PROPERTY RIGHTS AND PERSONAL RELATIONSHIPS: REFLECTIONS ON REFORM

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This paper considers the possible reform of the law governing property rights upon the termination of a close personal relationship, taking as its point of departure the Law Commission's Discussion Paper on Home-Sharing (2002). Having considered the reasons for the inconclusive outcome of the Law Commission's project (and the Discussion Paper's comments on the law of trusts), the paper moves on to consider the possible shape of future reform. It examines first the preliminary question of whether possible legislation should focus on unmarried cohabitees or whether a wider range of relationships should be encompassed (with or without a cohabitation requirement). The paper then looks at the form which a legislative scheme might take, examining the possibility of focusing on contributions (along the lines of New South Wales' legislation) and the Law Society's proposals for a regime based on 'economic advantage and disadvantage'. The experience of the courts in the matrimonial context is considered with a view to extracting relevant lessons. In general, rather defending one particular model for reform, the paper attempts to identify and explore key issues which will be of relevance across a variety of approaches to reform.

INTRODUCTION

The government has announced plans to introduce a civil partnership registration scheme for same sex couples.[1] This proposal is undoubtedly momentous in that it would finally extend to same sex couples the opportunity to enter a legal institution analogous to marriage. However, this legislation (assuming that it is enacted) will not bring closure to the ongoing debate on the reform of the property rights of those in close personal relationships. The proposed new legislation will have no impact on the

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[1] This proposal was included in the Queen's Speech in November 2003, following the publication of a consultation paper on the topic in June 2003: Department of Trade and Industry, Women and Equality Unit *Civil partnership: A framework for the legal recognition of same sex couples*. See also Department of Trade and Industry, Women and Equality Unit *Responses to Civil partnership: A framework for the legal recognition of same sex couples* (November 2003). Cf R Wintemute and M Andenaes (eds) *Legal Recognition of Same Sex Partnerships* (Oxford: Hart Publishing, 2001); K Waaldijk 'Taking Same-Sex Partnerships Seriously – European Experiences as British Perspectives?' [2003] International Family Law Journal 84.

property rights of unmarried heterosexual couples[2] or unregistered same sex couples. Nor will it affect the outcome of disputes arising in the context of 'non-couple' relationships. Therefore, even in the changed landscape, the fundamental questions in the reform debate will remain more or less the same. It will still have to be decided how the law should deal with the consequences of the breakdown of close personal relationships outside marriage/civil partnership.

This article offers some reflections on the possibilities for reform, taking as its starting point the Law Commission's recent Discussion Paper on 'Sharing Homes'.[3] In this Paper, the Law Commission admitted defeat in its attempt to develop a 'property law solution' to the problem of the property rights of home-sharers (bringing to an end a project which had dragged on for close to a decade). The Discussion Paper is a somewhat unusual document. It does not constitute a Consultation Paper and no responses were sought. Instead, the Discussion Paper was intended to 'draw a line' under the project and to explain the reasons why the Law Commission did not feel in a position to put forward any recommendations, even on a provisional basis. Unlike many law reform documents, where the underlying drift is to promote the merits of a particular reform proposal, any bias in this document is towards justifying the decision to abandon the putative reform proposals. While there is a certain value in providing a record of the Law Commission's protracted and ultimately unsuccessful endeavour, that is not the primary purpose of this article's consideration of the Discussion Paper. Rather, it is felt that certain interesting perspectives are opened up when one looks closely at the problems encountered by the Law Commission in attempting to implement its distinctive approach to the reform question. Spending some time with the Law Commission down its 'blind alley'[4] may leave us a little more street-wise for the adventures of the future.

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2 Heterosexual couples will not be entitled to register as civil partners and, even if the proposal were changed to permit them to do so, it is likely that the take-up rate would be low. For comparative statistics, see eg K Waaldijk 'How the Road to Same-Sex Marriage Got Paved in the Netherlands', Chapter 23 in Wintemute and Andenaes note 1 above, p 463.

3 Law Com No 278, July 2002 (henceforth, the Discussion Paper). See S Bridge 'The Property Rights of Cohabitants – Where Do We Go From Here?' [2002] Fam Law 743; R Probert 'Sharing Homes – A Long-Awaited Paper' [2002] Fam Law 834; J Miles 'Property law v family law: resolving the problems of family property' (2003) 23 LS 624. Note also The Law Society *Cohabitation – The Case for Clear Law* (July 2002) (henceforth, the Law Society Report) and the New South Wales Law Reform Commission *Discussion Paper 44: Review of the Property (Relationships) Act, 1984 (NSW)* (April 2002) (henceforth, the NSW Discussion Paper). Cf South African Law Reform Commission *Discussion Paper 104: Domestic Partnerships* (2003).

4 See the comments of Lord Justice Thorpe 'Property Rights on Family Breakdown' [2002] Fam Law 891 at 894.

Part I of the Article will set out briefly the main features of the Law Commission's putative reform scheme and make some general observations concerning the Discussion Paper's emphasis on the distinction between property law and family law. Part II will then consider the main reasons for the failure of the Law Commission's putative reform scheme. Finally, in Parts III and IV, the discussion will move on to consider the possibilities for reform in light of (but not restricted by) the experience of the Law Commission's abortive project.

PART I: PROPERTY LAW AND FAMILY LAW

It will be helpful at the outset to set out the main features of the reform scheme which the Law Commission considered (and ultimately rejected) in the Discussion Paper. The putative scheme was to apply to those sharing a home,[5] except where the home-sharing was pursuant to a genuine commercial relationship.[6] A successful claimant would be entitled to a share in the beneficial interest in the shared home under a statutory trust. The claimant would 'earn' a share under a trust on the basis of 'objectively valued' contributions, with the courts taking a 'broad brush' approach to assessing the parties' shares.[7] No account would be taken of questions such as the needs of the parties. The trust would take effect automatically, without the need for a court declaration. It would therefore be capable of binding third parties, subject to the normal rules governing priorities. The intention of the parties would, in general,[8] be ignored except where it had been expressed in the form of an express declaration of their beneficial entitlements in the home. Such express declarations of trust would continue to be enforced rigorously. Where the statutory scheme was applicable, it would replace the common intention constructive trust and the doctrine of proprietary estoppel.[9] The aim of the scheme was to offer 'greater certainty, clarity and consistency' in the relevant law.[10]

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5 There was no requirement that the home in question be the 'only or principal home' of the parties (page 44). Homes which were rented, rather than owned, by their occupiers were not intended to be covered (page 2). Minors would not have been able to claim under the scheme (page 45).

6 Page 45.

7 To encourage this, the Commission envisaged limiting courts to assessing shares in bands of five per cent (5%, 10%, 15% etc). See page 49.

8 See page 47 for the scheme's proposed treatment of gifts.

9 See further text following note 172 below.

10 Page 43.

The Law Commission repeatedly categorised its putative scheme as involving a 'property law' approach to reform. Although perhaps a useful short-hand at one level, the use of this terminology is liable to prejudice future debate. The references to a 'property law' approach create an implicit contrast with a 'family law' approach.[11] This contrast is heightened by the discussion, in Part V of the Discussion Paper, of the alternative of 'A Relationship Approach' (also referred to as a 'status-based approach'). The implication of this is that the issues considered in the Discussion Paper are peculiar to a 'property law' framework and, now that that route has been identified as a cul de sac, there is nothing to be learned from the work carried out by the Law Commission to date. In fact, this is an over-simplification because (insofar as it is helpful to adopt such broad generalisations) the Law Commission's putative scheme was really a hybrid between 'property law' and 'family law' ideas.

It is clear from the Discussion Paper that the main attribute of a 'property law' solution was perceived to be the certainty and predictability it would offer. Such an approach would not involve giving any serious element of discretion to the courts (aside from allowing them to calculate the entitlements of the parties using a 'broad brush' approach). This contrasts with the approach to the adjustment of property entitlements in the case of divorce and presupposes an assumption that significant problems are caused by the unpredictability which results from the existence of a wide-ranging discretion.[12] Another feature of the putative scheme which is strongly reminiscent of the law of property is its exclusive reliance on the remedy of the trust. Furthermore, the scheme's focus on the family home (with its heavy emphasis on the value of express declarations of trust) leads to a suspicion that the overall problem was constructed from a 'property' angle. The solution considered in the Discussion Paper seems primarily designed to address the perceived problem of litigation over the ownership of the family home. Arguably, it tries to treat the symptom of disputes over the ownership of houses rather than address the underlying problem of the fall-out from the breakdown of informal[13] relationships.

On the other hand, it is also important to emphasise the ways in which the putative scheme departed from a 'property law' framework. Although this observation

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11 See generally Miles note 3 above.

12 See further text accompanying notes 24-25 below. It is unfortunate that there is no attempt in the Discussion Paper to make explicit the arguments against relying on a very broad judicial discretion.

may at first sight appear trite, it is worth noting that the current (undoubtedly unsatisfactory) legal position constitutes a prime example of a 'property law' solution – those living together in close personal relationships are accorded no special treatment and are governed by the same rules of the law of property and equity which are applicable as between strangers. The most obvious method of improving this position, within the framework of property law, would be to alter the general rules of the law of property (in particular, the rules governing resulting and constructive trusts). However, the Law Commission decided against any attempt at a complete codification of the law of implied trusts and felt that there was 'a real risk that statutory intervention on the fringes of this area of the law could have unforeseen and unintended consequences'.[14] Although the point is passed over rather quickly in the Discussion Paper,[15] it seems clear that the Law Commission was fully justified in taking this view. An essential criticism of the application of the law of trusts in the context of disputes between cohabitees[16] is that the relevant rules were designed to govern disputes between strangers and are unsuitable to do justice in the context of close personal relationships. The trouble is that, if the rules were changed to make them suitable to deal with close personal relationships, there might well be undesirable results in the context of disputes between strangers. Moreover, any attempt to codify the existing law of trusts could, as the Law Commission pointed out, 'hinder further judicial development of the underlying legal principles'.[17] It would certainly be undesirable to lock into the law the incoherent 'common intention' trust analysis,[18] thus precluding any possibility of the courts eventually untangling the jumble which they have created in the law of trusts.

The Law Commission, then, was not considering a pure 'property law' solution. In fact, the putative scheme undeniably involved a 'status-based' approach. The scheme was to affect only a particular class of people: those sharing a home

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13 References in this article to 'informal' relationships are not intended to imply that such relationships are necessarily casual or lacking in commitment, simply that they have not been formalised in marriage.

14 Page 62.

15 Cf Bridge note 3 above at 744, expanding further on the point which he states was 'implicit' in the Discussion Paper's arguments.

16 Some writers prefer the term 'cohabitants'. Neither word exactly trips off the tongue. For what this is worth, 'cohabitee' seems to be far more popular with the courts, with a LEXIS search (carried out in January 2004) of 'UK Cases, Combined Courts' giving 456 results for 'cohabitee' as opposed to only 71 for 'cohabitant'.

17 Page 62.

(subject to certain exclusions). Those within this category would no longer be permitted to avail themselves of the standard rules of property and equity but instead would be governed by a special statutory regime. It is true that the definition of the status in question has a ‘property’ flavour, since it appears to turn on a person’s relationship with a home (an item of property).[19] However, since both parties have to be sharing the same home, the definition of the qualifying status clearly involves a form of relationship between two people. Furthermore, the notion of relationship was implicit in the fact that the scheme was founded on a consideration of the parties’ contributions to their joint lives. Overall, the Law Commission scheme was therefore a distant relation of the type of ‘family law’ regime favoured for example by New South Wales[20] – claimants who were in a certain relationship to each other would have earned a remedy on the basis of an assessment of their contributions to the relationship in question. This is not to say that the Law Commission’s putative scheme was somehow defensible, simply that it had family law as well as property law elements and that the Discussion Paper raises (directly or indirectly) issues which will be of relevance in attempting to formulate more promising reform proposals in the future.

To conclude this section, it should be emphasised that it is potentially divisive to speak of property law and family law as if they were two distinct legal orders rather than simply artificially constructed sub-divisions of the one legal system. There may be a temptation, in light of what the Law Commission attempted to do in its name, to dismiss property law as narrow and rigid and to praise family law as being flexible and just. Such generalisations are not particularly helpful. One might as well argue that a screwdriver is a better tool than a hammer. It is also worth noting that, although discretion[21] tends to be regarded as the touchstone of family law, its influence has arguably diminished in recent years.[22] Also, of course, the law of property does contain (limited) elements of discretion, notably within the doctrine of proprietary

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[18] For criticism of this doctrine, see J Mee *The Property Rights of Cohabitees* (Oxford: Hart Publishing, 1999), Chapter 5. See further text following note 89 below.

