RESPONSE TO
THE LAW COMMISSION CONSULTATION PAPER
COHABITATION: THE FINANCIAL CONSEQUENCES OF RELATIONSHIP BREAKDOWN

Introduction

Resolution’s 5,000 members are family lawyers committed to the non-adversarial resolution of family disputes. Resolution members abide by a Code of Practice which emphasises a constructive approach to family problems and encourages solutions that take into account the needs of the whole family and the best interests of any children in particular.

Resolution as an organisation is committed to developing and promoting best standards in the practice of family law amongst its members and amongst family lawyers in general. Resolution explores and promotes other means of resolving family disputes, such as mediation and collaborative law, so that couples can negotiate solutions without using the courts. Many Resolution members also practice as mediators and collaborative lawyers and many are accredited by the organisation as specialists in particular aspects of family law, such as contact cases or financial aspects of separation.

Resolution publishes various guides to improve standards of practice. Resolution provides training in law and in the skills and understanding that family lawyers need to help their clients face a difficult time. We also campaign for better laws and better support and facilities for families and children undergoing family change.

Resolution’s position on Cohabitation Law

Resolution has been campaigning for reform of the law relating to cohabitants for many years because of the widespread ignorance and injustice our members encounter in the course of their work with clients. Ignorance of the law is no excuse but when 59% of respondents to a survey carried out by the National Centre for Social Research believe there is such a thing as a common law marriage urgent action is necessary. Injustice is caused by the confusing and complex rules of property and trust law and the requirement to look back at what has been said and done by a couple during their relationship rather than at what is fair at the time of separation. The prospects of success are hard to predict and clients cannot afford to risk litigation which may be costly and ultimately unsuccessful. The law should be clear and reasonably predictable. The current law increases the distress of relationship breakdown and does not produce fair outcomes.
Resolution supports the institution of marriage. People decide whether or not to marry for various reasons but from the government’s Green Paper ‘Parental Separation: Children’s Needs and Parents’ Responsibilities’ 2004 the number of married couple households with dependent children fell by 13% between 1991 and 2001 and the number of cohabiting couple households with dependent children rose by 102% during the same period. The way to encourage marriage is not by making cohabiting couples vulnerable. The law must reflect the society we live in and protect the vulnerable.

That is why Resolution produced proposals for reform of the law ‘Fairness for Families’ in 2000 and, working together with the Law Society, produced a draft Bill in 2004 that would provide a safety net for all unmarried heterosexual couples and all unregistered same sex couples but would allow them to opt out by way of a cohabitation contract.

Since then, Resolution has been working to build alliances with other interested organisations to support reform by letter writing, hosting lunches and making presentations. In January 2006 Mary Creagh MP agreed to sponsor an Early Day Motion calling on the government to introduce a new law to provide a safety net for couples of whatever sexual orientation who live together and this received 122 signatories making it a very successful and solidly supported EDM. Resolution provided a briefing for MPs at the House of Commons and plans to hold further events highlighting the urgent need for reform.

Resolution welcomes the fact that the government has asked the Law Commission to look at this issue and sincerely hopes that this signifies at least a recognition of the unsatisfactory state of the current law and a desire to rectify the situation. Following the enactment of the Civil Partnership Act for same sex couples, reforming the law for couples who live together is long overdue and should be the government’s next priority. By taking this step, we can ensure that we have a family legal system fit for the 21st Century.

Resolution’s Response to the Provisional Proposals and Consultation Questions

PART 5: EVALUATING THE CASE FOR REFORM

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

Resolution supports the introduction of a new law to provide a safety net for couples who live together. Whilst an opt-in approach might protect the autonomy of cohabitants, it does nothing to assist those individuals where the choice to opt in would not meaningfully be available, such as where one party
(probably the economically weaker) may wish to opt in but the other may not be prepared to take that step.

In those circumstances, the default position would be no different to that which exists under current law, and the individuals concerned would be left with an inadequate legal framework, based on the principles of property and trust laws, which are both overly complex and expensive to interpret.

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

Resolution has considered the impact of applying a universal safety net to all couples. However we agree that those who wish to opt out should be able to do so, provided that they make a free choice not to be covered by the new law and that this is agreed in writing.

Resolution agrees that the core idea of cohabitation plus parenthood should bring a couple within the scope of any new opt-out scheme. Resolution has considered how the concept of parenthood should be defined and believes that any new opt out scheme should apply to all cohabiting couples with a "relevant child", which might include the following:

a) a child who is the parties' child biologically;
b) a child who is adopted by the parties during the currency of their relationship;
c) a child in respect of whom there is a joint residence order in favour of the parties;
d) a child born to either of the parties as a result of assisted reproduction licensed under the Human Fertilisation and Embryology Act 1990 during the currency of their relationship;
e) a child born as a result of a non-commercial surrogacy arrangement between the parties and a surrogate mother during the currency of their relationship.

Resolution believes that if there is no relevant child, any new law should only apply to cohabiting couples who have been living together for two years or more (in or outside of United Kingdom), save in exceptional circumstances where there is evident substantial unfairness or economic disadvantage. Two years is regarded as appropriate because it is tried and tested in other countries and minimizes the risk of spurious claims by people in short relationships. Where there is any dispute about whether people have been together for two years, the
Department of Work and Pensions’ signposts for assessing family units for benefit purposes could be adopted.

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

Resolution agrees that in cases where the couple has children, the current law is uncertain and capable of producing unfair outcomes. Schedule 1 Children Act 1989 can only provide short term relief and a mother may find herself homeless when the children reach the age of eighteen or cease full time education, having potentially given up a career to bring up those children. In practice children do not always disappear at the age of eighteen, and may require a home for some time after that. Furthermore, the capital provisions of Schedule 1 are usually only of use in the bigger money cases.

Resolution believes that any new statutory scheme should apply not only to couples with children, but also to cohabiting couples who have been living together for two years or more.

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

Resolution believes that reform is warranted in cases involving cohabitants without children, such as where economic advantage/disadvantage may have arisen. For further details see Part 7.

PART 6: FINANCIAL RELIEF ON SEPARATION: A NEW SCHEME

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

Resolution agrees that that any scheme should be discretionary and not be based on fixed rules of property division. A discretionary scheme will sit much more easily with existing English family law. As such it will be more easily
understood by practitioners and the judiciary and principles espoused in case law can be applied or distinguished as appropriate.

Resolution believes that the following principles should apply:

(a) the court should have as its overriding objective that fair account should be taken of any economic advantage derived by either party from contributions economic or otherwise made by the other during the cohabitation, and of any economic disadvantage suffered by the other party in the interests of the other or of any child of the family;
(b) there should be no presumption of equal sharing.
(c) there should be a presumption that the parties will be self-supporting and orders for maintenance should only be made where the court is satisfied as to either or both of the following:
   (i) that the applicant is unable to support himself or herself adequately by reason of having the primary residence of a relevant child.
   (ii) that the applicant is unable to support himself or herself adequately because the applicant's earning capacity has been adversely affected by the circumstances of the relationship and, in the opinion of the court it is, having regard to all the circumstances of the case, reasonable to make the order.

