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Title	A critique of the cohabitation provisions of the Civil Partnership Bill 2009
Authors	Mee, John
Publication date	2009
Original Citation	Mee, J. (2009) 'A critique of the cohabitation provisions of the Civil Partnership Bill', Irish Journal of Family Law, 12(4), pp. 83-92
Type of publication	Article (peer-reviewed)
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Download date	2026-11-05 10:34:53
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A Critique of the Cohabitation Provisions of the Civil Partnership Bill 2009

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Introduction

This article considers the attempt to reform the law in respect of cohabitants' rights in the Civil Partnership Bill 2009.[1] This Bill attempts to achieve two distinct aims. The first is to provide for a system of civil partnership for same sex couples, providing such couples with the option of obtaining formal recognition for their relationships. The second aim is to set up a scheme to create certain rights for cohabitants, whether same sex or opposite sex, upon the termination of a relationship outside of marriage or civil partnership. It is unfortunate that the two separate issues are dealt with in the same Bill. The argument in favour of introducing a civil partnership scheme for same sex couples, or permitting such couples to marry, seems unanswerable. However, the case for the introduction of legislation at this time in relation to informal cohabitation is actually much less strong than that in relation to civil partnership/same sex marriage. Moreover, given the limited resources in a small legal system, the attempt to introduce two major reforms at once leads to a risk that neither will receive the detailed consideration necessary to avoid errors and contradictions in the legislation.

This article analyses Pt 15 of the 2009 Bill which deals with cohabitation outside marriage or civil partnership. The current author believes that this aspect of the Bill is, unfortunately, seriously flawed. The specific problems with the scheme proposed in the Bill will be discussed in detail in the article. Some of the problems are the result simply of poor drafting or of a failure to think through the consequences of certain proposals. However, more critically, a key problem with the Bill is that it attempts to restrict the scope of the scheme so that it will not go too far in creating rights for cohabitants against each other, resulting in a half-hearted approach which leads to indefensibly arbitrary results. As will be seen, this is particularly evident in the imposition of a precondition upon relief that the claimant must have been made financially dependent on the other claimant as a result of the cohabitation.[2] The consequence is that a claimant who has suffered very serious loss as a result of the relationship, perhaps running to hundreds of thousands of euro, will have no claim if he or she is not rendered financially dependent as a result. It also means that the introduction of the legislative scheme will have very little effect in terms of simplifying the law, since recourse will still frequently be necessary to the unsatisfactory rules of equity. The author's conclusion is that it would be preferable to refrain from introducing any legislative scheme for cohabitants at this point than to introduce a scheme which is very restrictive, which offends against basic principles of

[*] I am grateful to Mary Donnelly and Louise Crowley for comments on an earlier draft of this article. Any errors which remain are solely my responsibility.

[1] The Bill was published on June 26, 2009 and the discussion in this article refers to the Bill as initiated.

[2] See s.171(2) of the Civil Partnership Bill (the "2009 Bill").

justice by failing to treat like cases alike and which is likely to raise false expectations of legal protection in the minds of cohabitants.

The article looks first at issues relating to the definitions of "cohabitant" and "qualified cohabitant", which determine who is eligible to seek "redress" under the scheme of the Bill. It then moves on to consider the redress scheme created by the Bill, examining the financial dependency requirement mentioned above, as well as other aspects of the scheme (excluding aspects of the scheme for cohabitants relating to the law of succession, which are considered elsewhere by the current author).[3]

"Cohabitants" and "Qualified Cohabitants"

Section 170 of the Bill provides the definitions of "cohabitant" and "qualified cohabitant". Even if they do not meet the definition of "qualified cohabitants", "cohabitants" are covered by the rules on cohabitation contracts in s.199 of the 2009 Bill and, in addition, the Bill modifies certain provisions of the Residential Tenancies Act 2004, the Civil Liability Act 1961 and the Domestic Violence Act 1996[4] so that they are applicable to a "cohabitant" rather than, as at present, to a person who has lived with another person "as husband and wife". Only a "qualified cohabitant" is eligible to apply for "redress" from the other cohabitant upon the termination of the relationship, in the form of a property adjustment order,[5] a compensatory maintenance order,[6] a pension adjustment order[7] or an order for provision from the estate of the other cohabitant.[8]