[19] See Miles note 3 above at 630-631.

[20] See the Property (Relationships) Act 1984.

[21] Cf generally, C Schneider ‘Discretion and Rules: A Lawyer’s View’, Chapter 2 in K Hawkins (ed) *The Uses of Discretion* (Oxford: Clarendon, 1992).

[22] See J Dewar ‘Reducing Discretion in Family Law’ (1997) Australian Journal of Family Law 309; J Dewar ‘Family Law and its Discontents’ (2002) 14 International Journal of Law, Policy and the Family 59.

estoppel.[23] Therefore, the Law Commission's unsuccessful pursuit of certainty and predictability was not simply some blinkered 'property law' obsession.[24] Excessive reliance on discretion makes it difficult for the parties to bargain in the shadow of the law. This impacts most seriously on the more vulnerable party in a relationship, who will tend to be more risk-averse, leading to a danger of such parties accepting unfavourable settlements in order to avoid unpredictable litigation.[25] The reduction of uncertainty in the law (where this may be achieved without damage to other values) is a law reform priority which transcends the traditional boundary between property and family law.

PART II PROBLEMS WITH THE LAW COMMISSION'S PUTATIVE SCHEME

This Part will examine briefly some of the reasons why the Law Commission's putative scheme failed. The emphasis here will be on points which were specific to the scheme in question. A unifying theme is that these issues all relate in one way or another to the scheme's central emphasis on the shared home of the parties. Those problems with the scheme which are of wider relevance are dealt with in Part IV of the article in the context of a discussion of the path which reform may take in the future.[26]

(a) Focus on Home-sharers

Essentially, in order to qualify for a remedy under the putative scheme, a claimant would simply have had to qualify as a home-sharer and to have made a recognised contribution. In terms of a focus for law reform, the category of 'home-sharer' is clearly over-inclusive,[27] applying for example in the case of an acquaintance who has

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23 As noted by Miles note 3 above at 626.

24 Unfortunately, the predictability which was hoped for in the putative scheme, and for which much else was sacrificed, was not attainable in reality. Cf note 119 below.

25 See NSW Discussion Paper note 3 above, para 5.40.

26 See the discussion of the scheme's emphasis on 'contributions' at the expense of 'sacrifices' (text to and following note 117 below), the relationship between the scheme and the existing equitable rules (text to and following note 173 below) and the problems related to the issue of retrospectivity (text to and following note 181 below).

27 There is also an argument that it is under-inclusive, in that it excludes close relationships where the parties do not happen to cohabit. See paragraph of text following note 77 below.

been taken into the home of the legal owner as an act of kindness.[28] A less obvious aspect of this problem is that (without discussion) the Discussion Paper failed to exclude married couples from the category of home-sharer.[29] A detailed legislative framework already protects the interests of married couples and it is difficult to see how matters would be improved (rather than unnecessarily complicated) by extending home-sharer legislation to cover their situation.

What makes the breadth of the home-sharer concept particularly problematic is that the court was to be afforded no discretion to take account of the nature of the relationship between the particular home-sharers in dispute. If one considers another piece of legislation which applies to a very broad sweep of relationships, the Australian Capital Territory's Domestic Relationships Act 1994, one sees that the court is entitled to take into account a range of factors besides the contributions of the parties, most notably 'the nature and duration of the relationship'.[30] It is not at all surprising that the Law Commission was unable to come up with a scheme which would apply in precisely the same way to all home-sharers irrespective of their relationship. This point was heavily emphasised in the Discussion Paper itself and, in aftermath of its publication, Stuart Bridge (the Law Commissioner with particular responsibility for the Discussion Paper) summed up the essential problem as 'one size does not fit all'.[31] To illustrate the point, the Discussion Paper contrasted a hypothetical example involving an adult son living with his parents with another example involving an unmarried mother living with her partner.[32] According to the Law Commission, it would be unacceptable to many people that the adult son would earn a share on the basis of his contributions towards his keep. The possibility is then discussed of introducing a number of 'control mechanisms' into the calculation process in order to reduce or eliminate the son's share.[33] However, to be consistent, these mechanisms would have to be employed in all cases, thus reducing the share of the cohabitee in the second example (who appeared more deserving).[34] The Law

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28 Page 58 of the Discussion Paper.

29 Ibid, page i.

30 See s 15(1) and s 19(2).

31 'Fair shares for home sharers?' [2002] NLJ 1192 at 1192. See also S Bridge 'The Property Rights of Cohabitants – Where Do We Go From Here?' [2002] Fam Law 743 at 744.

32 Pages 52-57.

33 See pages 51-52 and 55 for discussion of these possible control mechanisms.

34 Unfortunately, the examples in the Discussion Paper appear ill-chosen to make the Law Commission's point. For example, if one employed just one of the 'control mechanisms' – making a deduction for enjoyment of 'free' accommodation – the son's claim against his parents in Example 1

Commission identified the danger of a scheme becoming 'ends-driven', in other words that the calculation process might be distorted in order to produce results which appear 'fair and reasonable'. The consequence could be that one would lose sight of the rationale for the scheme and one's reform would become 'immersed in obscurity'.[35]

Given the emphasis placed on the 'one size does not fit all' point, the obvious question is whether the putative scheme could at least cater adequately for the rights of cohabitees. After all, the Law Commission appeared to conclude in Part V of the Discussion Paper that a likely path to reform lay in a status-based model which would (probably) focus primarily on the rights of unmarried cohabitees. However, there is no suggestion to be found in the Discussion Paper, or in Stuart Bridge's subsequent comments, that the putative scheme could provide a viable reform option even if one were dealing only with cohabitees. The reality is that the various other problems with the putative scheme (which are discussed in the following sections)[36] made it unsuitable as the basis for any sort of reform. Thus, the Law Commission was arguably somewhat disingenuous in highlighting the diversity of home-sharing arrangements as the central reason for the failure of its project.

(b) Focus on the Home

The Law Commission stated that its project was 'centred on a belief in the importance of the home as property.'[37] It pointed out that the home is often 'the single most valuable asset of its owner' and has 'great economic significance' as a form of security.[38] However, this does not justify restricting any possible remedy for a claimant to a share in the home. Consider, for example, the case of contributions in the form of work in the home after the home has been acquired, with no mortgage outstanding. While such contributions can with some plausibility be linked to the home, it is equally plausible to link them to other assets of the legal owner (eg a valuable business which was built up by the legal owner over the relevant period).[39] Why should any possible claim relate only to the home and not to the business (and

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would be completely eliminated, while the unmarried mother's share in Example 2 would be decreased only slightly (from 34% to 31%).

35 See pages 56-57.

36 See also the cross-references in note 26 above.

37 Page 3.

38 Ibid.

thus be liable to be defeated by an express declaration of the beneficial interests in the home)?[40]

(c) Statutory Trust as the Only Remedy

The Law Commission envisaged that the only remedy under the statutory scheme would be a share in the beneficial interest in the home under a statutory trust. The Discussion Paper provides no convincing defence of the exclusive reliance on the mechanism of the trust. In particular, no justification is given for the assumption that it is appropriate for a successful claimant to be given protection against third party claims. Under the existing law, a claimant who succeeds in establishing a constructive trust will (in some circumstances) enjoy priority over a third party creditor. However, this is simply an automatic consequence of the employment of the trust device. Equity (at least in England and Wales) has not considered the possibility of separating out the different consequences which flow from the declaration of the existence of a trust.[41] In the context of statutory reform, however, there is no reason to assume that allowing a claimant to share in the ownership of the home (and its increase in value over the years) implies that his or her share must have the potential to defeat third party claims. If, for reasons internal to their relationship, home-sharers allow the ownership of their property to rest in the hands of one home-sharer, why should they not take the negative consequences of this arrangement upon (for example) the bankruptcy of the legally-owning home-sharer (in the same way as they would take the positive consequences if it had been the other home-sharer who had become bankrupt?)[42]

(d) Self-Regulation Through Express Declarations of Trust

The Discussion Paper strongly emphasises the importance of encouraging the parties to make their own arrangements.[43] What is envisaged is that the parties should make

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39 Cf *Peter v Beblow* [1993] 1 SCR 980 at 1020: such a contribution 'seeps throughout all of the assets of the defendant'.

40 See text following note 42 below.

41 Cf *Muschinski v Dodds* (1985) 140 CLR 583 at 615 per Deane J (suggesting that it was open to the court to stipulate that a constructive trust would have prospective effect only); P O'Connor 'Happy Partners or Strange Bedfellows: The Blending of Institutional and Remedial Features in the Evolving Constructive Trust' (1996) Melbourne University Law Review 735 at 751-761.

42 See Mee note 18 above, pp 312-313. Of course, one might not feel much sympathy for creditors such as banks and might believe that they are in a position to take steps to protect their interests (cf Miles note 3 above at 646 fn 95). However, in the absence of any positive rationale for doing so, these considerations do not justify allowing remedies under a legislative scheme to defeat the rights of creditors.

43 See eg page 6.

an express declaration of the beneficial interests in their home.[44] It is well-established law that, where the parties have signed such a declaration, it is not possible for either party 'to go behind' the declaration in the absence of fraud or mistake.[45] In one of its few strong recommendations, the Discussion Paper insists that it 'is essential, in order to reward those who make proper provision, that courts continue rigorously to enforce express declarations of trust.'[46] The reward, of course, will be for the person seeking to rely on the express declaration, not the person who (in light of his or her contribution in the years following the declaration) is seeking to establish a greater share than that ordained for him or her. The enforcement of express declarations lends itself to certainty but not necessarily to the avoidance of injustice. One can easily imagine cases where, at any early stage in the relationship, one partner accepts a small share under an express declaration and then fails to renegotiate the arrangement notwithstanding dramatic changes in the family's circumstances or, on the other hand, where one party pays for a home which is put into a beneficial joint tenancy and where the relationship breaks down shortly afterwards. At an early stage of a relationship, it may not always be easy to determine the most suitable manner in which to divide the beneficial ownership in a shared home (although the courts, in their desire to encourage express declarations, may not always admit this).[47] The parties to the relationship do not know how their lives together will turn out and an express declaration, which covers the ownership of only one item of property and has a limited capacity to take account of changing circumstances, is a very blunt instrument for the self-regulation of property entitlements. Furthermore, the Law Commission envisaged that the courts would continue with their 'robust approach' to the enforcement of express declarations, whereby eg a person will be bound even if he or she has signed a declaration without having read it.[48] This would seem unreasonably harsh in the context of the putative statutory scheme. If the express

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44 As the Discussion Paper points out (page 20), where a house is being purchased in joint names the Land Registry already insists on the inclusion of an express declaration. It is not, however, normal practice to make any such declaration where the parties begin living together in a home which already belongs to one of them.

45 See *Pettitt v Pettitt* [1970] AC 777 at 813 per Lord Upjohn; *Goodman v Gallant* [1986] Fam 106. It is suggested in a footnote on page 21 of the Discussion Paper that fraud, 'would appear to include "actual" undue influence: see *CIBC Mortgages Plc v Pitt* [1994] 1 AC 200 at 209, per Lord Browne-Wilkinson.' The implication is that *presumed* undue influence would not be a basis for challenging an express declaration. This is surely mistaken: an express trust will be of no effect if it is set aside on the basis of undue influence (of whatever variety).

46 Page 22.

47 See *Carlton v Goodman* [2002] 2 FLR 259 at 273 per Ward LJ ('It is not very difficult to do').

declaration were to serve as a means of contracting out of a statutory scheme for home-sharers, it would seem reasonable to require that each party's attention be drawn to the significance of the declaration and to the statutory entitlement that was being foregone.

Obviously, a cohabitation contract would provide a more comprehensive method of self-regulation but such contracts have been very unpopular in practice (being seen as, amongst other things, overly complex).[49] The difficulties with self-regulation provide one argument in favour of the introduction of more radical legislation than that considered in the Discussion Paper, which would provide a default position for cohabitees who fail to address the question of their separate property entitlements.