The court should also take into account the following factors:

(a) the nature of the commitment between the parties during their cohabitation and the length of the cohabitation including the degree of dependency or interdependency;
(b) the income, property and financial resources of each party (including the rate of any pension, allowance or benefit paid to either party to the relationship or the eligibility of either party to the relationship for a pension, allowance or benefit);
(c) the physical and mental ability of each party to obtain gainful employment;
(d) the financial needs and obligations of each party to the relationship;
(e) the responsibilities of either party to the relationship to support any other person;
(f) any payments made in respect of the maintenance of a child or children in the care and control of the applicant;
(g) the needs of any children living with the couple;
(h) all other relevant circumstances e.g. the existence of any written agreement or declaration of trust relating to the parties or their property.

For these purposes, “contributions” means:
(a) the financial and non-financial contributions made directly or indirectly by or on behalf of the cohabitants to the acquisition, conservation or improvement of any of the property of the parties or either of them or to the financial resources of the parties or either of them, and
(b) the contributions, including any contributions made in the capacity of homemaker or parent, made by either of the cohabitants to the welfare of the other party or to the welfare of the family constituted by the parties and a relevant child.

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

Not necessarily. As per the response to question 6.45 above, needs is one of the factors to be taken into account. In some circumstances needs may be the predominant factor in justifying and quantifying an award.

6.77 We consider that the court's decision whether to grant financial relief and, if so, of what value, should be based on principles that focus on:

1. the contributions which have been made by each party to the parties' joint household and to the welfare of the other party and other members of their family, in particular their children; and
2. the contributions that each shall make to the welfare of their children following their separation

Do consultees agree?

Resolution agrees that contributions should be taken into account as should all of the principles and factors set out at 6.45 above.

6.215 We invite the views of consultees on the question of which children should be “relevant” to the provision of financial relief between “cohabitants” with children.

In the Resolution ‘Fairness for Families’ paper published in 2000 we proposed that: “in order to qualify for relief the cohabitation must have continued for at least 2 years unless there is a child (to include a natural child or one who has been treated as a child of the family) in which case there should be no minimum period.”

We have re-considered our proposal. We now take the view that the 2 year requirement should apply in all cases, save in exceptional circumstances where there is evident substantial unfairness or economic disadvantage, unless there is a child of both parties. Where there is a child of the family who is not the child of both cohabiting partners, the couple would not qualify automatically. Instead,
they would have to have lived together for two years in order to be eligible to make a claim. This change is a consequence of concerns that, to allow claims in all cases where there is a child of the family, might give rise to unmeritorious claims by a parent who has cohabited with another (non parent) for only a short period. This is an eligibility question (see section 9) but is relevant to our thinking on the question of relevant children.

Resolution takes the view that, in cases where there has been cohabitation of at least 2 years, any child who has been treated by the couple as a child of the family should be a relevant child for the purpose of assessing financial relief. This concept is familiar to practitioners and the judiciary in a matrimonial context. It is also reflective of the Resolution view that the majority of the public would assume a degree of mutual responsibility as between long-term cohabitants.

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

Resolution considers that the court should have regard to the principles and factors set out in answer to 6.45 above in determining both whether to grant relief and the quantum of relief to be granted.

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

Resolution agrees that the law of ancillary relief on divorce should not be extended to cohabitants for the reasons outlined by the Law Commission. Marriage has always had a special status in society and if ancillary relief jurisdiction were to be extended in its entirety to cohabitants, there would be many people who would be concerned that the institution of marriage would be undermined.

6.240 We consider that, in determining whether to grant relief and, if so, what the relief should be, the court should have regard to whether, and to what extent, either party’s economic position following separation (in terms of capital, income or earning capacity) was:

(1) improved by the retention of some economic benefit arising from contributions made by the other party during the relationship (“economic advantage”); or

(2) impaired by economic sacrifices made as a result of that party’s contributions to the relationship, or as a result of continuing child care responsibilities following separation (“economic disadvantage”).
Do consultees agree?

Resolution agrees that fair account should be taken of economic advantage and disadvantage as outlined. It should also take into account the principles and factors set out in answer to 6.45 above.

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

Resolution takes the view that fair account should be taken of economic advantage/disadvantage. We also agree with the Law Commission that this should not be a forensic exercise because this would result in lengthy and costly litigation and would fail properly to take into account non-financial contributions. Resolution does not believe that this should be the sole criteria and proposes that the principles and factors outlined in answer to 6.45 above should apply in all cases.

6.242 We invite the views of consultees on whether awards should be limited to “transitional support”, with particular reference to the costs of retraining that may be necessary to enable the applicant to re-enter the labour market.

Resolution does not believe that financial claims should be limited in this way. It may be that, particularly in the case of shorter cohabitations where there are no children, an order limited to transitional support is appropriate and fair. However, Resolution does not believe that transitional support only would be appropriate in many cases where the couple have cohabited for a significant period and where there are children.

Resolution’s own proposals include a limitation on orders for periodical payments to a maximum of 3 years save in cases of exceptional hardship. It also proposed to impose a duty upon the court, so far as is practicable, to make such orders as will finally determine the financial relationships between cohabitants and avoid further proceedings between them. This is intended to mark a difference between marriage and cohabitation and to allow finality to be achieved following the breakdown of a cohabiting relationship.

6.243 We invite the views of consultees on whether a new scheme for financial relief between cohabitants should include a power to make awards in appropriate cases to assist the party with whom any relevant children will principally live following the separation with the costs of child care.
Resolution agrees that the failure of the child support formula to take into account costs of child care is a problem. Indeed the Resolution proposals for reform of the Child Support Agency did include provision for the court to be able to make orders which would make provision for such costs.

In matrimonial proceedings child care costs commonly form part of the primary carer’s budget and are therefore provided for. In those Schedule 1 Children Act 1989 cases where means are sufficient the court is able to make, by way of a top up order or part of a global order, provision which includes child care costs. See for example *F v G (child: financial provision) [2005] 1 FLR 321*. The difficulty arises in the vast majority of cases where the maximum CSA assessment is not achieved and therefore the court cannot make a top up order.

Under the Law Commission’s proposals where maintenance is not time limited child care costs could be met as part of the former cohabitants budget as they could under Resolution proposals (but for a 3 year period only in most cases). None the less there will be cases under either proposal where maintenance is not appropriate and this is likely to remain a problem therefore. Resolution takes the view that this lacuna should be dealt with by way of amendment to Schedule 1 Children Act 1989 as opposed to any new scheme because otherwise this might offend against the clean break principle which Resolution believes should apply to any new scheme.

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

Resolution does not believe that awards should be restricted in this way. To do so would create a presumption against an award that would not do justice to many cohabitants. It would also create an additional hurdle that would deter many deserving applicants from making a claim.

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

Resolution agrees.

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

- (1) periodical payments, secured and unsecured;
- (2) lump sum payments, including by instalments;
(3) property adjustment;
(4) property settlement;
(5) orders for sale;
(6) pension sharing; and
(7) interim payments ordered on account pending a full trial of final settlement.
Do consultees agree?

Resolution agrees that the full array of financial orders should be available to the court in any new scheme as between cohabitants. Resolution believes that the court should also have the ability to make pension attachment orders. Although such orders are used less frequently in matrimonial proceedings since the advent of pension sharing orders, they still do perform a useful function in some circumstances e.g. where sharing a pension may result in an overall loss of benefits or where only death in service benefits are sought to be attached.

Interim payments on account would no doubt be a useful device. However, no such power exists in matrimonial proceedings (the power is contained in the Family Law Act 1996 but the relevant part has never been made law). Resolution is concerned that cohabitants are not placed in a more favourable position than married persons or those who have entered into a civil partnership. Resolution calls for the relevant provisions of the Family Law Act 1996 to be implemented.