The Definition of Cohabitant

A cohabitant is defined in s.170(1) as "one of 2 adults (whether of the same or the opposite sex) who live together as a couple in an intimate and committed[9] relationship and who are not related to each other within the prohibited degrees of relationship or married to each other or civil partners of each other." Section 170(2) provides that in

[3] See "Succession and the Civil Partnership Bill 2009" (2009) 14(4) CPLJ (forthcoming), which also covers relevant issues related to civil partnership.

[4] These Acts are amended by ss.200, 201 and 203 of the Civil Partnership Bill respectively. In relation to the Domestic Violence Act 1996, the surprising effect of s.203 of the Bill is that a safety order would only be available to a cohabitant who has lived with the respondent "immediately prior to the application", rather than a person who has lived with the respondent as husband and wife "for a period of at least six months in aggregate during the period of twelve months immediately prior to the application"—thus the Bill would narrow the class of persons who can apply.

[5] Section 172 of the 2009 Bill.

[6] Section 173.

[7] Section 185.

[8] Section 192. Section 202 of the Bill amends the Powers of Attorney Act 1996, Sch.1, para.3(1) so that the category of qualified cohabitant is added to a list of persons potentially entitled to be notified in respect of the execution of an enduring power of attorney. See also Powers of Attorney Act 1996, s.5(2)(i) and Sch.1, para.2(1)(c); Enduring Powers of Attorney Regulations 1996, (S.I. No. 196 of 1996), reg.7. The Bill places the qualified cohabitant at the bottom of the hierarchy for notification, so that this category ranks below e.g. "the widow or widower of a child of the donor" and "the children of the donor's brothers and sisters" (whether of the whole or half blood). It is difficult to see the logic of this.

[9] The inclusion of a requirement that the relationship be "committed" seems ill-advised, in part because the parties have, by definition, not committed themselves to marriage or civil partnership. The court is already directed to consider the degree of the parties' commitment to each other by s.171(3)(e).

determining whether or not the parties are cohabitants, the court shall take into account all the circumstances of the relationship and in particular shall have regard to specified criteria, including the duration of the relationship, the basis on which the couple live together and the degree of their commitment to each other, the degree of financial dependence involved, the nature of any financial arrangements between the adults, whether there are dependent children, whether one of the adults cares for and supports the children of the other, and the degree to which the adults present themselves to others as a couple.[10]

A significant feature of the definition of cohabitant is that s.170(1) creates exclusions on the grounds of age and ineligibility to marry. A person aged under 18 is not an "adult" and so cannot be a cohabitant, even if such a person is cohabiting "as a couple" in "an intimate and committed relationship" with another person. Since the age of consent is seventeen, there would be nothing illegal in a seventeen year old engaging in such a relationship. One possible reason behind the exclusion of those aged under 18 is that they are not (unless an exemption is obtained) permitted to marry in Ireland. The definition of cohabitant in s.170(1) also excludes another category of persons unable to marry, i.e. those who are "related to each other within the prohibited degrees of relationship". Section 170(4) provides that persons are within the prohibited degrees of relationship if "they would be prohibited from marrying each other in the State" or if they are in one of the relationships specified in the Bill[11] as preventing two persons from entering into a civil partnership. Unfortunately, there is a drafting problem which needs to be addressed because all same sex couples "would be prohibited from marrying each other in the State" (as would couples where one or both of the cohabitants is still married to a third party) and so would be excluded from the definition of cohabitant by the current wording of the Bill. Leaving this aside, what is intended is clearly that opposite sex couples will not count as cohabitants if they would be prohibited from marrying each other on the grounds of consanguinity or affinity (i.e. relationship by marriage) and that a similar exclusion would apply to same sex couples who would be prohibited from registering a civil partnership together.[12]