(e) The Problem of Focus

A final problem with the putative scheme is the absence of a coherent focus for the exercise of assessing the respective contributions of the parties. The frequent use of the term 'contribution' prompts the question: 'contribution to what?' Logically, there are two main lines of approach which one could take in developing a statutory scheme. The first option would be to concentrate on the home, taking into account direct and indirect contributions to its acquisition and improvement. The second option would be to focus, not on the home, but on the relationship between the parties. One would then look to the contributions which each had made to the joint venture of their relationship (or as the Law Commission puts it, to their 'joint lives')[50] and base a remedy (which would not necessarily be limited to the family home) on the proportions of the respective contributions. Given that the Law Commission's scheme would have taken into account contributions (both financial and non-financial) made after the acquisition of the home was complete, it would appear that this second option was the one chosen by the Law Commission. Unfortunately, such a choice makes little sense given that the Law Commission's scheme would be triggered by the

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48 See page 21, citing *Pink v Lawrence* (1978) 36 P & CR 98.

49 The Law Society Report note 3 above, page 79 suggests, apparently on the basis of a misinterpretation of *Layton v Martin* [1986] 2 FLR 227, that cohabitation contracts are not binding on the courts. The better view (although the matter has not been authoritatively settled) is that they are enforceable in England and Wales. See S Cretney, J Masson and R Bailey-Harris *Principles of Family Law* (London: Sweet and Maxwell, 7th edn, 2002) pp 135-136; Mee note 18 above, pp 30-32. Contrast *Ennis v Butterly* [1996] I IR 426. Cf E Kingdom 'Cohabitation Contracts and the Democratization of Personal Relations' (2000) 8 Feminist Legal Studies 5.

50 Page 61.

mere fact that the parties are 'home-sharers' and, beyond this, it entirely ignores the nature of the relationship between the parties (and the question of whether they actually do, in any meaningful sense, live 'joint lives').[51]

The lack of focus which has just been identified leads to an absence of any principled basis for the calculation of the shares of the respective parties under the putative scheme. The essential problem lies in finding an appropriate means of comparing the different forms of contribution. In the two 'Worked Examples' in the Discussion Paper,[52] the calculations are drastically skewed because of the unfavourable treatment which is given to one party's ownership of a net (or 'opening') equity in the home. Such an equity represents pure 'capital' yet it is treated in the Discussion Paper on the same basis as expenditure on mortgage instalments and on general family bills. This is clearly misconceived. It is necessary to treat contributions to the mortgage repayments on a different footing to contributions of a purely capital nature (eg an 'opening equity').[53] It is also necessary to find some way of comparing indirect contributions (in the form of general family expenditure) to direct contributions. If one were focusing one's inquiry on contributions to the acquisition of the home, it would be possible to develop a method of comparing the various forms of contributions – essentially, one would seek to relate all contributions to the purchase price of the home.[54] Unfortunately, once take one takes account (as the Law Commission's putative scheme does) of contributions which are unrelated to the acquisition of the home (eg household expenditure after the mortgage has been fully repaid), one is left with no obvious way of relating the different kinds of 'contributions' to each other. Thus, the uncertainty in respect of the calculation process which is apparent in the Discussion Paper is not entirely explicable on the basis of an 'ends-driven' desire to reach particular results; it is also true that the whole

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51 The Discussion Paper does identify (pages 60-61) a 'lack of a unifying principle' in its scheme. Oddly, however, what is seen as the essential problem is not that the scheme should take account of contributions made after the acquisition of the home but rather that it should include home-making contributions. The Law Commission assumes that home-making cannot be seen as constituting, in economic terms, a contribution to the acquisition of a home. This assumption resurfaces in the Commission's proposals for judicial reform of the common intention trust. See text following note 92 below.

52 Page 52 et seq. See text following note 31 above.

53 It would be absurd if a claimant were to be in a far better position if, instead of contributing (say) £100,000 in the form of an opening equity, he or she were over a period of years to pay £250,000 in mortgage instalments to create the same equity in the property.

54 The Irish courts operate a system of this nature. See Mee note 18 above, Chapter 3, esp pp 75-80. Cf P Sparkes 'Quantification of Beneficial Interests: Problems Arising from Contributions to Deposits, Mortgage Advances and Mortgage Instalments' (1991) 11 OJLS 39.

process has no firm logical anchor and so it is difficult to defend one method of calculation above another. The Discussion Paper is valuable for making the difficulties of assessment more transparent. These difficulties will not be resolved if one opts for a 'family law' discretionary regime in which 'contributions' are central; the problems will simply be concealed under a layer of discretion.

Interestingly, the same kind of argument can be made in respect of the assessment of 'contributions' under the Matrimonial Causes Act 1973 (as amended).[55] The difficulty with assessing the comparative worth of contributions was strongly emphasised in the Court of Appeal decision in *Lambert v Lambert*[56] (which followed the landmark decision of the House of Lords in *White v White*).[57] At a later point in this article, the discussion will return to the relevance in the cohabitation context of the experience of the courts in the matrimonial cases.[58]

PART III THE FOCUS OF REFORM

In the Part V of the Discussion Paper, entitled 'A Relationship Approach', the Law Commission gave preliminary consideration to the possibility of adopting 'new legal approaches to personal relationships outside marriage.'[59] The Law Commission pointed out that these possibilities raise 'broad questions of social policy which fall beyond the present project' and, rather modestly, went on to suggest that such issues are 'in any event more appropriate for political debate and decision, rather than for a law-reform body.'[60] The remainder of this article seeks to address the possibilities for reform. The present Part looks at the type of relationships which might be included under a legislative scheme, while the next Part examines the criteria which might guide the court in determining awards in favour of eligible claimants.

In trying to determine which relationships should be included in any legislative scheme, it is obviously important to look to the reasons why the reform is thought to be necessary in the first place. One prominent argument for reform runs

[55] Cf P Parkinson 'Reforming the Law of Family Property' (1999) 13 Australian Journal of Family Law 117 at 122-127.
[56] [2003] Fam 103.
[57] [2001] 1 AC 596.
[58] See text to and following note 156 below.
[59] Page 86.
[60] Page 87. Note that the reforms in New South Wales were based on a detailed report by the New South Wales Law Reform Commission: *De Facto Relationships* (Report 36, 1983).

roughly as follows: it is unrealistic to draw a sharp distinction between marriage and cohabitation in terms of legal regulation because cohabitation is increasingly accepted in society, people rarely give weighty consideration to the decision as to whether or not to marry and there is a common public misconception that those involved in such relationships are 'common law spouses' and have legal rights against each other.[61] On this argument, cohabitation 'piggy-backs' on marriage, the suggestion being that (presumably) there are good reasons for regulating the property rights of spouses and, since it is unrealistic to distinguish cohabitees from spouses, these reasons also justify some degree of regulation of the rights of cohabitees.

One difficulty with the foregoing argument, considered in isolation, is that it would be more obvious to seek to eradicate public misunderstanding than to give legislative effect to it. The government could finance a public information campaign, including television advertisements, which would stress the vulnerable position of couples who fail to marry or 'self-regulate' their property entitlements through a cohabitation contract (or, more narrowly, an express declaration as to the ownership of their home).[62] Assuming that such a campaign would actually be effective (which is difficult to predict), this would take some of the steam out of the argument sketched above. However, would it really make any difference to the behaviour of the public? It seems reasonable to suggest that an increased public understanding of the legal consequences of cohabitation would have an extremely limited impact on the numbers of people choosing to live together outside marriage (and the impact in terms of encouraging self-regulation might be relatively modest also, given the practical difficulties inherent in self-regulation).[63] It seems likely that one reason why those living together have such an imperfect understanding of their legal rights is that they do not place any importance on the legal position. They tend to assume that (against

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61 For relevant empirical research, see A Barlow, S Duncan, G James and A Park 'Just a Piece of Paper? Marriage and Cohabitation', Chapter 2 in British Social Attitudes, 18th Report (London: Sage, 2001); M Hibbs, C Barton and J Beswick 'Why Marry? – Perceptions of the Affianced' [2001] Fam Law 197. Cf J Lewis 'Debates and Issues Regarding Marriage and Cohabitation in the British and American Literature' (2001) 15 International Journal of Law, Policy and the Family 159.

62 Cf Mee note 18 above, p 314. In Department of Trade and Industry, Women and Equality Unit *Responses to Civil partnership: A framework for the legal recognition of same sex couples* (November 2003) para 3.6, the Department of Constitutional Affairs was said to be leading a cross-governmental working group to explore how best to raise public awareness as to the consequences of cohabitation.

63 See Barlow *et al* note 61 above, p 46.

the general odds)[64] their relationship will never break down or that, if it ever did break down, they would behave reasonably towards each other. Assuming a world where the public misconceptions about cohabitation had somehow been eliminated, so that people would eschew marriage with a clear knowledge of the risks from a legal point of view but with their instinct for economic self-preservation dulled by normal human optimism, could the law fairly leave them to the consequences of their decision? While different views are obviously possible on this point, it can certainly be argued that sufficient grounds for legislative reform would still exist in this scenario. However, these grounds would not rest directly on the premise that cohabitation was practically indistinguishable from marriage. Rather, the grounds for legislative intervention would be the state's interest in avoiding injustice upon the termination of a relationship where the parties were economically and emotionally interdependent and relied on the relationship rather than their separate legal entitlements to secure their financial well-being. The interesting aspect of this rationalisation is that it is not restricted in its application to couples but could, in principle, be applied to other close personal relationships which have less of a resemblance to marriage.

In this respect it is relevant that the Discussion Paper, as has already been noted, did not confine its attention to unmarried cohabitees but instead attempted to address the situation of a wide range of home-sharers.[65] Depending on how one looks at the matter, moving beyond a focus on unmarried couples can be seen as either a very conservative or a very radical move.[66] In the case of the Law Commission's project, it may plausibly be speculated that the demise of the relatively innocuous Family Homes and Domestic Violence Bill in 1995 (following a campaign by the Daily Mail to suggest that it would undermine marriage)[67] – occurring at a key point in the long gestation of the project – contributed to the Commission's decision to focus its reform proposals on the bland category of 'home-sharers' (with no explicit

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64 Cf L Baker and R Emery 'When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage' (1993) 17 Law and Human Behaviour 439; Rotherham *Proprietary Remedies in Context* (Oxford: Hart Publishing, 2002) pp 224-225.

65 Cf R Probert 'Home Sharing – Widening the Debate' [1999] Fam Law 153.

66 New South Wales' Property (Relationships) Act 1984 (as amended in 1999) now also covers (according to s 5) 'a close personal relationship … between two adult persons … one or each of whom provides the other with domestic support and personal care'. This is understood to refer primarily, if not exclusively, to (unpaid) carers: see NSW Discussion Paper note 3 above, paras 6.7-6.13. The expansive definition of 'domestic relationship' in the Australian Capital Territory's Domestic Relationships Act 1994, s 3(1) includes no cohabitation requirement and is wide enough to encompass various forms of non-sexual relationship.

67 For background, see eg E Walsh 'Dear Lady Olga' [1995] Fam Law 658.

mention of unmarried couples). Somewhat similarly, in the Australian context, Millbank suggests that the prominence given to the position of carers in the debate on expanding the scope of existing legislative schemes (to include inter alia same-sex couples) 'says much about the desire of politicians to reinforce traditional notions of the family and de-sex or de-radicalise … law reform in the public eye.'[68] On the other hand, following the Law Commission of Canada in its Report entitled *Beyond Conjugality*,[69] one could argue that an exclusive focus on unmarried couples fails to recognise the diversity of non-conjugal relationships in society. The Law Commission of Canada argues that, on the grounds of equality and respect for autonomy, the state should remain neutral as between different forms of relationship and not accord one form of relationship more benefits or legal support than others. One should focus on 'the functional attributes of particular relationships' rather than accord a special status to categories of relationship (such as marriage or cohabitation[70]). The argument is not just that marriage should not be privileged as against informal 'marriage-like' relationships but rather that marriage and similar relationships should not automatically be privileged above other types. This view has the potential (for good or ill) to 'undermine marriage' at a far more profound level than the recognition of unmarried cohabitation as an informal version of marriage. Indeed, the Law Commission of Canada, borrowing from the history of church and state, refers to the 'disestablishment' of marriage.[71]

Of course, even if one recognises that one should give fair recognition to non-conjugal relationships, it is possible to argue that a particular type of legislative regime (which might be the first step in a phased reform programme) should be confined to couples. If one is thinking in terms of a discretionary regime of property adjustment, which would apply to the parties unless they have chosen to contract out,

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[68] J Millbank 'Domestic Rifts: Who is Using the Domestic Relationships Act 1994 (ACT)?' (2000) 14 Australian Journal of Family Law 163 at 182.