6.254 We consider that all types of order should be available to the court on the same substantive basis. Do consultees agree?

Resolution agrees.

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

(1) the needs of both parties and any children living with them; and
(2) the extent and nature of financial resources which each party has or is likely to have in the foreseeable future.

Do consultees agree?

Resolution’s view is that needs and resources of the parties and the needs of any children living with them should be taken into account as part of the overall assessment and as such taken into account in determining whether to make an order and in quantifying a claim.
If the Law Commission’s proposals are adopted then needs and resources of the adult parties must be taken into account at the second stage because otherwise there would be no check on whether orders made were fair and as such the scheme would produce unfair and unworkable results.

6.264 We invite the views of consultees on:
(1) generally, how the welfare of children ought to be taken into account in the provision of financial relief between cohabitants; and
(2) specifically, how existing remedies for children of the cohabitants should interact with a new statutory scheme for financial relief between cohabitants on separation.

This is principally a scheme for adults although the needs of any children living with them will be relevant. Claims for children themselves should continue to be made under Schedule 1 Children Act 1989 and heard together with the claims of the adults where applicable.

As between any new scheme and Schedule 1 Children Act 1989 there would need to be a hierarchy of claims. It would make sense for Schedule 1 claims to take precedence.

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

Resolution’s proposals included periodical payments orders but only for periods not exceeding 3 years save for in cases of severe and exceptional hardship. This remains our view and also that such orders should only be made in circumstances where:

(a) the applicant is unable to support himself or herself adequately by reason of having the primary residence of a relevant child.

(b) the applicant is unable to support himself or herself adequately because the applicant’s earning capacity has been adversely affected by the circumstances of the relationship and, in the opinion of the court it is, having regard to all the circumstances of the case, reasonable to make the order.

We also proposed that the court should, so far as is practicable, make such orders as will finally determine the financial relationships between cohabitants and avoid further proceedings between them.
Under the Resolution proposals therefore, a clean break would be achieved in most cases, if not immediately, within a relatively short period. Since publication of the Law Commission paper the House of Lords has delivered judgement in the case of *McFarlane*. The importance of a clean break in matrimonial proceedings is somewhat diminished by that decision. None the less, Resolution takes the view that there should be a distinction between the rights of cohabitants and married persons/civil partners. We remain of the view therefore that the clean break principle should be of considerable importance in any new scheme for cohabitants and that maintenance should be restricted to 3 years save in cases where this would result in severe and exceptional hardship.

6.277 We invite the views of consultees on the effect that subsequent marriage, civil partnership or cohabitation with a third party should have on a periodical payments order made in favour of a former cohabitant on separation.

Resolution takes the view that orders for maintenance should terminate automatically where the person benefiting from the order either marries or registers a civil partnership. We also take the view that there should be a presumption that orders will be terminable by order of the court upon cohabitation of the recipient. This should not be automatic because of the potential for a dispute of fact as to whether the recipient is cohabiting or not. Although this may lead to occasional hardship where a new cohabiting relationship breaks down before qualifying criteria are met, Resolution takes the view that the majority of the public would find it unjust to require a person to support a former cohabitant who is in a new cohabiting relationship.

Resolution also proposes that subsequent marriage or civil partnership should be a bar to the commencement of a claim. Cohabitation should also be a bar to any claim for periodical payments.

6.283 We invite the views of consultees on the interaction of any new remedial scheme for cohabitants with the Matrimonial Causes Act 1973 in relation to:

(1) cohabitants who marry and subsequently divorce; and
(2) an ex-spouse in receipt of periodical payments who cohabits with a third party.

Resolution agrees that where a couple cohabit and later marry and then divorce that the MCA only should be relevant to claims and that there should be no need to refer to any new scheme within divorce (or indeed dissolution of a civil partnership).
Resolution does not believe that any new scheme will need to address the second issue. This will be a matter for judiciary within the context of the MCA. However, Resolution does not believe that cohabitation should terminate orders for maintenance under the MCA. Under Resolution proposals on cohabitation, maintenance would only be capable of being ordered for a maximum period of 3 years in most cases and then only where there is need arising out of the relationship. Under the Law Commission’s proposals the former cohabitant would have to prove economic advantage/disadvantage. In either case the new scheme for cohabitants would not be capable of replacing what is available under the MCA.

6.288 We invite the views of consultees on the interaction of any new statutory scheme with the general law as it applies to cohabitants.

Resolution’s view is that any new scheme for cohabitants would obviate the need to pursue existing trust claims in the same way that there is no need to obtain a declaration of interests as between married persons and civil partners on divorce/dissolution. Such claims should remain available however as they currently are for married person and civil partners where they continue to be used in circumstances where there are third party interests. See also the response to question 10.146 below.

6.297 We invite the views of consultees on whether the liability of those who are not parents under schedule 1 to the Children Act 1989 should be extended to include “cohabiting step parents” and other non-parents in cohabiting families.

Resolution has serious reservations about extending Schedule 1 to “step-parents” because it would undoubtedly cause resentment and a sense of injustice on the part of the payer to impose an obligation to provide for a child who is not his own, when that is the obligation of the natural father. This is particularly so where, for example, that person had already provided for a ‘step-child’ during the relationship out of generosity and goodwill. Resolution recognises that this is a difficult issue, as there may some circumstances where the child has a potentially more deserving claim. eg where the natural father has died and the mother’s cohabitee has assumed paternal role over significant period of time.

6.302 We invite the views of consultees regarding any matters specific to cases involving limited assets and debts.

Within the framework of well structured legislation the court should be able to apply the relevant principles and factors as well as proportionality.
PART 7: FINANCIAL RELIEF ON SEPARATION: HOW WOULD IT WORK?

7.83 We invite the views of consultees on the Examples set out in Part 7. In particular, we invite consultees to indicate in which of the Examples they consider that financial relief should or should not be available, and why.

EXAMPLES - A. COHABITANTS WITH CHILDREN

Example 1: A and B living together for 15 years in house owned by A. 2 children. B (in joint decision with A) gave up work after second child having reduced to part time after first child. B out of employment for 5 years.

Response
A and B should be eligible on account of the length of time that they have been living together (in excess of 2 years) and the separate fact that they have children together.

The Law Commission has made it clear that proof of a relevant economic advantage or disadvantage would be necessary to trigger a claim (3.100 of the overview).

Resolution takes the view that B’s claim should not be governed solely by economic advantage or disadvantage. Theoretically, if for example, A was earning many times that which B was earning (whether in full or part-time employment), it could be argued that B’s economic disadvantage claim was negated or neutralised by the level of A’s earnings which allowed them to enjoy a significantly higher standard of living than B could have enjoyed on her own.

Resolution does not agree that an applicant should only be able to succeed in a claim of economic disadvantage where it is a consequence of the parties’ joint decision. That criterion could lead to significant litigation as to whether or not a decision was a joint one.

Resolution’s view is that the principles set out in paragraph 6.45 above should be applied and consideration be given to the factors set out in that paragraph. Thus, fair account should be taken of any economic advantage derived or economic disadvantage suffered by either party in the interests of the other or of any child of the family, and that the Court should also take into account the nature of the commitment between the parties during their cohabitation (to include length of cohabitation). Financial and non-financial contributions would be relevant to the issue (including contributions made in the capacity of homemaker or parent). In contrast to the Law Commission’s proposals, B’s needs would be a relevant factor in determining what provision B should fairly receive. It is likely on these
facts that B would need some capital from A to re-house her and the children. Taking into account the length of their relationship and the nature of their interdependence, it would not be expected that B’s capital provision would be limited to an amount in trust until the children have finished their education (as she might expect under the current application of Schedule 1 to the Children Act 1989).