It is not at all clear why the definition of cohabitant should seek to mirror the requirements for entering into a marriage or civil partnership. The better approach would seem to be to follow the line of the Law Commission for England and Wales, which recommended that persons should be excluded from the definition of cohabitants "where

[10] The LRC in its *Report on the Rights and Duties of Cohabitants* (LRC 82 – 2006) (December 2006), p.28 had envisaged the inclusion of the criterion of "whether or not a sexual relationship exists". The 2009 Bill deletes this but describes the necessary relationship as "intimate" and includes a clarification in s.170(3) to the effect that "a relationship does not cease to be an intimate relationship … merely because it is no longer sexual in nature." Although the only overt reference to sexual relations is now to their absence, the phrasing of the Bill may suggest that a relationship will be excluded unless, at one stage at least, it was sexual in nature.

[11] See s.26 of the 2009 Bill, proposing to add a Third Schedule to the Civil Marriage Act 2004.

[12] In relation to marriage, the prohibited degrees of relationship were initially set out in the Marriage Act 1537. For discussion, see the LRC *Report on Nullity of Marriage* (LRC 9 – 1984), pp.45–48; 130–144. See further, Mee, "Marriage, Civil Partnership and the Prohibited Degrees of Relationship" [2009] ILT (forthcoming).

sexual activity between them would constitute a criminal offence owing to the age of either party or to the fact that the parties are relatives."[13] There are a limited number of family relationships which fall outside the incest laws but where the parties would fall within the prohibited degrees of relationship for marriage or civil partnership based on consanguinity, e.g. the relationship between uncle (or aunt) and niece (or nephew).[14] In the case of the "affinity" rules applying to marriage, whereby a person is prevented from marrying the former spouse of certain relations, there is no blood relationship between the parties and the incest laws have no application at all. It is not easy to see why persons cohabiting in such relationships should be excluded from the definition of cohabitant in the Bill. The Law Commission's approach also has the advantage of not excluding a 17 year old person who is in a cohabiting relationship.

The Definition of Qualified Cohabitant

Section 170(5) of the Bill gives the following definition:

> "For the purposes of this Part, a qualified cohabitant means an adult who was in a relationship of cohabitation with another adult and who, immediately before the time that that relationship ended, whether through death or otherwise, was living with the other adult as a couple for a period—
> (*a*) of 2 years or more, in the case where they are the parents of one or more dependent children, and
> (*b*) of 3 years or more, in any other case."

Probably inadvertently, s.170(5) makes no requirement that the parties have been living together for the requisite period as a couple "within the definition in s 170(1)-(4)".[15] This means that, if two people lived together "as a couple" for three years without satisfying the definition of "cohabitant" and then changed the basis of their relationship so that they satisfied the definition, they would immediately be categorised as "qualified cohabitants", triggering the availability of orders under the Bill even if their relationship ended only a week after they had first become "cohabitants". It seems that s.170(5) should be modified to require two or three years of living together "as cohabitants" and not merely "as a couple".

Partial Exclusion Based on Marriage

Section 170(6) introduces a restriction on the class of "qualified cohabitant". The exclusion in question applies where:

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[13] See *Cohabitation: The Financial Consequences of Relationship Breakdown* (LC 307, 2007), p.63. See further pp.61–63; Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown: A Consultation Paper* (LC CP 179, 2006), pp.267–269.

[14] Note that, notwithstanding the blood relationship, marriage between uncle/niece and aunt/nephew is permitted in many European jurisdictions and elsewhere, e.g., in Australia under the Marriage Act 1961, ss 23 and 23B and in Canada under the Marriage (Prohibited Degrees) Act 1990, c.46.

[15] Contrast the wording of Heading 123(4) of the General Scheme of the Civil Partnership Bill (June 2008). See also s.3(4) of the LRC's Draft Bill, appended to LRC *Report on the Rights and Duties of Cohabitants* (LRC 82 – 2006).

> "(a) one or both of the adults is or was, at any time during the relationship concerned, an adult who was married to someone else, and
> (b) at the time the relationship concerned ends, each adult who is or was married has not lived apart from his or her spouse for a period or periods of at least 4 years during the previous 5 years."