[69] *Beyond Conjugality: Recognising and supporting close personal adult relationships* (December 2001) (available at www.lcc.gc.ca).

[70] Thus, the Law Commission of Canada favoured tailoring each legislative definition of a personal relationship to the legislative purpose at hand (ibid, Chapter Three, Recommendations 4 and 5). This contrasts with the recent proposal of the Law Society (note 3 above, p 83; supported by Bridge note 3 above at 745) that there should be a single definition of unmarried cohabitation for the purposes of all legislative provisions, thus effectively creating a new status in the law.

[71] See note 69 above, Chapter Four, text to fn 51 (quoting N Cott *Public Vows: A History of Marriage and State* (Cambridge, Massachusetts: Harvard University Press, 2000) p 212). Cf *Nova Scotia (Attorney General) v Walsh* [2002] 4 SCR 325 (Sup Ct of Canada) reversing the decision of the Nova Scotia Court of Appeal (2000) 186 DLR (4th) 50 that the Canadian Charter of Rights and

it is arguable that it would be inappropriate to include non-conjugal relationships. To consider one significant constituency, it is questionable whether such a scheme would really be appropriate to address the position of carers. Millbank argues that a claim by a carer would be unlikely to arise before the death of the person being cared for and could therefore be better accommodated under the law of succession.[72] Even if the interests of justice required the recognition in some circumstances of *inter vivos* claims by carers to a share in the assets of the person being cared for,[73] it would appear that such claims could not comfortably be dealt with under the same set of rules as claims by cohabitees.[74] It is significant that the Law Commission of Canada, in suggesting ways to support non-conjugal relationships, placed most emphasis on a flexible approach to the design of registration schemes for relationships. In the case of carers, for example, 'models of care-giving arrangements could be proposed which the parties could modify, if they so wish'.[75] Other types of non-conjugal relationship, for example that between siblings, could conceivably also be best dealt with through an expansive notion of registered partnership. It certainly seems to be the case that, at present, the majority of disputes to reach the courts have concerned (heterosexual or same-sex) couples and, in those Australian jurisdictions where legislation has been extended beyond couples, there has thus far been a very limited number of cases involving other sorts of relationship.[76] There is therefore a pragmatic argument for attempting to address the position of couples before moving on in the light of experience with the legislation (as has eg occurred in New South Wales)[77] to consider the ways in which the law could support a wider variety of relationships.

Freedoms was violated by the exclusion of unmarried couples from the property adjustment provisions of divorce legislation.

72 Note 68 above at 181-182.

73 Millbank ibid does not refer to the possibility that the person being cared for might, for a protracted period before death, be mentally incompetent and, therefore, unable to come to any arrangement with the carer. Leaving such a carer to a remedy in the law of succession could be seen as unjust.

74 Certainly there is force in Millbank's suggestion (note 68 above at 181) that one could not expect a court to order the sale of a property 'from under an incapacitated and/or elderly person in order to pay a share to the carer'.

75 Note 69 above, Chapter Four, text to fn 26.

76 Cf Millbank note 68 above (low use of ACT legislation thus far by inter alia non-cohabiting couples and non-couples); L Willmott, B Mathews and G Shoebridge 'Defacto relationships property adjustment law – A national direction' (2003) 17 Australian Journal of Family Law 37 at 58.

77 In New South Wales, after 15 years the 1984 Act was extended to include same sex couples (which it is suggested here should be included from the start). However, without much debate, the definition was also extended to include (in effect) carers (see note 66 above). The New South Wales Law Commission is now considering more closely the question as to which, if any, types of non-couple relationship should be included. See NSW Discussion Paper note 3 above, Chapter 2.

Another important question is whether legislative reform should be limited to home-sharers (which would have been the primary limitation under the English Law Commission's putative scheme). Except for the Domestic Relationships Act 1994 (Australian Capital Territory), the legislative schemes in all the Australian jurisdictions currently involve a cohabitation requirement. It can be argued that such a requirement unnecessarily excludes couples who live apart during the week due to work commitments or who are separated because one partner is in prison or serving in the armed forces abroad.[78] It has also been pointed out that (in Australia, at least) a significant number of gay and lesbian couples live apart but consider themselves to be in interdependent relationships.[79] Furthermore, if one's scheme were broad enough to include carers, it would seem anomalous to exclude non-resident carers.[80] On the other hand, dropping the cohabitation requirement could also have unfortunate consequences. If one's legislative scheme extended to a wide range of personal relationships, the absence of a cohabitation requirement would arguably make the application of the scheme too uncertain and broad (with a person potentially being liable to be sued by anybody with whom they share a personal relationship). Also, if one's scheme were focused on unmarried couples, it is arguable that the fact of cohabitation serves the necessary function of demonstrating that the parties have made a commitment to each other (which becomes the functional equivalent of marriage in terms of justifying legislative intervention in their relationship). Couples who live apart but wish to express a commitment to each other would have the option of marriage or (assuming that this comes to pass) civil partnership.

To conclude on the question of the most appropriate focus for reform, it is possible that (although the arguments are by no means clear-cut) the best course would be to focus initially on unmarried couples who are living together and who meet specified qualifying criteria.[81] In any case, as a practical matter, this may be the likely direction of future reform given that the fate of the Law Commission's project may discourage consideration of more widely-focused proposals. The next Part will explore in more detail some of the options for reform, focusing in general on the position of cohabiting couples (undertaking, in the first section, a foray into the law of

78 See the NSW Discussion Paper note 3 above, para 2.64.
79 Ibid, para 2.65.
80 Law Commission Discussion Paper, page 58.

trusts to consider what judicial reforms might be possible if legislation were not forthcoming).

PART IV: THE NATURE OF REFORM[82]

(a) The Law of Trusts

One should not omit to consider the consequences of there being no comprehensive reform of the property rights of those in informal relationships, especially since it is by no means impossible that this will reflect the reality for many years. If civil partnership legislation is indeed passed, thus creating a new category of formal relationship, that may well be the limit of legislative action. After all, other European countries (which have been progressive in passing registered partnership legislation) do not appear to favour a model which would impose 'default' obligations on those who have not registered their relationship. If no further legislation were to be passed, there would certainly be a strong argument for attempting the kind of public information campaign discussed earlier, aimed at educating the public as to the legal consequences of informal cohabitation (and, of course, there is an argument that, in fact, the optimum approach would involve civil partnership legislation plus an information campaign).

In the absence of comprehensive legislation, one would also have to consider whether the courts could develop doctrines which would lead to a more just resolution of disputes between those in close personal relationships than the current unsatisfactory 'common intention' analysis.[83] In this respect, it is worth referring to the consideration in the Discussion Paper of doctrinal developments in Canada, Australia and New Zealand and the suggestions made by the Law Commission as to

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[81] For example, the proposals in the Law Society Report note 3 above, p 15 are restricted to couples who have lived together for two years or who have a child. Cf Property (Relationships) Act 1984 (NSW), s 17(2).

[82] See generally R Bailey-Harris 'Financial Rights in Relationships Outside Marriage: A Decade of Reforms in Australia' (1995) 9 International Journal of Law and the Family 233; R Bailey-Harris 'Law and the unmarried couple – oppression or liberation?' (1996) 8 CFLQ 137; A Barlow and C Lind 'A matter of trust: the allocation of rights in the family home' (1999) 19 LS 468; R Probert and A Barlow 'Displacing marriage – diversification and harmonisation within Europe' (2000) 12 CFLQ 157; L Fox 'Reforming family property – comparisons, compromises and common dimensions' (2003) 15 CFLQ 1; Cretney, Masson and Bailey-Harris note 49 above, pp 223-226.

how the English law of trusts might be improved by the courts. This was an unconvincing part of the Discussion Paper. The discussion begins with the assertion that the Commonwealth jurisdictions have taken 'a somewhat more expansive approach' than that taken in England and Wales.[84] Following this disconcerting understatement, there follows a brief review of the various Commonwealth doctrines,[85] leading to the surprising conclusion that the relevant doctrines 'may be thought to bear very close similarities to the English law doctrine of proprietary estoppel.'[86] It is difficult to see how the debate is advanced by lumping together the distinct approaches of Canada, Australia and New Zealand and trying to suggest that, in essence, they are mere variations on the familiar English doctrine of proprietary estoppel.[87] Proprietary estoppel is, in fact, of very limited use in the context of disputes between cohabitees because of the fundamental requirement that the claimant have been led to act to his or her detriment on the basis of some form of representation. On the other hand, the Commonwealth doctrines have (in different ways) jumped the chasm between real intentions and 'reasonable' intentions. In their practical operation, they focus on the existence of a close relationship between the parties and do not depend on any genuine representation, understanding or common intention as to property ownership.[88] The relevant part of the Discussion Paper betrays a somewhat parochial attitude leading to an unwillingness to engage seriously with, and learn from, the experience of the Commonwealth jurisdictions.[89]

Having examined the Commonwealth doctrines, the Discussion Paper concludes that the principles set out in the leading English case of *Lloyds Bank plc v Rosset*[90] are 'unduly restrictive, and that the courts should seek to be more flexible in

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83 On this doctrine, see Mee note 18 above, pp 117-174. See also eg Hayton 'Equitable Rights of Cohabitees' [1990] Conv 370; Gardner 'Rethinking Family Property' (1993) 109 LQR 263; Glover and Todd 'The Myth of Common Intention' (1996) 16 LS 325.

84 Page 62.

85 For detailed consideration of the relevant case law, see Mee note 18 above, pp 184-293.

86 Page 67.

87 Which is itself a less extensive doctrine than the unified doctrine of equitable estoppel recognised by the High Court of Australia in *Waltons Stores (Interstate) v Maher* (1988) 164 CLR 387. See eg P Parkinson 'Estoppel' in Parkinson (ed) *The Principles of Equity* (Sydney: Lawbook Co, 2003).

88 See Mee note 18 above, pp 297-301.

89 One obvious lesson would have been the undesirability of developing a statutory scheme which relied exclusively on the device of the trust and did not make provision for the award of monetary compensation when this would be more appropriate. Cf Mee note 18 above, pp 192-193 (Canada); p 251 (Australia); pp 291-292 (New Zealand).

90 [1991] 1 AC 107.

their approach.'[91] The manner in which this conclusion is presented leads one to imagine that some substantial reform of English law is about to be suggested. However, this impression is immediately dispelled when it is stated that while 'the application of "common intention" … can lead to a highly artificial exercise, it is difficult to present a convincing case for any more effective criteria on which an assessment of beneficial entitlement could be based.'[92] In the end, two proposals are made as to how the common intention trust might be improved. The first is that where one party has paid other household bills, thus enabling the other party to pay the mortgage instalments, this should be sufficient to justify the inference of a common intention that the beneficial entitlement in the home be shared.[93] Within the terms of the common intention doctrine, this is rather implausible. It does not seem at all unlikely that a person would pay some of the shared household expenses in the absence of an actual (and communicated[94]) common intention with his or her partner that the beneficial ownership in the property would be shared. If the inference which the Law Commission is suggesting should be made is really fictional in nature,[95] where does that leave claimants who are relying on work in the home? The judicial law reform suggested by the Law Commission, by implausibly widening the range of financial contributions which can trigger a remedy while giving no recognition to non-financial contributions, seems to entrench in the law the view that non-financial contributions do not really matter.

The Law Commission's second suggestion was the adoption, in cases where a common intention had been inferred from the fact that the claimant had made financial contributions, of a 'holistic approach'[96] to quantification. This would involve 'undertaking a survey of the whole course of dealing between the parties and taking account of all conduct which throws light on the question what shares were

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91 Page 68.

92 Ibid. The Law Commission argued (ibid) that 'it would be wholly unsatisfactory if a person were to obtain a beneficial interest where it was made extremely clear that a particular contribution, by financial or other contribution, would not be met this way.' However, a reliance on actual common intention is by no means the only way to avoid this result: see eg *Gillies v Keogh* [1989] 2 NZLR 327 (constructive trust based on 'reasonable expectations' precluded where legal owner had made clear her unwillingness to share ownership of the disputed property).

93 This suggestion is based, in part, on the rather tenuous authority of Judge Mostyn QC's decision in *Le Foe v Le Foe* [2001] 2 FLR 270 (noted by Thompson [2002] Conv 273). On the limited value of the concept of 'enabling' in this context, see Mee note 18 above, pp 82-83.