Under Resolution’s proposals B would be expected to become self-supporting and therefore, any maintenance order should be limited to a term of 3 years to allow her to become self-supporting unless the imposition of that term would result in severe and exceptional hardship.

B would also be entitled to child maintenance. Account should be taken of the need for an allowance for childcare to enable B to obtain employment. As per paragraph 6.243 above, Schedule I to the Children Act 1989 should be extended to allow a claim for child care costs.

Resolution considered whether or not a proposed new cohabitation law might include claims for child maintenance (in the same way as under the Matrimonial Causes Act), rather than a mother having to make separate application under Schedule I of the Children Act (assuming that the Court should take over the function of child maintenance from the CSA). However, whilst there may be advantages to having such claims dealt with under one umbrella, on balance Resolution felt that by allowing mothers to claim for children under the new cohabitation law, that could inadvertently encourage such claimants to launch a claim for the whole gamut of available relief for herself where she might otherwise have no realistic claim (ie “piggy-back” her claim on those for the children). Therefore, it was felt that it would be best to keep mothers’ and children’s claims under separate legislation, even if the separate applications, were (where applicable) heard together.

With reference to paragraph 7.20 for the reasons already given, if economic advantage and disadvantage are neutralised, then needs may be the predominant factor giving rise to the claim rather than (on the Law Commission’s recommendation) being brought into account only at the point of consideration of the type of Order to be applied.

Resolution agrees with 7.21. The outcome regarding accommodation should be the same whether children’s accommodation is determined under Schedule 1 or under a new scheme. However, either way, accommodation needs is a relevant factor which could give rise to a claim. In contrast, under the Law Commission’s proposals, as already indicated, needs only feature when considering the type of order to be made.
Example 1A: A and B have lived together for 30 years. Children now independent. B has only worked intermittently, and part-time, since the younger child was born. Mortgage paid off.

Response
A and B should be eligible for the same reasons as above.

The Law Commission says at 7.28 that ‘it would be impossible to quantify in any meaningful way the precise quantum of [B’s] sacrifices’ of giving up full-time work to look after the home and bring up the children.

The principles and criteria set out at paragraphs 6.45 above should be applied in determining the appropriate provision for B.

It is relevant that B has been financially dependent on A and that A has been dependent on B as regards the running of the home and the bringing up of the children.

Resolution does not agree that the appropriate outcome would necessarily be the equal splitting of the parties’ resources between them by virtue of the length of their cohabitation (as suggested by the Law Commission). The effect of that would be to impose similar principles to those which would apply on divorce, and in Resolution’s view that would be inappropriate. In Resolution’s view (as per paragraph 6.45 above) although they had been together for 30 years, account should be taken of the fact that A owned the property before the commencement of the relationship. In these circumstances, B’s claims might necessarily be ‘needs driven’ on separation. In order to achieve fairness, in particular taking account of their interdependence (financial and otherwise) over 30 years, B’s reasonable needs ought to be met insofar as possible.

Example 1B: Same facts as 1A, but house was in B’s name (rather than A’s). A had paid most of the mortgage instalments over the years once B had given up work.

Response
Although Resolution notes the simplicity of the Law Commission’s solution by offsetting one party’s economic advantage claim against the other’s economic disadvantage claim, Resolution is concerned that they would not necessarily achieve a fair result by reference to the principles and criteria which it proposes (see para 6.45 above). It does not seem fair that where the parties have lived together for 30 years, one of them (in this case A) who has created equity in the property by paying off the mortgage should not have a share of that asset under any new scheme.
The Law Commission has raised an interesting point at 7.31 (and footnote 11) as regards the potential of a trust claim to be brought by one party after the limitation period of a claim under proposed new legislation. This is dealt with in response to paragraph 11.78 below.

**Example 2:** C and D have lived together for 12 years have two children and are joint owners of the home. Both in well paid and relatively flexible jobs. D returns to work after maternity leave and continues working. C and D have shared tasks of raising children.

**Response**
C and D should be eligible on account of the length of time they have been living together (in excess of 2 years) and separately the fact that they have children together. Resolution agrees that on these facts there may be no need for either party (despite being eligible) to make a claim for financial provision.

**Example 2A:** Same facts as in 2 with the parties expressly holding the property in equal shares, but D having made a far larger proportion of the mortgage payments than C. The Law Commission suggests that one solution would be that under the scheme the Court would have power to adjust the beneficial shares unless the parties had also agreed expressly to opt out of the scheme. Another option would be that under the new scheme the declaration of trust should continue to be conclusive (thus preventing D from making an economic advantage claim in relation to those payments).

**Response**
Resolution takes the view that the Court should have the power to adjust the beneficial shares unless the parties had agreed expressly to opt out of the scheme. See response to paragraph 10.146 below. The existence of an express trust would be a relevant factor and, in the appropriate case it may be a determining factor.

If the property is the only asset then it may well be that in order to achieve a fair outcome between the parties by reference to the principles identified at paragraph 6.45 above, the Court would need to have the power to adjust the beneficial shares. Further, the existence of the trust should not remove the value of that property from the scheme.

**Example 3:** E and F living together for 3 months when F becomes pregnant. F did not return to work after baby was born when maternity leave ended. The parties separated after less than 2 years together.
Response
E and F would be eligible on account of the fact that they have a child together. It is not clear what the asset base is in this example. It is also not clear the extent to which F can go back to work.

If F has suffered an economic disadvantage as a result of having a child with E, and as a result of her ongoing responsibility to that child, then she may have a claim for some financial provision. However, bearing in mind the short duration of the relationship and one of Resolution’s principles to be applied is ‘the nature of the commitment between the parties during their cohabitation – to include length of relationship’ it may be that F’s claims should be determined along the lines of the current Schedule I Children Act 1989 principles. In ‘Fairness for Families’, Resolution proposed that Schedule I of the Children Act should be extended to allow a mother to have a life interest in appropriate circumstances. However, in this example, as F appears to have an earning capacity, it would not necessarily be appropriate for her to have a life interest in any settlement of property that E might be able to provide.

Resolution agrees that the extent of F’s claim may depend on her ability to return to the employment market.

It may be appropriate for E to assist F with childcare costs, in addition to general child maintenance.

The comments under example 1 above regarding the jurisdiction for child maintenance orders apply.

Example 3A: E and F going out with each other; F becomes pregnant; they decide to cohabit as a result of unplanned pregnancy, but subsequently separate.

Response
Although the pregnancy was not the result of the parties’ cohabitation, Resolution would say that E and F would still be eligible on account of the fact that they had lived together and have a child together. See paragraph 9.67 below.

Example 3B: E and F live in social housing with low incomes and no significant assets. Existing remedy of transfer of tenancy under Schedule 7 to the Family Law Act 1996.

Response
Although E and F would be eligible, Resolution agrees that it is likely on the facts of this case that there are insufficient assets and income to enable a claim to be made under the proposed new scheme.
Example 4

Paragraph 7.46. Two questions were raised:

(a) First, should the presence only of ‘children of the family’ who are not children of both cohabitants make that couple eligible under a new scheme?