In its Consultation Paper,[16] the Law Reform Commission (LRC) had proposed to exclude all cohabiting relationships where one or both cohabitants is married to a third party (henceforth, for convenience, this article refers to "married" cohabitants, although it should be remembered that only one of the cohabitants may be married). The reasoning of the LRC was that "if the State by its laws were to recognise and improve the position of a cohabitee who is already married to someone else, those laws would undermine the institution of marriage."[17] This approach was criticised[18] and, in its Report, the LRC changed its approach, accepting that it would not be appropriate to exclude "married" cohabitants[19] and, following this line, there was no such exclusion in the General Scheme of the Civil Partnership Bill published in June 2008.

The provision which has now been inserted into the Bill does not attempt to exclude all "married" cohabitants. Rather, it excludes only a subset of those relationships, those where, at the time the relationship ends, each partner who is, or was, married has not lived apart from his or her spouse for at least four of the previous five years. The exclusion would operate to deny any remedy to a cohabitant where, for example, he or she moved in with his or her partner following the breakdown of his or her partner's marriage and the couple cohabited together for less than four years; thus, if the cohabiting couple had a child, the exclusion would have the effect of doubling the qualifying period for protection under the Bill (from two to four years) in respect of the parties' cohabitation. The type of exclusion under discussion is highly undesirable in principle since it excludes one class of cohabitants from protection on a basis which is essentially irrelevant in terms of justice between the cohabitants. The exclusion under discussion would be likely to create confusion in the minds of the public, with some "married" cohabitants falsely assuming that they are not covered by the scheme (when, in fact, they are because the "four out of five years" requirement has been satisfied) and others falsely believing that they are protected by the legislation (when, in fact, they are not because the "four out of five years" requirement has not been satisfied). It is clearly important, in devising a reform scheme, to make it as straightforward and coherent as possible and to avoid any arbitrary or unnecessarily complex exclusions.[20]

The Rationale for the Exclusion: The Impact of the Constitutional Protection for Marriage

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[16] *The Rights and Duties of Cohabitees* (LRC CP 32 – 2004).

[17] *The Rights and Duties of Cohabitees* (LRC CP 32 – 2004), p.9. The same line was taken in the Colley Working Group on Domestic Partnership *Options Paper* (November 2006), p.13.

[18] See Mee "A Critique of the Law Reform Commission's Proposals on the Rights and Duties of Cohabitees" (2004) 29 Irish Jurist (ns) 74, 83–89.

[19] *Report on the Rights and Duties of Cohabitants* (LRC 82 – 2006), pp.32–34.

[20] See further fns 52–53 below.

It is clear that the reference in s.170(6) to the spouses living apart for four of the previous five years echoes the requirement for obtaining a divorce under the Family Law (Divorce) Act 1996, s.5(1), which reflects the wording of Art.41.3.2 of Bunreacht na hÉireann. However, unless they actually obtain a divorce, spouses are no less married and no less protected by the Constitution because they have lived apart for a specified period. Therefore, the exclusion in the Bill does not disarm the argument, formerly favoured by the LRC but repudiated in its Report, that it would undermine marriage to include any "married" cohabitants within the scheme (and, in this connection, it should be noted that "married" cohabitants are not excluded from the limited protections in the Bill for "cohabitants" who do not count as "qualified cohabitants"). Before moving on to consider the purpose of the partial exclusion in the Bill, it is necessary to consider whether the absence of a complete exclusion means that the Bill undermines marriage by bringing married persons within a competing institution.