94 See *Springette v Defoe* [1992] 2 FLR 388.

95 Contrast the rejection by Stuart Bridge, the Law Commissioner with particular responsibility for the Discussion Paper, in a different context of the idea of introducing 'still further discrepancy between legal fiction and factual reality': note 3 above at 744.

intended.'[97] The result would be that the plaintiff's share would not necessarily be proportionate to his or her financial contribution. In considering this suggestion, it is important to remember that the so-called 'holistic approach' to quantification does not, in principle, represent any new departure in terms of the common intention analysis. In his seminal speech in *Gissing v Gissing*,[98] when discussing the question of quantifying the shares intended by the parties, Lord Diplock was clearly willing to look at the totality of the evidence and did not confine himself to evidence of financial considerations.[99] One reason why the 'holistic' approach has been controversial is that it does not fit with a simplified 'partitioned' view of the common intention doctrine (held by some commentators) which – departing from the approach of Lord Diplock in *Gissing* and of the Court of Appeal in subsequent cases such as *Grant v Edwards*[100] – seeks to explain cases involving an inferred common intention on the basis of resulting trust principles and cases involving an express common intention on the basis of proprietary estoppel.[101] Ironically, the Law Commission's earlier proposal (that a common intention could be inferred from indirect contributions) fits more easily with the resulting trust approach to financial contributions[102] than with the more complex approach to such contributions which would justify the 'holistic' approach to quantification.[103] In any event, there is plenty of scope for arbitrariness in the operation of the common intention trust if one takes a 'holistic' approach to quantification. The result is that where a common intention is established on the basis

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96 *Le Foe v Le Foe* [2001] 2 FLR 970 at 982 per Judge Mostyn QC.

97 Page 69, citing *Midland Bank v Cooke* [1995] 2 FLR 915 at 926 per Waite LJ.

98 [1971] AC 886.

99 Ibid at 909. In part, the 'holistic approach' to quantification has been tainted because it was advocated by Waite LJ in *Midland Bank v Cooke* note 97 above, a case where the inference of a common intention on the basis of the parties' conduct should have been impossible because the parties had expressly stated in evidence that they had never given the matter any thought.

100 [1986] 1 Ch 638.

101 For discussion of this position, see Mee note 18 above, pp 171-173. Under this view, unless there has been an express common intention, the claimant's share must always be proportionate to his or her contributions.

102 Note, for example, the approach of the Irish courts which recognises indirect contributions as sufficient to trigger a resulting trust (in the proportion represented by the claimant's contribution). For detailed discussion, see Mee note 18 above, pp 66-92.

103 This more complex understanding would see a financial contribution not simply as evidence of an intention on the part of *the contributor* to obtain a proportionate share in the ownership (as under a resulting trust analysis) but rather as evidence that there must have been a prior *common* intention between the parties that the contributor would gain a share. Detrimental reliance on this common intention would lead to the award of a beneficial interest on the basis of estoppel principles (or, on an alternative view, the principle in *Rochefoucauld v Boustead* [1897] 1 Ch 196). See further on the theoretical basis for the common intention trust, Mee note 18 above, pp 151-173.

of a small financial contribution[104] one can often move to equal ownership (as occurred in *Midland Bank plc v Cooke*[105] where the claimant's contribution amounted to less than 7% of the purchase price). On the other hand, a person who does not surmount the hurdle of showing some common intention (for example because his or her contributions are all non-financial) will get nothing at all. Unfortunately, the Law Commission did not address this problem of arbitrariness.

Overall, in terms of the common intention analysis, as with the Commonwealth doctrines, the Discussion Paper barely scratched the surface of the complexities involved and therefore its suggestions for reform do not carry much authority. Moreover, there was no recognition that an expansion in the scope of the common intention trust would be less desirable if some form of statutory scheme were to be introduced to cover the same ground. The arbitrary nature of the common intention analysis (leading to a tendency to give a claimant either no remedy or else a very substantial one) means that even in its current form it would probably continue to complicate the law to some extent after the enactment of a statutory scheme. There are, therefore, obvious dangers in expanding further the scope of this theoretically incoherent analysis. Unless it is with a view to burying the doctrine, the courts should stop digging this particular hole. Any serious advance on the current doctrinal position would require the courts to drop their insistence on proof of actual intention and, following the spirit of the Commonwealth doctrines, focus instead on notional 'reasonable' intentions. Given that such developments would, *ex hypothesi*, only be necessary if the legislature decided not to act, there would be an obvious problem with such a strategy from the point of view of democratic legitimacy (although some might regard this difficulty as being outweighed by the injustice caused by the limitations in the current law).[106]

(b) The Shadow of Marriage

Assuming that the legislature was willing to act, one simple approach to reform would be to equate the position of qualifying cohabitees and married couples (along the lines

[104] Which, if one adopted the Law Commission's other recommendation, could be an indirect one.

[105] Note 97 above.

of recent legislation in New Zealand).[107] In support of this, it could be pointed out that there is already a common belief amongst the public (based in part on confusion caused by the idea of 'common law marriage') that after some period of time cohabitees acquire the rights of married couples.[108] There would be attractions in keeping one's reform simple and comprehensible to the public and avoiding having a 'two-tier system' which would involve a distinct and elaborate regime governing unmarried couples. One obvious difficulty with this radical solution is that it could be seen as undermining the institution of marriage. A different objection is that the equation of marriage and cohabitation in this respect takes away the freedom of members of society to enter informal unions without the interference of the law.[109] On this view, it could be argued that the 'radical' reform was actually conservative in nature, in that it would impose a traditional marriage model on informal relationships.[110]

The most widely accepted view at present appears to be that the property regimes for marriage and cohabitation should be different because of the differing levels of commitment involved in the two sorts of relationships.[111] Of course, the 'commitment' involved in some cohabitations can, in terms of practical actions undertaken in reliance on the relationship, be as great as in many cases of marriage. There is, however, another important sense of commitment as the conscious entering into of an arrangement known to carry certain consequences.[112] In fact, the commonly held view of the distinction between marriage and cohabitation involves the

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106 For a discussion of a possible way forward in equity, and the attendant difficulties, see Mee note 18 above, pp 307-316. Cf Harris 'Justice, Doctrine, and Home-Sharing' (1999) 19 OJLS 421; Rotherham *Proprietary Remedies in Context* (Oxford: Hart Publishing, 2002) pp 197-244.

107 Property (Relationships) Act 1976 (as amended in 2001). See generally B Atkin 'The rights of married and unmarried couples in New Zealand – radical new laws on property and succession' (2003) 15 CFLQ 173; B Atkin and W Parker 'De Facto Property Developments in New Zealand: Pressures Impeded Progress', Chapter 29 in J Dewar and S Parker (eds) *Family Law – Processes, Practices and Pressures* (Oxford: Hart Publishing, 2003); Willmott, Mathews and Shoebridge note 76 above (suggesting this model as the basis for a uniform Australian approach). To qualify under the New Zealand regime, couples must (generally) have cohabited for three years. Of course, one could fix a longer time period in an attempt to make this type of reform more palatable in England and Wales.

108 See note 61 above and accompanying text.

109 See Mee note 18 above, pp 315-316. This argument is also relevant in respect of other reform proposals in this area, although less far-reaching reforms would obviously constitute a lesser interference with cohabitees' freedom from legal regulation.

110 This is reminiscent of another paradox which arose at an earlier point in the discussion: see text following note 65 above.

111 See eg the Law Society Report note 3 above, p 1. In what follows, this view is accepted for the purposes of argument although it does not necessarily reflect the position of the current author (who would prefer to remain agnostic on the point).

112 In other words, one is looking here also at the commitment entered into by the defendant.

proposition that, on the basis of the same contributions, sacrifices and other relevant conduct, a cohabitee should receive a lesser share than a spouse. This creates a conundrum: how would one go about achieving different results on the basis of the same conduct?

One direct way of doing so, which would presumably be unlikely to find favour in practice, would be to stipulate that unmarried couples should be awarded some specified fraction of what they would have been awarded had they been married. On this view, in the case of a claim by an unmarried cohabitee, one would apply the established criteria applicable to married couples and then reduce the resulting award appropriately. Somewhat similar approaches would involve applying the marital rules to cohabitees but restricting the range of remedies in some way (eg allowing only monetary remedies capped at a specified amount or allowing a remedy only in relation to real property).[113]

An alternative approach would be to attempt to modify the criteria for the exercise of judicial discretion so as to ensure different treatment for spouses and cohabitees. One would look at the factors in section 25 of the Matrimonial Causes Act 1973 and apply a suitably modified list of factors to unmarried couples. Unfortunately, the truth is that the discretion in the matrimonial legislation is in part a ‘rule-compromise discretion’[114] which conceals a lack of agreement over many highly politicised issues related to the distribution of property at the end of a marriage. Given that the legislative regime involves such a high level of discretion, with no clear policy objective being specified, it is very difficult to identify particular factors which could appropriately be excluded from consideration in respect of claims by unmarried couples. Therefore, while it would not be impossible to develop a solution which resembled the current matrimonial regime,[115] there are pragmatic reasons for avoiding the ‘list’ approach and approaching the matter from a different angle. In seeking a

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113 The second form of restriction existed until recently in the legislative provision for cohabitees in Victoria (although not in the context of a regime which applied the marital rules to unmarried couples). See Property Law Act 1974, Part IX as inserted in 1987 and amended in 1998. Cf A Sifris ‘Part IX of the Property Law Act 1958 (Vic) – What Constitutes a Just and Equitable Order?’ (1998) 12 Australian Journal of Family Law 179.

114 See Schneider note 21 above, p 65.

115 Cf Domestic Relationships Act 1994 (Australian Capital Territory), s 15(1) and s 19(2). The three most recently introduced Australian regimes (Queensland’s Property Law Act 1974 (as amended in 1999); Tasmania’s De Facto Relationships Act 1999 and Western Australia’s Family Court Act 1997 (as amended in 2002)) bear a closer resemblance to Australia’s Family Law Act 1975 (which governs the position of spouses). See Willmott, Mathews and Shoebridge note 76 above at 39-40.

solution, however, it is worth recalling the view of Lord Nicholls in *White v White*[116] that '[s]elf-evidently, fairness requires the court to take into account all the circumstances of the case.'

(c) An Approach Based on 'Contributions'

One option would be to focus simply on the contributions of the parties (both to the acquisition and maintenance of property and, more generally, to the welfare of the family).[117] The concept of a 'contribution' was central to the Law Commission's putative scheme and the term is so familiar that it is easy to overlook its pernicious influence. The focus on 'contributions' derives ultimately from the old purchase money resulting trust doctrine which represented the English courts' first vehicle for dealing with disputes over the beneficial interest in the family home. However, when one puts the concept at the heart of a possible statutory reform of the law, one creates a subtle pull towards a particular substantive approach. The concentration on 'contributions' makes it more difficult to take account of what might better be termed a 'sacrifice' on the part of a claimant. This point may be demonstrated by a discussion of the putative scheme's treatment of the crucial question of assessing 'home-making contributions'.

The Law Commission conceded that the valuation in monetary terms of 'home-making and caring services' was 'a potentially difficult and, some might argue, demeaning process.'[118] Nonetheless, rather than overlook such contributions, it was felt that the scheme should focus on their economic value (even if the market value for such services would be low relative to other activities).[119] It appears that the Law Commission's scheme would simply have ignored the most distinctive aspect of home-making contributions, ie the economic sacrifice which they frequently entail.

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116 [2001] 1 AC 596 at 605.

117 The relevant New South Wales provision, the Property (Relationships) Act 1984, s 20, allows the court to 'make such order adjusting the interests of the parties in the property as to it seems just and equitable having regard to:

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

(b) the contributions, including any contributions made in the capacity of homemaker or parent, made by either of the parties to the relationship to the welfare of the other party to the relationship or to the welfare of the family constituted by the parties and [a child of the parties].'

118 Page 50.

Under the heading 'Economic Detriment', the Discussion Paper states the view (with no justifying argument) that 'account should not be taken of economic detriments incurred, save possibly in relation to the cost of lost opportunities where the claimant would have earned more had he or she been in paid employment for the relevant period.'[120] In some ways, the concession at the end of this sentence is an important one. Given the low economic value generally assigned to home-making services, a claimant's contribution would be greatly enhanced if he or she could get credit for money which would have been earned had he or she not stayed at home to mind the children of the relationship. Difficult problems are, however, thrown up by any attempt to assess how much a person, who did not in fact pursue a career, *would have earned* over a period of years.[121] In any case, the Law Commission prefaced its comment on attempting this inquiry with a begrudging 'possibly' and, since the issue is explored no further, the notion of taking account of economic detriment is given no real life in the Discussion Paper.