Response – such a couple should not be eligible unless they have been living together for 2 years. The existence of the ‘stepchild’ by itself would not confer eligibility. However, the existence of a ‘stepchild’, once qualification through time together (2 years) would be a relevant factor in determining appropriate provision to be made.

(b) Should such children be relevant when considering economic advantage and disadvantage claims, insofar as the relevant benefit or sacrifice is said to have arisen from care provided by one party to those children?

Response – yes, as above, such children should be relevant when considering claims under the scheme (which Resolution reiterate should not necessarily be limited strictly to ‘economic advantage and disadvantage’ claims).

The example.

G has young son, X, from previous relationship. The father cannot be traced. G and H relationship began shortly after X was born. H always treated X as if he were his own son. When X was 1 year old H moved in with G and X. H reduced working hours so that he could look after X before and after school and during holidays. G was better paid and therefore H worked less. G and H separated. X to remain with G.

Response

Clearly, there is interdependence (both financial and child caring) throughout the relationship. The length of the relationship would be relevant to whether or not H is eligible to make a claim (yes if they have cohabited for more than 2 years; but no if not). Also, whether or not H has a realistic claim would depend in part on his earning capacity.

With reference to paragraph 7.50, if G was the one looking after X, she had given up work to do so, and H had treated X as a child of the family, then that fact would be relevant to the validity of a claim by G (provided that they had lived together for 2 years). G’s economic disadvantage has arisen from the birth of a child prior to H coming on the scene. It could be argued that G (and X) have benefited from H’s generosity in taking them under his wing and providing for them for the years that they were together. Should H have a continuing obligation to provide? If so, it would appear that that obligation arises out of dependence and need rather than economic disadvantage suffered by G.

With reference to paragraph 7.51 contrary to the Law Commission’s statement in this paragraph, the Court does have the power under Schedule 1 to the Children Act 1989 to make an Order against a step-parent – provided the step-parents are
married (but not if the couple are not married, even if the father has treated the child as ‘a child of the family’ - see J v J [1993 2 FLR 56]).

**Example 5:** J moves in with K and L (K’s child from a previous relationship). K owns property and works full time with child care. J unemployed for most of relationship. K pays mortgage and majority of bills. J makes occasional small financial contributions and takes on some housework. They separate after two years together.

**Response**
J and K should be eligible to claim under a new scheme by reference to the length of their relationship (providing that it could be established that they had cohabited for two years or more).

However, it is unlikely that J would have any realistic claim taking into account the length of relationship, nature of commitment and contributions.

**EXAMPLES – B. COHABITANTS WITHOUT CHILDREN**

**Example 6:** M and N living together for over ten years in a property bought by N before relationship began. N’s elderly mother, O, moved in. M and N in full time work. M gave up work in order to care for O, N’s mother. After five years they separate. O remains with N.

**Response**
M and N should be eligible on account of the length of their cohabiting relationship (in excess of two years).

M may have a capital claim based on contribution and a potential maintenance claim if M’s earning capacity has been adversely affected by being out of the employment market to look after N’s mother. Under Resolution’s proposals there is a presumption that both parties should be self-supporting and therefore, if M was entitled to any maintenance it would be limited. A further factor which would have to be taken into account is O’s apparent dependence on N. Resolution agrees that O’s resources may be relevant to the cogency of that factor.

Resolution is also of the view that neither M nor N would have a claim against O as O would not fall within the definition of cohabitant favoured by Resolution (being a relationship between two adult persons who live together as a couple, and who are not married to one another or related by family and referable to the social security signposts).
Example 7: P is a self-employed builder. His partner Q inherits a large, run-down house from her parents. P and Q move in and P spends a year working on rebuilding the property. Once refurbished the relationship breaks down, P and Q did not discuss ownership of the house.

Response
It is not clear how long P and Q have lived together. If more than two years, then they would be eligible to make claims against each other under the scheme.

If eligible under the scheme, then P should have a claim based on contribution and added value. If less than two years, P would have to rely upon existing trust law which on present facts may not succeed, save to the extent that P could show financial contribution towards development in which case he may be entitled to the return of that financial contribution (pursuant to the case of Hussey v Palmer [1972] 1 WLR 1286). It is unclear whether P would succeed on a trust claim by reference to non-financial physical contributions. See conflicting cases of Cooke v Head [1972] 1 WLR 518 and Eves v Eves [1975] 12 WLR 1338 on the one hand where the non-financial claimant was successful (although these cases preceded the stipulations of Lord Bridge in Lloyds Bank plc v Rosset [1990] 2 FLR 155) as against Thomas v Fuller-Brown [1988] 1 FLR 237 CA where the physical contributor was unsuccessful.

Example 7(a): P worked unpaid throughout ten year relationship in Q’s private limited liability company. The parties’ home and other assets in Q’s name. Company prospered as a result of P and Q’s combined, extensive efforts.

Response
This is where the need to establish economic advantage or disadvantage at the point of separation (as the Law Commission proposes) could give rise to unfairness. P may have a valid claim by reference to contribution and the other principles and factors referred to at paragraph 6.45 above.

Example 8: R and S, in their twenties, living together for two years in a private rented flat. Both worked full time throughout and kept finances separate, shared all bills (including rent) equally and household chores. Now separating.

Response
Under Resolution’s proposals, R and S should be eligible to claim as they have been living together for two years. However, on the facts there would be no substance to a claim.

Example 8(a): R and S living in property bought by R before relationship began. R paying mortgage. S paying all other household bills.

Response
Again, assuming they have been living together for two years, then they would be eligible. However, the substance of a claim is likely to be limited. S might seek to argue that her payment of the household bills enabled R to pay the mortgage. However, R could argue that S has had the benefit of better accommodation than she might otherwise have had if they have not been together and he had not had a property in which they could live. If the relationship is only two years, then unlikely that S would have a claim. However, the longer the financial interdependence continues, then the greater likelihood of a claim by S succeeding on Resolution’s proposal by reference to the principles and criteria set out in paragraph 6.45 above.

Example 9: T had been conducting long distance relationship with girlfriend U. He wanted to force the pace. She was not sure. T gave up job to move across country to live with U in house which her parents had bought for her. U had not suggested this but did not object. She supported T financially during their relationship with T making little effort to find a new job. They split up within a year of T moving in.

Response
T would not be eligible to make a claim under Resolution’s proposals as they had not lived together for two years and they did not have children together.

So far as paragraph 7.77 of the Law Commissions Paper is concerned, Resolution does not agree that an applicant should only be able to succeed in a claim of economic disadvantage where it is a consequence of the parties’ joint decision. That criterion could lead to significant litigation as to whether or not a decision was a joint one.

Example 10: W and V living together since 1975 (when he was thirty and she was twenty eight). They set up home together. V was a primary school teacher and W a surgeon. A few months after they began to live together, W became a consultant. The couple moved from rented accommodation to a house bought in W’s sole name. They agreed that V should give up work as W’s income was more than sufficient to maintain them both. This arrangement allowed them to spend more time together when W was not working and freed V to look after the house and garden. They had hoped to have children but this proved impossible. W recently asked V to leave the house as he has become involved with a younger colleague. At the time of separation, the house is free of mortgage. W has substantial other assets in his name and a high value pension. V has no income, limited pension entitlements from her contributions whilst a teacher and few assets.

