties' cohabitation would be documented through council tax and the annual electoral roll to which there could be no objection, and there would be a discrete regime which respected equality principles without threatening marriage

(ii) There would be a much simpler financial and property regime on separation if the parties did not opt out by an agreement registered in similar fashion to a Children Act 1989 PR agreement to which there could be no objection

(iii) The scheme would *not* replicate marriage, but respect the functionality recognised by other successful regimes, owing to the discretion left to the court in financial applications to differentiate between cohabitants' and the other couples' relationships where necessary, for example, probably in stricter ring fencing of cohabitants' separate property than is normally applied to pre-owned or inherited property of spouses or civil partners, and depending heavily on to what extent the cohabitants had kept their financial and property affairs separate

(iv) The Lord Chancellor would be at liberty to add further detail by secondary legislation at a later stage without holding up early legislation as would be likely in the case of a Bill as detailed as Lord Marks', since it is clear that the government has previously been deterred from legislation by concern about such detail.

Conclusion

The overall conclusions of this investigation are as follows.

First, there is a pressing need, and probably a sufficiently favourable context, for the introduction of a normative scheme of cohabitants' rights at the present time, particularly as it is urgent for cohabitants to have an accessible statement of the law on which they can rely in responding to the current policy of dispute resolution rather than litigation to settle financial and property matters on separation.

Secondly, there is much useful information to be gleaned from the work of the Law Commission in 2006-7, despite the government's decision not to implement the recommendations; and from comparative study of some of the key jurisdictions now selected from those which have already introduced normative schemes there are

indications of the optimum content of a scheme for England and Wales, although no one scheme or jurisdiction is particularly apt as a model for English law.

Thirdly, doctrinal influence on a model for England and Wales is sparse apart from that of the unique discretionary nature of English Family law: and each other jurisdiction studied has based its scheme on a different principle driving its own law, such schemes being supported by a variety of practical mechanisms, some of which could be apt for a version for English law.

Fourthly, academics and practitioners in each jurisdiction with an existing scheme consider that their particular system needs some potential improvements to be made.

Fifthly, owing to the complexity of the Law Commission's recommendations the most successful scheme for England and Wales is more likely to be as simple as possible, based on existing law rather than a more voluminous statute created from scratch in the architectonics style of building whole systems described by Kant, since this is not popular in the common law which was developed from pragmatism and best practice (that is by 'what works').

Sixthly, some harmonisation with UK and EU neighbours, and as far as possible with other common law schemes further afield, would be desirable.

THE APPENDICES

Appendix 1. The standard Interview Questionnaire copied to consultee lawyers in Scotland, Spain, New Zealand, Australia and England and Wales

Appendix 2. The suggested Draft Bill

Appendix 1. The standard Interview questionnaire

COHABITATION – STANDARDISED QUESTIONS FOR PROPORTIONATE ETHICAL APPROVAL

SAMPLE QUESTIONS FOR (1) FAMILY LAW SOLICITORS/NOT FOR PROFIT ADVICE ORGANISATIONS IN ENGLAND AND WALES

1. What is the profile of your practice

- (i) Family Law only
- (ii) Family Law and general
- (iii) Non specialist practice

2. Is your firm

- (i) City/West End
- (ii) London, not Central
- (iii) Other, e.g. regional, country

Thinking about the ordinary person's awareness of the legal consequences of cohabitation:

3. In 2001 it was estimated (18th report of the National Centre for Legal Research) that 57% of the public believed in the existence of a legal relationship of "common law marriage": can you (*without*

identifying any particular client, in accordance with the usual principles of confidentiality in the practice of Family Law) shed any light on your clients' beliefs in the past decade:

- (i) Are *any* aware that this is a myth?
- (ii) Can you assign an approximate percentage of those who are/are not?
- (iii) What % are aware?
- (iv) What % are not?
- (v) Is there a category of partial awareness?
- (vi) What % is that?
 - (a) Please give examples of partial awareness.
 - (b) Is any time period involved in beliefs of legal effect of cohabitation?
 - (c) If so, is this 2 years?
 - (d) Or 5 years?
 - (e) Other period? Please specify.
- (vii) Do clients on average react in any particular way when you give them the correct information?
 - (a) do they then request a pre-nuptial agreement?
 - (b) do they say they "can trust" their partner?
(“Mrs Burns’ syndrome)
- (viii) Have you experienced any returns to you for advice if/ when the relationship founders?”
- (ix) If/when this happens do the couple have children?
- (x) Have they mingled assets? (If yes, can you assign an approximate %?)
- (xi) Have they shared responsibilities? If yes, can you assign an approximate % in each case of (a) to (g)
 - (a) Financial?
 - (b) Parental?
 - (c) Social?
 - (d) Other (eg business)?
 - (e) Has the woman changed her name to that of the man?
 - (f) If so, formally?
 - (g) Or informally?
- (xii) Have your clients given you any reasons for preferring cohabitation to marriage? (a) before you have explained the legal consequences ?
 - (b) what were those reasons?
 - (c) after you have explained the legal consequences?
 - (d) what were those reasons?

4. Were you aware of the government initiative “Living Together” website which set out to eliminate the phrase “common law marriage” from lay use and to publicise the legal effect of couples “living together” in quasi-marriage (but which now seems to have disappeared)?

- (i) Are you aware of any of the later professional clone initiatives?
 - (a) Stonewall ?

(b) Resolution?

(c) CAB?

(e) Individual solicitors' firms'?

(ii) Were any of your clients aware of these websites?

(iii) Can you assign any % of those who were/were not?

5. If you had clients who were aware of the publicity on the status of cohabitation relationships, and were advised by you of the efficacy of a cohabitation agreement, can you assign a percentage who then entered into such an agreement?

- (i) if they did, what was their reason for doing so?
 - (a) your general "solicitor's" advice?
 - (b) perceived financial protection?
 - (c) other? Please specify.
- (ii) if they did *not*, what was their reason for doing so?
 - (a) "trust" in partner or relationship preferred to formality?
 - (b) "trust to luck"?
 - (c) other?

6. Did you respond to the Law Commission's 2006 consultation?

- a. If so, did you suggest that any relevant question had been omitted from it?
- b. What were those questions?
- c. Did the Law Commission take up/make any use of those questions?
- d. Did any of your clients show awareness of the Law Commission's project? (can you assign an approximate percentage?)
- e. Did any of your clients comment on the ongoing work? (can you assign an approximate percentage?)
- f. Did any notice when the final report was published in 2007? (can you assign an approximate percentage?)

7. What is the balance in your practice now between the following

- a. Married couples wanting post-nuptial agreements? (can you assign an approximate % of the married couples who consult you who want this?)
- b. Fiancés/fiancées wanting a pre-nuptial agreement? (can you assign an approximate % of affianced couples consulting you who want this?)
- c. Cohabitants wanting cohabitation contracts? (can you assign an approximate % of cohabitants who consult you who want this?)
- d. At what stage of their relationship do cohabitants tend to consult you?

- i. before living together
- ii. after living together for a period?
- iii. If (b) after how long?
 - (ci) after some months?
 - (cii) after one or two years? (can you assign an approximate %?)
 - (ciii) after a longer period? (can you assign an approximate %?)
- e. What is the % of your practice which is concerned with each category (i) to (iii)?

8. Are you surprised that the 2003 Law Society and Resolution schemes have not been taken forward in any way?
- a. Have you criticisms of either of these? Please mention all.
 - b. Have you criticisms of the 2007 Law Commission report? Please mention all.

Proposed solicitors for the study:

(1) ENGLAND AND WALES

A Family partner in a firm in Central London which has a substantial national and international practice (mostly privately funded clients, some public funding for cases now within the exceptions to r3 of the FPR 2010 which normally permits funding only for mediation and such exceptional cases)

A Family partner in a firm with branches in North Central London and South Central London with a practice including public funded and some private clients

A Family partner in a regional firm including public funded and private clients

A Family worker in a not for profit advice centre.

(2) SCOTTISH LAWYERS

The same questions, save for the fact that the thrust of questions must be amended since for 5 years the Scots have had their own Family Law (Scotland) Act 2007 so that

the object will be to discover (i) their positive awareness of their formal cohabitants' regime in the Act (if applicable) and how they are treating this provision, e.g. Q1(i) for the Scots will be "Are *any*. [of your clients] aware that common law marriage is no longer non-statutory in Scotland?"