Furthermore, a realistic attempt to take account of a claimant's home-making activities could not stop at giving credit for money which would have been earned during the period of the contribution. Potentially even more important is the impact of such a contribution on *future* earning capacity. A person who has sacrificed advancement in a career (or, more modestly, the possibility of acquiring skills which will make him or her attractive in the market place) will continue to suffer economic loss long after the home-making contribution has ceased. This vital factor was entirely ignored in the Law Commission's putative scheme. The result is that it would have rendered invisible one of the main sources of injustice arising upon the termination of an unmarried cohabitation: the fact that one party (generally the female partner) has damaged her future earning power by restricting her involvement in the work-force in order to care for the children of the relationship.[122]

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119 Ibid. An alternative possibility discussed (page 51) was to have given the court a discretion in relation to non-financial contributions only. The disadvantage of this would have been the loss of much of the predictability and certainty of the putative scheme.

120 Page 51.

121 Cf Parkinson note 55 above at 137. Criticising the focus on a 'middle-class paradigm' of a professional woman who sacrifices her career to raise a family, he advances the example of a woman who had her first child at 18 when she was working in a fast-food restaurant. How is one to assess her loss, given that her job at 18 gives no real indication of what her long-term prospects would have been? Cf Parkinson 'Quantifying the Homemaker Contribution in Family Property Law' (2003) 31 Federal Law Review 1 at 18 (valuation of the woman's sacrifice by reference to the earnings of her partner).

122 Arguably, the concept of sacrifice is also indirectly relevant to the issue of the claimant's enjoyment of free accommodation in a home owned by the defendant. There will often be an element

It seems likely that any new legislative scheme which focuses on 'contributions' would similarly be unable to give adequate recognition to homemaking (in particular to the economic sacrifices associated with child-rearing). The point is ultimately that, while one might wish to afford lesser rights to unmarried claimants as compared with spouses, there is no justification for choosing an unfair or sexist method of differentiation.[123] It is true that the current equitable regime tends to focus on contributions rather than on sacrifices but this is not due not to any point of principle but simply to its historical basis in the doctrine of the purchase money resulting trust. In shaping a new legislative scheme it would make as much sense to consider only sacrifices and ignore contributions as the other way around. One must conclude that distinguishing between contributions and sacrifices does not provide an appropriate method of distinguishing the position of cohabitees from that of spouses. It is significant that, in New South Wales, where the legislation refers explicitly only to the contributions of the parties,[124] there has been intense debate as to whether other matters (not limited to sacrifice) may legitimately be taken into account.[125] Even the decision of a specially convened five-judge New South Wales Court of Appeal in *Evans v Marmont*[126] has failed to resolve the controversy.[127] This gives some weight to the suggestion that the arbitrariness inherent in the attempt to restrict the courts' consideration to the contributions of the parties is likely to lead to instability in practice.

of sacrifice in the conduct of a claimant who foregoes the possibility of using his or her money to build up an equity in a home (whether or not with another partner) in order to live with the defendant in a home in the defendant's sole name. This might suggest that it would be unfair to take into account the full economic value of the accommodation enjoyed by the claimant.

123 Cf *White v White* [2001] 1 AC 596 and the discussion in the text to and following note 156 below.

124 See note 117 above. Bridge note 3 above at 745-746 appears to favour a similar approach.

125 The debate has been coloured to some extent by *Dwyer v Kaljo* (1992) 15 Fam LR 645 (NSW CA) where Handley JA controversially introduced quasi-commercial concepts, referring to protecting the claimant's 'reliance interest', 'expectation interest' and 'restitution interest'. Contrast *Wallace v Stanford* (1995) 27 NSWLR 1 (NSW CA).

126 (1997) 42 NSWLR 70.

127 For discussion, see A de Costa 'Searching for justice and equity after *Evans* v *Marmont*: Property adjustment following the termination of domestic relationships in New South Wales' (2002) 16 Australian Journal of Family Law 116; S Wong 'Property Rights for Home-Sharers: Equity versus a Legislative Framework?', Chapter 7 in S Scott-Hunt and H Lim *Feminist Perspectives on Equity and Trusts* (London: Cavendish, 2001); Sifris note 113 above.

(d) Focus on Economic Advantage and Disadvantage

Another option is that recently proposed by the Law Society and originally put forward by the Scottish Law Commission in 1992.[128] This would involve adopting a wording found in the Family Law (Scotland) Act 1985, which requires that 'fair account should be taken of any economic advantage derived by either party from contributions from the other, and of any economic disadvantages suffered by either party in the interests of the other party or of the family'. This wording has the advantage of encompassing both contributions and sacrifices. It also has the cosmetic advantage of looking very different from the matrimonial provisions; instead of a long list of factors, one simply has one succinct principle. But would it lead to very different results? The Law Society argues that its proposed approach would differ 'significantly' from the ancillary relief regime upon divorce.[129] The Law Society points as an example to the fact that, in the divorce context, the courts can look to the present and reasonably foreseeable needs and resources of the parties.[130] One wonders however whether, as has occurred in New South Wales, pressure would arise to take account of the needs and resources of the parties (and other factors not specifically referred to, eg the length of the parties' relationship). What is the significance of the requirement to take '*fair* account' of economic advantages and disadvantages? It is possible that the needs and resources of the parties would, at least to some extent, inform the question of what remedy would be 'fair'.

Assuming, however, that the Law Society's wording would exclude consideration of needs and resources, would the result be (as indicated by the Law Society) 'much more modest adjustments [than in the matrimonial context], and indeed in many cases no adjustment'?[131] There has already been some experience with the proposed wording, since it constitutes one of the principles to be taken into account in Scottish law in determining applications for financial provision on divorce. The 'economic advantage and disadvantage' principle is contained in the Family Law (Scotland) Act 1985, section 9(1)(b) and must be considered alongside the other

[128] See the Law Society Report note 3 above, pp 60-61; Scottish Law Commission *Report on Family Law* (Scot Law Comm No 135, 1992), paras 16.14-16.23. The Law Society's document contains only a brief discussion of the merits of the proposal and does not mention its origins in the Scottish Law Commission Report.

[129] Ibid, p 60.

[130] Ibid.

[131] Ibid. Of course, there may have been a desire, for tactical reasons, to play down the practical impact of the proposed reforms.

section 9 principles, including the very broad section 9(1)(a) which stipulates that the 'net value of the matrimonial property should be shared fairly between the parties to the marriage', with fair sharing being prima facie equal sharing.[132] It is obvious that the interpretation of a provision is liable to change if it is extracted from a list of principles drawn up in the matrimonial context and utilised as the sole criterion for adjusting the property rights of cohabitees. Nonetheless, it is worth commenting briefly on the Scottish experience with the relevant wording. It has been suggested that the 'under-utilisation of s. 9(1)(b) is perhaps the most disappointing feature of the way in which the Family Law (Scotland) Act 1985 has been applied in practice.'[133] One reason for this appears to be that, in order to make an award under this principle, the Scottish courts have required the claimant to demonstrate an imbalance in terms of economic advantage and disadvantage when his or her position is compared to that of the other spouse. The tendency to undervalue home-making contributions has led to such contributions being cancelled out by the financial support which the claimant has received during the marriage.[134]

If, as the Scottish experience might suggest, the Law Society were correct in its assessment that its proposals would have a modest impact, one would be faced with a potentially very significant problem. Given the current prevalence of the assumption on the part of the public (notwithstanding the absence of legislative intervention) that the status of 'common law' spouse confers substantial legal rights, would it not be dangerous to fuel this myth by passing reforming legislation which – although likely to attract considerable media attention and to lead to high expectations – would confer such limited rights on cohabitees?[135] Moreover, as will be discussed later in this article,[136] important issues arise concerning the relationship of any statutory reform scheme to the existing doctrines of equity. It is desirable that one's reform scheme be sufficiently generous to make it unnecessary (at least for the most part) to resort to the old equitable rules. If the Law Society's scheme would really

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[132] See s 10(1). There are three further principles in s 9, which deal respectively with sharing the burden of caring for children under 16, the provision of financial support to allow a dependent party to adjust to the loss of support and the award of financial provision to avoid likely future hardship.

[133] J Thomson *Family Law in Scotland* (Edinburgh: Butterworths/Law Society of Scotland, 4th edn, 2002) p 159.

[134] Ibid. For further discussion of the relevant provision, see E Clive *The Law of Husband and Wife in Scotland* (Edinburgh: W Green, 4th edn, 1997) pp 462-465.

[135] Note that the Law Society proposed (note 3 above, p 55) a public information campaign to promote an accurate public understanding of the legal position of cohabitees. Cf text to and following note 62 above.

generate such modest results, then the common intention trust would always be pleaded in the alternative and many of the undesirable features of the current law would persist. In general, it seems that (unless one is willing to assimilate the position of spouses and cohabitees) the reform process must walk a fine line – the remedies generated must be less than in the case of married couples but sufficiently substantial to sideline the old equitable rules and to deliver on the expectations that would be generated in the public mind by the advent of statutory reform.

(e) A Model Based on Restitution or Economic Partnership?

Crucial to the foregoing discussion is one further issue which is not definitively resolved by the Law Society wording (nor, indeed, in the various Australian statutes). This relates to the general method of calculating any award under the relevant legislative scheme. There are two main approaches, which have been termed by Parkinson the 'restitutionary' approach and the 'partnership' approach.[137] It may be useful to illustrate the point by reference to the Law Society wording. Under the restitutionary approach, one would look at the economic advantages and disadvantages derived or suffered by the parties and come up with a figure which represents roughly the net amount needed to even things out. So, in many cases, the assessment could come down to looking at the value of the female claimant's contribution in terms of home-making and income from part-time work and deducting from this an amount for the 'free' accommodation she received in a family home legally belonging to her partner[138] (as well as other support she received). This approach could (as was envisaged by the Law Society) result in the failure of claims or very low awards in favour of claimants.[139]

The alternative model, 'the partnership approach', would regard the parties as having pooled their resources for the sake of the relationship and in order to generate

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[136] See text to and following note 173 below.

[137] See P Parkinson 'The Property Rights of Cohabitees – Is Statutory Reform the Answer?' in A Bainham, D Pearl and R Pickford (eds) *Frontiers of Family Law: Part II* (Chichester: John Wiley & Sons, 1995) pp 308-310.

[138] Cf note 122 above.

[139] As happened in the early years of the New South Wales legislation. See NSW Discussion Paper note 3 above, para 5.20. It appears that matters have improved to some extent over the years, with the courts emphasising that home-maker contributions should be given more substantial weight (ibid, para 5.45). Cf the Law Society's somewhat casual assertion (in its Report note 3 above, p 87) that 'The effect of the [New South Wales] Act is reported to have been that a few low awards have been made for the benefit of cohabitants.' Note also that the discussion which precedes this comment overlooks the 1999 expansion and renaming of the legislation as the Personal Relationships Act 1984.

wealth for the family. This would mean that, rather than receiving a monetary payment to compensate for his or her net disadvantage, a claimant would gain a share in the wealth generated by the family[140] which reflected the proportionate value of her contribution to the joint endeavour of generating that wealth.[141] There would often be a striking difference between the results generated by each of these two approaches eg where the value of the family assets (such as the family home) have greatly appreciated over the course of the cohabitation. It is noteworthy that the putative Law Commission scheme, although very restrictive in other ways, clearly opted for a version of the partnership approach. This is evidenced by its philosophy of dividing up the ownership of the family home in the proportions of the parties' respective contributions. It is not clear whether the Law Society envisaged the courts ever applying a partnership model. The Society was 'looking only at protecting the disadvantaged'[142] but it was left unclear precisely how this would translate into a overall approach to deciding on appropriate awards. When making its similar proposal in 1992, the Scottish Law Commission viewed the claim which would be created as 'akin to a claim based on unjustified enrichment'[143] and appeared to assume a restitutionary model of calculating the award for the claimant.[144]

The distinction between the restitutionary and partnership models is capable of making a crucial difference in terms of the impact of legislative reform. It is arguable that legislation based purely on the restitutionary model would be too limited to be worthwhile. If one looks back at the disputes between cohabitees (and, prior to the modern matrimonial regime, between spouses) that have reached the English courts over the years, it is clear that a major factor has been the increase in the value of the family home over the duration of the relationship. One of the attractions of the law of trusts as a method of providing a remedy for claimants has been that the award of a fractional share in the beneficial ownership allows claimants to participate in the

140 Although it is not possible in the present context to do justice to this complex issue, it seems that the plaintiff's claim should relate primarily to the additional wealth accrued by the family over the course of the relationship (rather than to the value of property brought into the relationship by one of the parties or to property acquired after the termination of the relationship). Cf Parkinson note 121 above at 28 et seq (developing the argument in the matrimonial context that, where a home-making contribution would otherwise be inadequately rewarded, it may be appropriate to allow a 'compensation' claim against pre-marital assets, inheritances and the like).