Response
Eligibility on the basis that they have lived together for more than two years.
V would have a claim against W for capital and income by reference to the principles and factors set out at paragraph 6.45 above. In contrast to the Law Commission’s proposals, Resolution would not define these entitlements strictly by reference to the economic disadvantage which she may have suffered. As with the point made in example A above, any economic disadvantage suffered by V might be neutralised by the argument that she will have benefited from the relationship by enjoying a higher standard of living during her cohabitation with W than she would have done if she had continued on her own as a primary school teacher. In the circumstances of this case, V’s claims might be governed by her reasonable needs.

PART 8: REMEDIES ON DEATH

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

Resolution agrees.

8.49 We consider that it would be appropriate for there to be some correlation between remedies available to eligible cohabitants on separation and on death. Do consultees agree?

Resolution agrees.

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

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

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

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

(iv) the court should be entitled, on granting a cohabitant financial relief on separation, to direct that neither cohabitant should subsequently be entitled to make an application under the 1975 Act in the event of the other’s death; and
(v) claims should be permitted under the 1975 Act on the same basis by those ‘former cohabitants’ who cease to cohabit with the deceased in the 12-month period immediately before the deceased’s death.

Do consultees agree?

Resolution agrees. Need should be a factor on separation and on death and it may be a predominant factor on death.

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

Resolution agrees.

8.61 We invite the views of consultees on whether the definition of ‘child of the family’ contained in the Inheritance (Provision for Family and Dependants) Act 1975 should be amended so that those treated as children of the family in relation to a cohabiting couple should also qualify as applicants.

Resolution does not consider that the definition of ‘child of the family’ should be amended. There is already provision in the Act for claims on behalf of such children on the basis of dependency.

8.66 We consider that there is no justification to amend the current law that (subject to exceptions) a will is revoked by the testator’s subsequent marriage or civil partnership. Do consultees agree?

Resolution agrees – the existing law has the merit of certainty.

8.75 We consider that there should be no equivalent provision to sections 18A and 18C of the Wills Act 1837 applicable where, subsequent to the execution of will, a testator separates from a person with whom he was cohabiting and whom he appointed as executor or trustee, or devised or bequeathed property, in the terms of the will. Do consultees agree?

Resolution agrees – the existing law has the merit of certainty.

PART 9: ELIGIBILITY TO APPLY
9.32 We invite the views of consultees on whether any legislative definition of those eligible to apply as cohabitants for financial relief on separation should be expressed by analogy to marriage and civil partnership, or in other terms.

Resolution believes the definition of cohabitants for the purpose of any legislation which may be proposed should be based on a relationship between two adult persons who live together as a couple, who are not married to one another or in a registered civil partnership or related by family, the identification of which would be assisted by reference to a checklist. See 9.56 below.

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

Resolution does not agree that any definition should expressly require that the parties share a joint household. However, we believe the requirement is implicit as part of our definition. It is also included in our checklist. See 9.56 below.

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

Resolution agrees that the legislation should include a non exhaustive checklist of factors to which the court would refer when deciding if a couple were cohabiting.

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

Resolution considers the following factors should form a statutory checklist:

a) the duration of the relationship
b) the nature and extent of common residence/joint household
c) whether or not a sexual relationship exists or has existed
d) the degree of financial dependence or inter dependence and any arrangements for financial support between the parties
e) the ownership, use and acquisition of property
f) the degree of mutual commitment
g) whether the parties have had and/or cared for a relevant child together
h) the performance of household duties
i) the reputation and public aspects of the relationship

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

Resolution agrees that cohabitants who are by law the parents of a child born before, during or following a cohabitation should automatically be eligible to apply for remedies.

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

Resolution does not consider that where there is the existence of a child of the family, this should automatically entitle a cohabitant to make a claim regardless of the length of the relationship. Resolution has revised its position on this. See 6.215.

9.114 We invite the views of consultees on:

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

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

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

(4) whether the same period should apply to claims on separation and claims on death under the Inheritance (Provision for Family and Dependents) Act 1975;

(5) how any minimum duration requirement should deal with breaks in the continuity of the parties’ cohabitation; and

(6) whether there are any circumstances (other than those already considered in relation to cohabitants with children) in which any minimum duration requirement should be waived, and if so what those circumstances should be.

Resolution considers that where there is no child of the parties, there should be a minimum period of cohabitation of 2 years before cohabitants are eligible to
apply, save in exceptional circumstances where there is evident substantial unfairness or economic disadvantage. Examples of such exceptional circumstances might include where one cohabitant has given up a secure tenancy to commence cohabitation, or where one cohabitant has made a substantial capital contribution upon commencing cohabitation (in such a manner that they would not be assisted by the current law on implied trusts).

Resolution believes continuous cohabitation should not be required, rather a cumulative total of 2 years. Breaks in continuity should be excluded from the cumulative total when calculating whether this 2-year threshold is met (by analogy with current divorce law when calculating the period of 2-years separation for the purposes of a divorce under Section 1(2)(d) of the Matrimonial Causes Act 1973).

Resolution considers that whatever the eligibility criteria on minimum duration in new legislation on separation claims is, it should also be applied to claims on death under the Inheritance (Provision for Family and Dependants) Act 1975.

9.115 We invite the views of consultees on whether the 2-year minimum duration requirement currently applying to claims by cohabitants under the 1975 Act should be amended, particularly in relation to cohabitants with children.

Resolution considers if new legislation is to be adopted for cohabitants, a consistent approach should be adopted to IPFDA claims by cohabitants, namely that the 2-year minimum should not apply where there are children of the parties.

9.124 We invite the views of consultees on how the separation of cohabitants should be identified for the jurisdictional purposes of:

1) determining eligibility to apply; and

2) application of the limitation period for financial relief

Resolution prefers to adopt an approach based on the specific facts of the particular case and would refer to the same checklist as when ascertaining whether an applicant was part of a couple. Also by analogy Resolution would suggest that matrimonial case law may be considered here in deciding whether and when the relationship ended.

9.135 We invite the views of consultees on whether relationships to which one or both parties is a minor at the time that the claim would be made or when the parties are relatives within the prohibited degrees should be eligible, in any circumstances, for the purposes of financial relief on separation.
Resolution believes that where one/both parties is a minor or if the parties are relatives within the prohibited degrees, they should be eligible to claim. Any legislation would be designed to protect the vulnerable and such people would be very vulnerable. Under divorce law, these circumstances would give rise to a nullity petition but would not preclude an ancillary relief claim. By analogy with divorce law, such cohabitants should be able to claim.

9.161 We invite the views of consultees on whether a person should be eligible to apply as a cohabitant for financial relief on separation in respect of any period of cohabitation during which they or their partner was married to or the civil partner of or cohabiting with another person.

Resolution believes that cohabitants who are either in concurrent relationships or are cohabiting with a partner in a concurrent relationship should be eligible to apply for financial relief on separation so long as they meet the general criteria of being a couple and living in a joint household, although whether there is any substance to the claim would depend on consideration and application of the principles and factors set out at section 6.45.

PART 10: COHABITATION CONTRACTS AND OPT-OUT AGREEMENTS

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

Resolution agrees.

10.26 We provisionally propose that parties should be able to enter into an opt-out agreement regardless of whether their relationship is eligible under any new statutory scheme at the point of entering the agreement or subsequently.

Resolution agrees.