Scottish lawyers will break down, similarly to England, to those in Edinburgh and Glasgow, those in small towns, those in remote Highlands and Lowlands and those in advice centres (few, mostly attached to universities)

(3) SPANISH LAWYERS

Similar to Scotland, there is 1981 constitutional equality provision and detailed law in the individual provinces. Spanish lawyers will break down to those in London (at least 2 generalist Anglo-Spanish firms), those on the south coast of Spain with an Anglo-Spanish clientele, those in Madrid or Barcelona. It will not be worth looking at any rural practices and advice centres are very rare. NB In Spain lawyers are mostly "barristers" (abogados) not solicitors although they do the work of both, skype is widely available.

(4) NEW ZEALAND LAWYERS

Similar to Scotland, they have had statutory provision since 2007. Skype is widely available. The same process will be conducted with participants in **New Zealand** which also *has* a regime following federal statutory provision in 2006, thus also having had, like Scotland, 5 years experience of its operation, and where the initiative is to bring as many unformalised couples as possible into the new scheme. As that country is quite small (6m inhabitants and 40m sheep!) and with a significant population of Scottish descent, and is like England and Wales (and unlike Australia) not federal, the chosen southern

hemisphere common law respondent is a practitioner who works with the researchers of the University of Otago which has an Auckland capital city campus in the North Island as well as that in Dunedin in the South Island.

Judges and academics.

It is proposed to discuss the outcomes of the above investigative work with 2 southern hemisphere Law Commissioners (Judge Peter Boshier, formerly Principal Judge New Zealand Family Court, now New Zealand Law Commissioner, and Professor Frank Bates, University of Newcastle, NSW, former Law Commissioner for Tasmania) and 6 other Judges and academics from the 2 southern hemisphere jurisdictions.

Skype is widely available but where not, email will be used if telephone is too expensive

Appendix 2: A suggested Alternative Draft Bill

Suggested Draft Cohabitation Bill

A **BILL** TO

Make provision for certain matters in relation to persons who live together as a couple but are neither married in accordance with the Marriage Act 1949 as amended nor registered civil partners pursuant to the Civil Partnership Act 2004 ('the 2004 Act') and thus unable to access the provisions of the Matrimonial Causes 1973 ('the 1973 Act') in relation to spouses nor the 2004 Act in relation to civil partners and for connected purposes

BE IT ENACTED by the Queen's Most Excellent Majesty, by and with the advice of the Lords Spiritual and Temporal and Commons, in this present Parliament assembled, and by the authority of the same, as follows:-

Contents

PART 1 INTRODUCTORY

General

1. This Act makes certain provisions for cohabitants and former cohabitants as defined by section 2 (1) and 2(2)
 - (a) On their separation
 - (b) On the death of one of them, and
 - (c) During the period of their cohabitation as defined by section 2(3)

Cohabitants, former cohabitants and cohabitation

2. (1) Cohabitants are persons over the age of 16 who (whether of the same or opposite sexes) live together as a couple in an intimate relationship but not being within the prohibited degrees of relationship in relation to each other as

set out in the Marriage Act 1949 ('the 1949 Act') and Schedule 1 Part 1 of the 2004 Act since they are neither married nor registered civil partners but paragraph (a) applies and one or more of the following conditions (b) to (f) also applies –

- (g) they share a household as a couple whether or not they share financial interdependence
- (h) they are each the parent of a minor child living with them or with whom either is a parent of such a child having contact or spending time pursuant to a child arrangements order under section 8 of the Children Act 1989 or to a parenting agreement in lieu of such order and the other would be a step parent if the parties were married or in a civil partnership
- (i) they are the natural parents of an unborn child when they cease to live together in the same household
- (j) their names appear on the electoral roll at the same address and council tax is paid by one or the other on the basis that at least two adult persons live in their household
- (k) they in some way lead a joint social life in the manner of a couple as if they were married or parties to a registered civil partnership
- (l) where (b) or (c) does not apply they have lived together continuously for two years, such period to be determined without regard to any periods up to a period of six months during which they have not lived together as a couple.