141 In terms of the Law Society's proposed wording, the accumulated wealth in the defendant's hands could possibly be seen as an 'economic advantage' derived by the defendant partly as a result of the claimant's contributions and sacrifices.

142 Note 3 above, p 60.

143 Note 128 above, para 16.22.

‘windfall’ increase in the value of the family home (as would a remedy under the Law Commission’s putative scheme). The difficulty with a restitutionary model, which simply offsets the contributions of a claimant against the benefits he or she received, is that it takes no account of the increase in the value of the assets of the family (and the extent to which each partner has shared in that increase relative to the contribution which each has made). In principle, the remedy of a claimant who worked in the home would be the same whether, over the relevant period, the value of the home doubled or trebled or merely remained the same. In other words, the problem is that the restitutionary model ignores the reality that people generally aspire, over the course of a lifetime, to gaining some form of financial security for themselves in terms of the accumulation of assets, earning capacity, pension entitlements etc. It is significant that even the Canadian courts, whose judge-made rules are purportedly founded on the principles of unjust enrichment, do not rely heavily on the restitutionary model at the remedial stage but, for the most part, base a claimant’s remedy on a view of unmarried cohabitation as an economic partnership.[145] Similarly, the Australian courts have emphasised the notion of ‘pooling’ and have adopted a remedial approach which leads to the sharing of the wealth accumulated over the duration of the relationship.[146]

In light of the foregoing argument, the best option would appear to be to reject a purely restitutionary model in favour of an approach which also embraces the partnership model. Rather than simply leave the court with an unguided remedial discretion, one could identify in the legislation the two broad approaches to arriving at a remedy and indicate factors which would suggest adopting one general approach above the other in individual cases. One’s attempt to formulate these factors will inevitably be informed by one’s view of the essential basis for the law’s willingness to adjust the property rights of the parties to an intimate relationship. Parkinson argues that it is parenthood, rather than cohabitation per se, which is the key factor.[147] A partnership model of quantification would be appropriate where the partners to a cohabitation make different investments in the relationship, with one partner (often the woman) incurring long-term economic damage by restricting her involvement in

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144 See Parkinson note 137 above, p 316 fn 50.

145 See Mee note 18 above, pp 219-225. See also P Parkinson ‘Beyond *Pettkus* v. *Becker*: Quantifying Relief for Unjust Enrichment’ (1993) 43 University of Toronto Law Journal 217.

146 See Mee ibid, pp 249-250. There are elements of this approach too in the Irish courts’ treatment of indirect financial contributions. See ibid, pp 308-309.

147 (2003) 31 Federal Law Review 1 at 7-20 (discussing the ‘The Proprietary Consequences of Love’). See also Parkinson note 137 above at 314 et seq.

the workforce in order to care for children of the relationship. Parkinson would also leave it open for a case to be made that a particular couple had, notwithstanding the absence of children, engaged in a degree of 'role specialisation' which would justify the adoption of a partnership approach.[148]

There are clear attractions in Parkinson's view, which reflects the intuition that, in terms of generating a claim to a remedy, there is something special about the economic sacrifices involved in the childcare aspects of homemaking.[149] However, it is also arguable that, notwithstanding the significance of withdrawal from the workforce (generally due to childrearing), it would be reductionist not to consider other factors which might justify a partnership approach. Parkinson argues that, no more than mere home-sharing, sexual intimacy should not of itself have wealth-transferring consequences.[150] Similarly, he does not feel that the mere fact that the parties have pooled their resources should, of itself, give rise to any entitlement beyond a claim based on restitutionary principles (which principles could be applied within a statutory framework).[151] However, to make his points he considers a series of hypothetical situations where the parties have lived together for only five years.[152] What if the intimacy and the entwining of the parties' lives has lasted for a longer period? If the parties have lived together for, say, twenty years, one might well feel that it would be appropriate to apply a partnership model irrespective of any question of one party having restricted his or her involvement in the workforce.[153] Thus, it might be appropriate to provide for a 'durational element' in one's analysis,[154] so that a claimant might also benefit from a partnership method of quantification if there had

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148 Ibid at 13. In a slightly different context, Parkinson also mentions the possibility of one partner having left a city or country to live with the other partner and being unable to re-establish the same level of earning capacity (see ibid at 16).

149 A corollary of Parkinson's position is that a claim should not be possible in a two-career childless relationship simply on the basis that one partner performed more than his or (more likely) her share of the housework. He argues (ibid at 15) that 'the difficulties and costs of [the resulting] curial inquiry would far outweigh any benefits which might accrue to women'.

150 Ibid at 10.

151 Ibid.

152 Ibid at 8 et seq.

153 Cf Rotherham's discussion (note 64 above, pp 235-238) of the legal significance of a plaintiff's psychological connection with particular items of property. He notes (ibid, p 235) the argument of M Radin *Reinterpreting Property* (Chicago: University of Chicago Press, 1993) pp 35-71 that over time objects 'can become so central to our sense of self that their loss is felt as striking at who we are.'

154 Cf note 170 below.

been a high level of emotional and economic integration[155] in the parties' lives over the course of a long relationship.

It should be stressed that the application of the so-called 'partnership' model of quantification in a particular case would not amount to a judicial statement that the cohabitation in question, in all respects, constituted the same kind of 'partnership' as a legal marriage. To avoid misunderstanding, it might perhaps be safer to avoid the term 'partnership' and adopt a more neutral term for the relevant remedial model, eg 'the proportionality approach'.

(f) Lessons from the Divorce Courts

In assessing the merits of a proposal which focuses in some way on the contributions and sacrifices of the parties (or on economic advantage and disadvantage), it is necessary to take account of recent developments in relation to the property adjustment regime upon divorce.[156] In *White v White*,[157] Lord Nicholls explained that, while the circumstances in which the statutory discretion must be exercised vary widely, there was 'one principle of universal application which can be stated with confidence.'[158] This principle was that 'there is no place for discrimination between husband and wife and their respective roles' and, therefore, there should be 'no bias in favour of the money-earner and against the home-maker and the child-carer.'[159] Lower court judges were advised to check their tentative views on division 'against the yardstick of equality of division'.[160] The relevant issues were explored further by the Court of Appeal in *Lambert v Lambert*.[161] Relying on the earlier decision of the Court of Appeal in *Cowan v Cowan*,[162] the husband in *Lambert* attempted to argue that his contribution as a very successful business person was sufficiently special

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155 In this regard, note the factors listed in the New South Wales Property (Relationships) Act 1984, s 4(2) as indicators of whether or not the parties are in a 'de facto relationship'. See also the discussion of the meaning of 'living together as husband and wife' in the extract from the 'Decision Makers' Guide, Department of Work and Pensions, May 2002' reproduced as Appendix 4 to the Law Society Report note 3 above. Cf C Rotherham 'The Contribution Interest in Quasi-Matrimonial Property Disputes' (1991) 4 Canterbury Law Review 407 at 424-425.

156 See Matrimonial Causes Act 1973, s 25.

157 [2001] 1 AC 596, noted by R Bailey-Harris (2001) 117 LQR 199. Lord Nicholls gave the leading speech in this case, with Lord Cooke giving a shorter concurring speech.

158 Ibid at 605.

159 Ibid.

160 Ibid.

161 [2003] Fam 103, noted by S Cretney (2003) 119 LQR 349. Both *Lambert* and *White* were 'so-called "big-money" cases, where the assets available exceed the parties' financial needs for housing and income' (per Lord Nicholls in *White* note 157 above at 600).

when compared to the (primarily) home-making contribution of his wife to justify a departure from Lord Nicholl's equality yardstick. Thorpe LJ, giving the leading judgment, rejected this claim and attempted to lock the 'Pandora's box'[163] which he felt had been opened by *Cowan*. He suggested that only in the most unusual cases (perhaps involving genius) could a bread-winning contribution be regarded as more significant than a home-making contribution. Interestingly in the context of the present article, a number of further justifications emerge from the judgment of Thorpe LJ in *Lambert* for the unwillingness to compare the different forms of contribution (in addition to the *White* gender discrimination point). First, it was felt that the different forms of contributions were 'incommensurable': it was like 'comparing apples with pears'.[164] Secondly, the focus on the respective contributions encouraged the parties to engage in 'backward-looking mutual recrimination'[165] at a time when they should be moving on with their lives. Thirdly, it was an expensive process, with costs being driven up as the parties seek to score points against each other.[166] Finally, it was a distasteful exercise to 'mark' the parties on their performance of their respective roles; couples had a right to seek the assistance of the court without 'exposing themselves to the intrusion, indignity and possible embarrassment of such an appraisal.'[167]

Where does this leave a legislative framework for cohabitation which is based primarily on contributions and sacrifice (including the Law Society's 'economic advantage and disadvantage' model which refers directly to contributions and indirectly to sacrifices)? In the divorce context, it is mostly in the 'big money' cases that 'contributions' have come to the fore (with needs being central in the 'small money' cases). However, if one's cohabitation scheme is based exclusively on contributions and sacrifices, there are no other factors to take into account. In every cohabitation case (big money or small), will one be putting the parties through a painful, expensive and embarrassing 'rummage through the attic' of their relationship[168] in an attempt to compare the incommensurable? Will one ignore Lord Nicholls' strictures and discriminate in favour of the bread-winning contribution as

162 [2002] Fam 97 (where the Court of Appeal regarded the husband as having made a 'special contribution' which justified a departure from equality).
163 Note 161 above at 121.
164 Ibid at 114, quoting Coleridge J in *G v G* [2002] 2 FLR 1143 at 1155.
165 Ibid at 115, quoting Coleridge J ibid at 1160.
166 Ibid at 121.
167 Ibid at 120.
168 Ibid at 114 per Thorpe LJ, quoting Coleridge J in *G v G* note 164 above at 1160.

against the home-maker's contribution? The obvious way to avoid these problems would, of course, be to follow the logic of the divorce cases and regard the respective contributions as equally valuable except in extremely rare situations (thus making one's cohabitation legislation unexpectedly potent). Another issue is whether this determination of equality would apply only when a home-making contribution was involved. What if both parties had worked full-time? Would one then take the view that one was comparing like with like and therefore feel able to give greater credit to the higher earner? If one did, one would be giving the partner with the smaller income a less favourable deal than would have been available if that partner had stayed at home to mind the children of the relationship. The result could be to create a pressure on women (who, on average, earn less than men)[169] to fulfil the old-fashioned stereotype of home-maker notwithstanding Lord Nicholl's well-meaning attempt to avoid gender discrimination. This undesirable result suggests that, if one wished to follow the *White v White* line, one might be driven to a general presumption that (at least where each party had contributed in his or her own way over a long relationship)[170] the contributions of the parties would have to be regarded as equally valuable.

One might wish to argue against getting carried away by *White v White*. It might intuitively be felt that the pull towards equality in *White* is somehow linked to the fact that the parties are married and does not reside specifically in the reference to 'contributions' in s 25 of the Matrimonial Causes Act. One could point out that, by virtue of any new legislation, an unmarried claimant would be getting more than his or her current entitlements and that, unlike in the marriage context, one would be aiming at achieving something less than global fairness.[171] On the other hand, it is hard to see why it should be acceptable to subject a person to 'gender discrimination'

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169 Women working full-time in Britain in 2002 earned 81% of the average full-time earnings of men. Women working part-time earned 59% of the average hourly earnings of men who worked full-time. See Equal Opportunities Commission *Women and Men in Britain: Pay and Income* (2003), available at www.eoc.org.uk/research. See also Department of Trade and Industry, Women and Equality Unit *Individual Income 1996/97-2001/02* (June 2003).

170 Note that the length of the relationship was arguably a key factor in *White* and *Lambert*. Cf J Eekalaar 'Asset Distribution on Divorce - The Durational Element' (2001) 117 LQR 552; *GW v RW* [2003] 2 FLR 108. See note 154 and accompanying text for the argument that the length of the relationship should be taken into account, at least to some extent, in any legislative scheme for cohabitees.