10.27 We invite the views of consultees on whether minors should be entitled to enter into opt-out agreements, and if so, whether those agreements should be treated as contracts made by minors.

Minors should not be able to enter into opt-out agreements. The proposed new legislation is intended to protect the vulnerable and minors in such circumstances would be vulnerable, hence the provision in other jurisdictions requiring the consent of the Court or a parent/guardian if a minor purports to enter into such an agreement. Treating opt-out agreements for minors as contracts made by
minors and therefore voidable by one party would lead to uncertainty and potential litigation both of which are undesirable.

10.31 We invite the views of consultees as to whether an opt-out agreement should only be effective if it expressly states in specific or more general terms that neither party is to be entitled to apply for financial relief under any new statutory scheme.

An opt-out agreement should only be effective if it expressly states in specific or more general terms that neither party is to be entitled to apply for financial relief under any new statutory scheme.

10.43 We invite the views of consultees on whether, if an opt-out agreement relates only to part of a couple’s financial affairs and does not exclude the parties from making any application to court:

(1) the couple should be bound by the terms of the agreement in respect of the assets or issues that the agreement covers; but

(2) the court should remain free to deal with the assets and issues not covered by the agreement.

Resolution agrees.

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

Resolution believes that the opt-out agreement:

(1) should be in writing, signed by both parties and dated;

(2) the signatures should be witnessed;

(3) the parties should give financial disclosure to each other of the financial circumstances each is in at the time the agreement is entered into;

(4) that before signing it, each party should take independent legal advice and be provided with a certificate from the solicitor giving that advice confirming that he or she has explained:

  (a) the effect of the agreement on the rights of the parties to apply for an order under the new legislation;

  (b) in broad terms, the advantages and disadvantages, risks and benefits, of entering into such an agreement.
Leaflets should be produced by the Government to explain to people the claims that could be made under the new law and the significance of entering into an opt-out agreement. These leaflets should stress that an opt-out agreement which complies with the qualifying criteria will be regarded by the Court as binding save in exceptional circumstances, e.g. proof of duress or material non-disclosure. The leaflet should also warn people in the clearest possible terms that an agreement which does not comply with the qualifying criteria will not be upheld by the Court.

We appreciate that this may lead to objections that obtaining legal advice can be too expensive, or that people may not want to disclose their financial positions to one another when they decide to enter into an agreement not to make financial claims under the new legislation. However, it has to be borne in mind that this new statutory regime is intended to protect the vulnerable. If someone is being asked to sign away his or her potential rights, he or she should do so on an informed basis and with a full understanding of the consequences of so doing. If people do not want to give financial disclosure or pay for advice from a solicitor to enable the agreement to be binding, they will have a choice: either they can choose not to cohabit or they can take the chances that a claim may be made under the new legislation and may succeed.

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

No comment.

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

No significance should be attached to agreements which do not comply with the qualifying criteria required for agreements to be binding.

10.117 We invite the views of consultees on the potential role of “sunset clauses”.

Such clauses might be helpful in some cases, but generally the disadvantages outweigh the advantages. Sunset clauses should therefore not be mandatory, but if parties wish to include them, they should be able to do so.

10.120 We invite the views of consultees as to what circumstances, if any, should permit the courts to set aside the terms of an otherwise binding opt-out agreement. In particular, we seek consultees’ views on the following:
(1) whether the court’s powers to set aside an agreement should be limited to the grounds for setting aside contracts under the general law and failure to comply with qualifying criteria;

No. The grounds should be wider than that to avoid injustice to the vulnerable.

(2) if other grounds should be included, whether these should relate to:

(a) events or circumstances at the time of the making of the agreement;

Yes.

(b) subsequent, supervening events or circumstances;

Yes.

(c) in either case, should legislation identify particular events having that effect and, if so, what should they be? Or should they be defined generically and, if so, how?

Defined generically. The matrimonial approach should be followed i.e. they should only be capable of being set aside in similar circumstances to a valid Edgar agreement

(d) in either case, ought the court to have the power to set aside terms of the agreement simply on the ground that a relevant event occurred? Or ought the court’s power to intervene be limited, for example, to situations where, in light of the specified event, enforcement of the agreement would result in manifest injustice to either party?

The latter.

(3) whether any formal distinction should be drawn between agreements made at the point of separation and those made earlier.

No, if all the qualifying criteria for an opt-out agreement have been met.

If a challenge is mounted to the validity of an opt-out agreement, it is likely that the court will scrutinise particularly carefully whether there has been proper compliance with the requirements for independent legal advice and financial disclosure if the opt-out agreement was entered into when the relationship was rocky, shortly before or at the point of separation.
10.123 We invite the views of consultees on how the court should proceed where an otherwise binding opt-out agreement has been set aside:

(1) ought the court to have the power, where possible, to sever those terms affected by the vitiating circumstances, exercise its adjustive jurisdiction in relation to the issues covered in that area of the agreement, but otherwise enforce the agreement? or

(2) ought the agreement to fall entirely, leaving the court to exercise its jurisdiction without any limitation by the agreement, but having regard, where appropriate, to its terms?

The latter.

10.146 We invite the views of consultees on whether an express trust declared by both cohabitants should be treated in any circumstances as an opt-out, or whether the court should have the power to override such trusts when providing financial relief on separation or death.

The court should have the power to override such trusts. An express trust of itself should not be treated as an opt-out. Many injustices have occurred in the past as a result of express trusts being enforced, because such trusts can be drafted without taking into account the whole circumstances of the relationship. Moreover, such trusts usually do not provide for changes of circumstance. The court should take the existence of an express trust into account as one of the circumstances of the case. However, no particular weight should be attached to it.

10.147 If consultees consider that an express trust itself ought not to be treated as an opt-out, we invite views on how the arrangement of property pursuant to such a trust could, if the parties desired, be transposed into an opt-out agreement that would apply on separation or death.

The parties could have an opt-out agreement drawn up to reflect its terms.

10.148 If consultees consider that an express trust ought to be treated as an opt-out, we invite views on whether those advising purchasers (whether they are solicitors, licensed conveyancers or other advisers) about express trusts of land should be able to advise both parties about the effect of the declaration of trust, and about any aspect of the statutory scheme and the right to opt out.
Express trusts should not be treated as an opt-out. They should be a factor which the court should take into account in exercising its discretion, as one of the circumstances of the case.

10.151 We invite the views of consultees on whether cohabitants who would otherwise not be eligible to apply, having not satisfied any minimum duration requirement or had children, should be entitled in any circumstances to opt in to the statutory scheme by agreement.

No. If cohabitants do not meet the eligibility criteria they should not be permitted to opt in to the scheme by agreement.

PART 11: PROCEDURE, JURISDICTION AND OTHER ISSUES

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

Resolution agrees.

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

Resolution agrees.

11.29 We invite the views of consultees on the case management of cohabitants’ claims under any new scheme, both generally and with particular reference to the issues of:

(i) valuation of assets;
(ii) mediation and alternative dispute resolution; and
(iii) the desirability of split trials.

We recommend that case management is undertaken by a District Judge at an early stage for fairness and cases are dealt with in a proportionate way. The new
procedure should follow the ancillary relief rules. Resolution’s comments on the specific points of reference are:-

(i) Valuation of assets
It is agreed that the question as to whether or not an asset should be valued should be determined after disclosure depending on whether it is proportionate to do so.