(2) Former cohabitants are persons who formerly lived together as a couple within the meaning of section 2(1) of this Act, but who have not since married or entered into a registered civil partnership.

(3) Cohabitation shall be recognised in accordance with the principles of equality and diversity appropriate in a liberal democracy as a valid choice of the parties to establish a family format alternative to marriage or registered civil partnership whether or not the parties have or intend to have children of the family and the parties shall enjoy such rights as are conferred by this Act.

(4) Cohabitation shall in any event be established for the purposes of this Act when the parties are on the electoral roll at the same address and council tax is being paid on the basis that at least two adults are resident at the address and one or both of them would be paying council tax at that rate but for the fact that they are validly exempt from that tax or it is being paid for them by some other person or organisation such as their landlord.

(5) Cohabitants may if they wish enter into a cohabitation agreement which must be in the prescribed form and registered with the Family Court in the same manner as an agreement for parental responsibility pursuant to section 4 of the Children Act 1989 and the Lord Chancellor shall provide a similar process for the use of cohabitants to register their cohabitation agreement .

Part 2 FINANCIAL AND PROPERTY PROVISIONS

Financial Provision cohabitants and children of the family

3. Financial provision in connection with cohabitation shall correspond on separation of the cohabitants with that provided by section 72 and Schedule 5 of the Civil Partnership Act 2004 provided that application to the Family Court for such relief shall be made within three years of the termination of the cohabitation subject to the following qualifications –
 - (1) Sections 24B-G and 25B-E of the 1973 Act (in relation to pensions) shall not be capable of applying to cohabitants since they are neither married nor registered civil partners although nothing in this section shall affect any circumstances in which the court may make an order providing a pension to a cohabitant in accordance with the common law
 - (2) Section 25(1)-(4) of the 1973 Act shall thus apply to cohabitants but disregarding references to those sections referred to in section 3(1) above
 - (3) Section 25(1)-(4) of that Act shall apply to cohabitants as if where the word 'marriage' appears in the sub-sections the word 'cohabitation' were substituted
 - (4) In carrying out its duty to consider all the circumstances of the case pursuant to paragraph 20 of Schedule 5 to the 2004 Act the Family Court shall have regard to the discretion to be exercised by the Court in relation to the principles of needs, compensation and sharing and of overall

fairness as established by law in relation to spouses and civil partners and shall not discriminate against any couple with regard to the fact that they have chosen to found their family within a cohabitation relationship instead of through marriage or registered civil partnership although some circumstances amongst those which the court is required to consider may be indicate a different outcome from that which might apply within the circumstances of spouses or registered civil partners and cohabitants.

4. Cohabitants may opt out of the statutory provisions referred to by entering into a qualifying agreement for financial provision on their separation such agreement to be made within the three year period specified in section 3 of this Act.
5. Existing provisions in relation to succession and intestacy including in relation to the Inheritance (Provision for Family and Dependents) Act 1975 shall subsist in relation to cohabitants unless the parties make alternative provision by Will.
6. Existing provisions in relation to protection from violence and occupation of the family home as provided for by Part IV of the Family Law Act 1996 shall subsist in relation to cohabitants unless and until the Lord Chancellor shall make any consequential amendments to that Act pursuant to the power given to him pursuant to section 8 of this Act.

Part 3 APPLICATION TO THE COURT

7. The Family Court or where appropriate the High Court shall have jurisdiction in relation to any applications under this Act although the Lord Chancellor may by order specify that any such proceedings shall be commenced at any level.
8. The Lord Chancellor shall have power by order to make any transitional supplementary saving or consequential amendments that he considers necessary or expedient for the purpose of giving full effect to the provisions of this Act.

Commencement

9. (1) The following provisions of this Act shall come into force upon its passing
 - (a) Part 1
 - (b) Section 8

(c) Section 10

(2) The remaining provisions of this Act come into force in accordance with provision made by the Lord Chancellor who may appoint different days for different purposes.

Short title

10. This Act may be cited as the Cohabitation Act 2015.

SCHEDULES

Schedule 1

Consequential Amendments

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