171 One could, however, imagine a case where a *defendant* was relying on a home-making contribution as against a claimant who had made a contribution outside the home. In this circumstance, the unfairness in undervaluing the homemaking contribution would tend to deprive the legal owner of

merely because that person is not married. In addition, even if one could get away from the discrimination point (eg by relying on the reference in the Law Society's proposal to *economic* advantage and disadvantage) one would still be left with the other drawbacks of a focus on contributions and sacrifice: incommensurability of different forms of contribution, backward-looking nature of process, high costs etc. Thus, while it is difficult to assess the precise impact of *White* in the cohabitation context (as indeed in the divorce context), the case (read in conjunction with *Lambert*) certainly raises uncomfortable questions for any approach in which contributions play a central role.[172]

(g) Two Specific Issues

This final section discusses two issues which surfaced in the Law Commission's Discussion Paper and which must be taken into account when formulating new reform proposals.

(i) Relationship with the Doctrines of Equity

The Law Commission's putative scheme would have excluded reliance on the common intention constructive trust or equitable estoppel by those sharing a home within the terms of the scheme.[173] One can see, of course, why the Law Commission wished in principle to displace the old rules; its intention of simplifying the law would be thwarted if one had to tolerate the complexity of the existing law alongside the complexity of a new statutory scheme. However, it is not entirely clear how the exclusion of the equitable doctrines would have worked in the context of the putative scheme. While the common intention trust would be relatively easy to exclude,[174] it is more difficult to see how one could exclude a reliance on estoppel principles. It would be insufficient to provide that a claim to the beneficial interest in a shared home could only be made on the basis of the new statutory scheme; a court wishing to apply estoppel principles could simply choose a different estoppel remedy, eg a monetary

his or her property rights (rather than merely limiting the extent of the new rights accorded to the claimant).

[172] It is not intended to suggest that it would necessarily be undesirable if cohabitation legislation led to very substantial awards for claimants due to a presumption that the respective contributions were equally valuable. The point is simply that, if this were going to be the result, it would probably be simpler to reach it by assimilating the position of qualifying cohabitees with that of spouses.

[173] Discussion Paper, page 43.

[174] One would simply provide that no reliance could be placed on the common intention of the parties in determining a claim to a beneficial interest in a shared home within the scheme.

remedy (which might even be calculated by reference to the value of the home) or an indefinite licence to remain in the home. Furthermore, given that the only remedy available under the putative scheme would be a share in the beneficial interest, it might not be suitable to exclude estoppel in a case where the claimant was led to believe that he or she would have a home in the disputed property for the rest of his or her life.[175] Even assuming that one could draft an appropriate provision excluding reliance on the equitable rules, obvious problems would remain for the putative scheme. One can imagine cases where a claimant would have reached a more favourable result by relying on either the common intention trust or estoppel. One possibility would be a case where a claimant relied on an express representation that if he or she provided certain assistance to the legal owner he or she would receive a specific fraction of the beneficial ownership.[176] Another possibility would be where a claimant sought to rely on acts of detriment which are acceptable under the equitable rules but would not qualify as 'contributions' within the putative statutory scheme (notably 'economic detriments incurred').[177] The effect, then, of regarding the putative scheme as displacing the old rules of equity would have been to put certain claimants in a worse position than before.[178] It would be difficult to argue that, in all or most cases, this could be justified on a principled basis.

Interestingly, in other jurisdictions where statutory reform has been enacted (notably the various Australian jurisdictions), no attempt was made to oust the equitable rules.[179] However, the crucial difference is that the Australian reforms were not intended to provide a purely 'property law' solution and so do not mirror so closely the existing equitable rules. Therefore, it is arguably no more incongruous for the equitable rules to exist alongside the statutory jurisdiction in the Australian jurisdictions than it is for such rules to exist alongside the discretionary powers of property adjustment available upon divorce. The implication of the foregoing discussion is that if one were proposing a new discretionary scheme it would not be advisable to try to exclude the doctrines of equity. There would unfortunately be the consequence that claimants would still rely in the alternative on the common intention trust, since that analysis generates unpredictable but sometimes very favourable

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175 See eg *Greasley v Cooke* [1980] 1 WLR 1306. See also the Discussion Paper, page 59 fn 15.
176 Discussion Paper, page 57.
177 Page 51. See text to and following note 120 above.
178 Page 57.

results (and has various idiosyncrasies which might distinguish it from a legislative scheme, eg it takes no account of countervailing benefits received by a claimant).[180] Thus, the law after legislative reform might well be more favourable to claimants but even more complex than before. This point would have to be weighed in the balance in considering whether reform should proceed.

(ii) Retrospectivity

Another key question is whether a legislative scheme should be implemented on a retrospective or a prospective basis, in other words whether it would apply in respect of all relationships or only where the relationship began after a set date.[181] This point troubled the Law Commission in the context of its putative scheme. The disadvantages of prospectivity in the context of that scheme would have been that, for a long time, the courts would have had to administer two sets of rules and that, since the applicable rules would depend on when the parties began to share the home, litigation might have been generated over when the sharing period started. On the other hand, since the scheme would have disapplied the rules of equity, to apply it retrospectively would have meant that claimants who had satisfied the requirements of the common intention analysis on the basis of past conduct (so that an equitable interest had already arisen in their favour) could suddenly have been deprived of this property right.[182] Another consequence of retrospectivity would have been that legal owners who had shared their home could, without having had any opportunity to 'contract out' at the time, suffer a serious diminution of their property rights. The Law Commission did not express any concluded view on the retrospectivity issue, stating that it would have preferred to operate its reform on a retrospective basis but expressing 'some concern' that this 'would aggravate the existing problem of compatibility with the European Convention on Human Rights.'[183] In fact, it seems

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179 Contrast New Zealand's Property (Relationships) Act 1976, s 4 (which states that the Act is a code governing the property rights of relevant couples, to the exclusion of the rules of equity).

180 See Mee note 18 above, pp 142-143

181 Discussion Paper, page 60. Cf the Law Society Report note 3 above, p 81, suggesting (without full elaboration) that the legislation have retrospective application but that no claim be permitted until two years from the date of the legislation.

182 Since the test under the new scheme would have been different, there is no guarantee that such a claimant would have been successful (or successful to the same extent) under the statutory scheme.

183 Page 60. Presumably, the provision which the Law Commission had in mind was Article 1 of the First Protocol (protection of property). Note also the possible relevance of Article 8 (protection of private and family life and the home). See generally J Howell 'Land and Human Rights' [1999] Conv 287; C Ovey and R White *Jacobs & White: European Convention on Human Rights* (Oxford: OUP, 3rd edn, 2002) chapters 10, 11 and 15.

that the consequences of retrospectivity would have been unacceptable and that the Law Commission's scheme could only have been applied on a prospective basis (thus seriously weakening its impact).

The retrospectivity issue would, it seems, play out somewhat differently in the context of a discretionary legislative regime. New South Wales' Property (Relationships) Act 1984[184] was introduced with retrospective effect, the only element of prospectivity being that it did not apply to relationships which had already come to an end at the date when the legislation came into force. However, this legislation differs from the putative scheme in some significant ways. The New South Wales legislation did not disapply the rules of equity, thus ensuring that there could be no negative consequences for claimants under the scheme arising from its retrospective application. Also, the remedy under the New South Wales statute takes effect from the date of the court's decision, while the Law Commission's putative scheme would have created property rights which were deemed to come into existence at the time of the claimant's contributions (which could have been prior to the passing of the relevant legislation). Notwithstanding these points of distinction, a defendant could still object to the application of a new discretionary scheme on the basis that he or she is being deprived of property rights (without compensation) on a retrospective basis. In this regard, a regime which required the court to exercise a discretion on the facts of each case would make it easier to defend the justice of any particular decision than would be the case under the more 'automatic' putative Law Commission scheme. However, there would still be the argument that (unless this point was somehow accommodated within a new scheme) the scheme lacked proportionality because the court in exercising its discretion did not have to take into account that the defendant had had no opportunity to contract out of the scheme (and had perhaps made clear to the claimant an unwillingness to share his or her property). While there has been occasional consideration in the literature of whether the Human Rights Act 1998 might necessitate statutory regulation of the rights of cohabitees,[185] one must also bear in mind the possibility that such legislation, if retrospective, might fall foul of the Act.

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[184] Known, until 1999, as the De Facto Relationships Act 1984.

[185] See eg C Bessant 'Cohabitation, Reform and the Human Rights Act 1998' [2001] Fam Law 525. Cf S Wong 'Trusting in Trust(s): The Family Home and Human Rights' (2003) 11 Feminist Legal Studies 119 (possible impact of human rights discourse on the development of the law of trusts).

It is possible that there is no major problem here[186] but the human rights issue, and the general question of the fairness of retrospective application, at least merit consideration in the context of devising a statutory regime.

CONCLUSION

The aim of this article has been to consider the possibilities of future reform of the law governing the property rights of those in informal relationships, taking into account any lessons which can be learned from the Law Commission's home-sharers project. It has been suggested that, to a greater extent than may first appear, the Discussion Paper has made a worthwhile contribution to the debate. It highlights certain problems – notably the question of retrospectivity and the issue of the relationship between any new statutory regime and the existing rules of equity – which will have to be addressed as part of any new reform proposals. The Discussion Paper's unsuccessful attempt to develop a detailed methodology for calculating the shares of successful claimants is also instructive because it makes apparent some practical issues which might not have emerged in the course of a discussion of a purely discretionary regime. It is also significant that the abortive proposals outlined in the Discussion Paper would (within their own limited terms) have operated on the basis of a model of 'economic partnership' between home-sharers, rather than calculating remedies on a purely restitutionary basis.

Moving beyond the Discussion Paper, various reflections have been offered in this article as to the possible direction of future reform. No attempt has been made to exhaust the complex issues which arise[187] or to defend a set of detailed proposals. Instead an effort has been made to advance the debate by drawing attention to a number of general issues which are relevant across a range of law reform options. One

[186] The decisions of the European Court of Human Rights on Article 1 of the First Protocol have, thus far, afforded a generous margin of appreciation to states in matters of social and economic policy (see eg *James and Others v UK* (1986) 8 EHRR 123: upholding legislation allowing tenants to acquire the freehold estate). On the other hand, it is unclear whether the same restrained approach will be taken in the domestic courts. See Howell note 183 above at 289-291. Cf *Re The Matrimonial Home Bill 1993* [1994] I IR 305 (retrospective legislation providing for equal ownership of matrimonial homes struck down as contrary to Irish Constitution).

[187] Thus, no attempt has been made to consider all the details of a possible legislative solution, including the important question of whether it should be possible for a claimant to obtain, as well as a share in the defendant's property or a one-off monetary payment, other remedies such as an order for periodic maintenance or a share in pension entitlements. For discussion, see Miles note 3 above at 638-647.

thing which emerges from the discussion in this article is that the law reform process will not be an easy one. One is faced with the tricky task of finding a reform option which is not too modest (so that it will be unable to side-line the existing equitable rules and will fail to deliver on the public expectations it will create) and not too far-reaching (so that it will be perceived as undermining marriage). If, of course, as in New Zealand, it was considered appropriate to assimilate the rights of cohabitees and spouses,[188] the way forward would be fairly simple. It would be even simpler to do nothing (beyond the enactment of civil partnership legislation to allow same sex couples an option analogous to marriage). What is difficult is trying to find a middle way. Consideration of one of the more obvious options for reform, an approach based on an assessment of 'contributions', [189] demonstrates the danger that an attempt to give a 'lesser deal' to cohabitees as compared with spouses will involve gender discrimination because it gives insufficient weight to the kinds of sacrifice women tend to undertake. Recent case law in the matrimonial context also highlights the practical difficulties in attempting to compare the respective contributions and sacrifices of the partners over the course of a relationship.[190]

As well as being difficult to achieve, it is probable that reform of this area of the law will be an ongoing process, with any legislative scheme likely to require adjustment as society changes further. It is worth remembering that, shortly before the Law Commission published its Discussion Paper, the New South Wales Law Reform Commission issued a weighty Consultation Paper[191] on possible future reforms of its longstanding legislation (which had already been substantially expanded in 1999). Thus, the answers are not easy and are liable to change as time passes. This, of course, is no reason to give up on trying to find them.

188 See text to and following note 107 above.
189 See text to and following note 117 above.
190 See text to and following note 156 above.
191 See note 3 above.