(ii) Mediation and alternative dispute resolution
It is agreed that an opportunity should be given during the course of the claim for the parties to be referred to mediation. In addition to this there should be a similar hearing to an FDR within ancillary relief proceedings. A large proportion of divorce claims are settled at this stage with the assistance and guidance of the court. We recommend that a similar procedure is adopted in cohabitants’ claims.

(iii) The desirability of split trials
Split trials are by their nature expensive and Resolution does not think that they should become routine. The presumption should be that the Applicant making the application has jurisdiction to make the claim. If this is challenged the District Judge has discretion whether to order a split trial to consider jurisdiction issues.

11.33 We invite the views of consultees on whether steps should be taken to ensure consistency of approach and orders for costs as between ancillary relief claims and claims made by cohabitants under any new scheme on separation.

Resolution agrees that there should be a consistency of approach.

11.39 We invite the views of consultees as to the public funding of cohabitants’ claims under any new scheme on separation and as to the ways in which the accessibility of the scheme to those acting without legal advice or representation could be maximised.

Resolution considers that public funding should be available to cohabitants making claims under the new scheme. There should also be readily accessible information about the nature of claims that can be made. If parties are not represented the court system of assisting litigants should continue. It would be helpful if standard guidelines issued by the court were sent with forms and court notices so that litigants in person understand what is required of them.
11.40 We provisionally propose that any new scheme should include anti-avoidance provisions modelled upon section 37 of the Matrimonial Causes Act 1973 to prevent the disposition of assets, and to set aside dispositions that have been made, in order to frustrate a claim for financial relief. Do consultees agree?

Resolution agrees.

11.43 We provisionally propose that the machinery that is currently available to enforce family court orders should be available to enforce orders for financial relief made under any new scheme.

Resolution agrees

11.71 We invite the views of consultees on the private international law aspects of any new scheme for financial relief on separation, in particular:

1. do consultees consider that Brussels II Bis provides a suitable analogy for jurisdictional rules for any new scheme for financial relief on separation of cohabitants?

2. do consultees consider that the law of England and Wales should apply as the governing law in all cases arising in an English forum concerning:
   (a) financial relief on separation;
   (b) cohabitation contracts; and
   (c) opt-out agreements; and

3. do consultees consider that there are any other implications which cases with an international dimension may have for the development of any new scheme?

Private International law aspects are complex but given the increasing mobility of people around the world it is very important to address this aspect. The new scheme must be careful not to have rules that are confusing or conflicting.

1. Resolution does not consider that Brussels II should be adopted as a suitable analogy for jurisdictional rules under a new scheme. English courts should have jurisdiction only if the couple cohabit in England and Wales for a period of time. Brussels II was established to prevent two countries trying to deal with the same divorce and to ensure mutual recognition of divorces in the EU. The issues for cohabiting couples are quite different. Whilst the law relating what happens on divorce may differ
from country to country, marriage is universal and there are recognised obligations. However cohabitation is treated differently in these countries. Some countries will afford more recognition to a cohabiting couple whereas others will have limited or no provision.

Most EU countries have no automatic recognition of cohabitation. The scheme that is being proposed in England and Wales will mean by default: a couple who have children, or possibly who have been living together for a period of time, will have the law imposed on them unless they contract or opt out. This is an important distinction from marriage or same-sex or opposite-sex partnership registration schemes, which are all a matter of choice. It would be unfair to couples who have had no knowledge of the English law or connection with England to have such a system automatically apply to them unless they have been cohabiting here for a period of time.

In the alternative, Resolution proposes that the fundamental criteria to make an application under a new scheme should be:

- that the couple must have cohabited in England and Wales for at least one year before any such application can be made.
- that there should be a limit of one year from the time of leaving the UK (having cohabited here for at least one year) during which they can make such an application.

In all such cases the court should have discretion to stay any application if there are foreign proceedings pending.

2. Resolution agrees that English law should in all cases apply in matters concerning:
   (a) financial relief and separation;
   (b) cohabitation contracts; and
   (c) opt out agreements

   However a foreign cohabitation contract or opt out agreement should be a factor which is taken into consideration by the English courts and may be a determining factor especially if a choice of jurisdiction is referred to. This would include couples who have entered into opposite sex registered partnerships in other jurisdictions.

3. Recognition of same sex partnerships which are treated in England and Wales as civil partnerships acquiring the same status will need to be distinguished carefully from other registered partnerships for opposite-sex couples. The rules in countries where those partnerships apply should not have any impact on the proposed legislation other than to recognise that such relationships fall within the definition of cohabitant and as such a claim under the proposed new scheme could be made provided the other jurisdiction criteria are met.
11.77 We provisionally propose that claims under a new statutory scheme should be brought within one year of the parties’ separation. Do consultees agree?

Claims should be brought within one year of the parties’ separation but the court should have discretion to permit applications outside this time limit in exceptional circumstances.

11.78 We invite the views of consultees as to whether:-

1. the time period for making a claim under any new scheme should be extended to one year from the birth of a child of the cohabitants where, at the time of separation, the applicant is pregnant by the respondent;
2. there should be a general discretion vested in the court to extend the time period for making a claim in exceptional circumstances;
3. it should be specifically provided that a party who would be out of time for the purposes of making a claim under any new scheme ought to be permitted to invoke a claim under the scheme defensively to an action brought by the other party under the general law.

Resolution agrees:-

1. that time should be extended to one year from the birth of a child of cohabitants where at the time of separation the applicant was pregnant;
2. there should be a general discretion as stated above to extend the time period for making a claim in exceptional circumstances;
3. Resolution does not agree that it should be possible to use the scheme defensively to an action brought by a party under general law once the time for making the application has lapsed. This would create uncertainty. In actions brought by one of the parties under general law the other can raise the issue of not having made an application under the new scheme as a factor to be taken into account in the claim.
11.99 We invite the views of consultees on the proper way in which to balance the interests of putative applicants and respondents in relation to the retrospective operation of any new scheme, or whether any scheme should instead operate only prospectively.

Resolution supports the view that the court should assess the entire period of the relationship and not be concerned about whether it started pre or post commencement of a new scheme when considering eligibility to make a claim. Whilst it would open the flood gates of litigation to have claims made in respect of relationships which began and ended prior to a new scheme coming into force, this should not apply to relationships which are ongoing once new legislation exists, even if the relationship started before. We agree with the conclusions reached at paragraph 11.90 by the Law Commission in that the discretionary nature of the scheme proposed should make this possible. Clearly the legislation should not apply retrospectively to cases where the cohabitation ended before a new scheme came into force.

Resolution supports the suggestion that prior to new legislation coming into force there should be a period of time in which couples can opt out under their own agreements should they so choose. This would give time for parties to consider their position before a new scheme is automatically imposed upon them.

11.105 We invite the views of consultees on the impact of the provisional proposals and reform options discussed in this paper, and would welcome any other information relevant to the assessment of the consequences of reform.

Resolution agrees that any new legislation in this area would have little or no impact on businesses, charities or the voluntary sector. It would have a significant social impact and will assist many couples particularly those with children. Organisations which help one parent families may be in an easier position to advise and assist although initially they may have an increased demand on their services for information. This would not be unreasonable. The government could assist by providing leaflets to briefly explain what the new law is and guide them to the relevant voluntary sector if necessary.

Resolution considers that new legislation in this area is much overdue. It is also believed that such a scheme is unlikely to have any detrimental effect upon marriage and there is no evidence from other jurisdictions that this is the case.

**Conclusion**

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