It appears that the argument concerning the undermining of marriage is, in fact, somewhat stronger in respect of the scheme in the Bill (which, for the most part, reflects that proposed by the LRC in its Report), as compared to the scheme provisionally proposed by the LRC in its Consultation Paper. This is because the LRC's original proposals focused exclusively on the contributions of the cohabitants, so that any obligations incurred by a "married" cohabitant could be seen as comparable to the kind of obligations which such a person could, without controversy, incur in the law of contract, tort or equity. However, as well as referring to the contributions of the parties,[21] the Bill refers also to matters such as the "financial circumstances, needs and obligations" of the cohabitants,[22] "the duration of the parties' relationship, the basis on which the parties entered into the relationship and the degree of commitment of the parties to one another",[23] "any physical or mental disability" of the applicant cohabitant,[24] and "the conduct of each of the cohabitants, if the conduct is such that, in the opinion of the court, it would be unjust to disregard it."[25]

Thus, the scheme in the Bill goes beyond the idea of compensating a cohabitant for his or her unrewarded contributions and sacrifices during the cohabitation and moves into the territory of requiring one cohabitant to take responsibility for the other's needs or economic dependency on the basis of considerations other than what has been "earned" by the applicant cohabitant. There may be an implication that the "qualified cohabitant" acquires a legal status which triggers rights and duties as against his or her partner which are independent of the factual contributions and sacrifices of each party—this gives the legal concept of "qualifying cohabitation" something of the flavour of a substantive legal institution which could be seen as competing with the constitutionally protected institution of marriage.[26] It is not being asserted that this argument is necessarily

[21] See s.171(3)(f)–(g) of the 2009 Bill.
[22] Section 171(3)(a).
[23] Section 171(3)(e).
[24] Section 171(3)(i).
[25] Section 171(3)(j).
[26] Compare Mee, "Cohabitation, Civil Partnership and the Constitution" in Doyle and Binchy (eds) *Committed Relationships and the Law,* (Dublin: Four Courts Press, 2007), pp.201–207, discussing the constitutional objections to a system of civil partnership for opposite sex couples.

sufficient to demonstrate that it would be unconstitutional to extend the redress scheme of the Bill to "married" cohabitants but simply that the argument is stronger than the one which initially convinced the LRC in 2004 to propose excluding such cohabitants. The author's view is that a redress scheme which excluded "married" cohabitants would be fatally compromised, so that if one accepted the "undermining of marriage" argument in respect of the scheme in the Bill, the appropriate response would be to modify the criteria upon which a remedy could be granted (or to drop the whole idea of a "redress" scheme) rather than to exclude all "married" cohabitants.

Returning to the more limited exclusion in the Bill, it appears that it is designed to ensure that, if an application for relief is made against a cohabitant who is married to a third party, it will be possible to adjourn the proceedings to allow the spouse to seek a divorce and apply for ancillary relief, thus allowing the spouse to get "first bite of the cherry".[27] Unfortunately, there are serious problems with the attempt in the Bill to develop an exclusion centred on the ability to apply for a divorce. First, and most importantly, it is necessary to question the perceived significance of the estranged spouse of a qualifying cohabitant being eligible to seek a divorce. Under Ireland's unusual matrimonial property regime, it is possible for a spouse to access ancillary relief not long after the breakdown of the marriage by obtaining a decree of judicial separation, one of the grounds for which is that "a normal marital relationship has not existed between the spouses for a period of at least one year immediately preceding the date of the application".[28] Since the full panoply of ancillary remedies is available upon judicial separation, there is no need to wait until the parties have lived apart for four of the previous five years and a divorce can be obtained. The requirement in the Bill that, in order to qualify as cohabitants, a couple must have lived together for at least three years (or two years if they have a child) appears to ensure that a normal marital relationship between one of the cohabitants and his or her spouse could not have existed for at least one year.[29] In other jurisdictions, whether a spouse has access to ancillary relief may well depend on whether he or she can obtain a divorce (as, for example, in Australia where judicial separation was abolished in 1975).[30] However, the position is entirely different in Ireland, since one trigger for ancillary relief is judicial separation, which is much more quickly available than

[27] See the argument of Woods, "Rights for Cohabitees – Who Should Qualify?" (2004) 55 NILQ 8, 17–18. The Bill provides in s.198(2) for the making of Rules of Court to permit inter alia the adjournment of proceedings under s 173 (maintenance) or s 185 (pension adjustment) in a case where one or both of the cohabitants is or was married.

[28] See Judicial Separation Act 1989, s.2(1)(f).

[29] Also, the adultery ground for judicial separation (Judicial Separation Act 1989, s.2(1)(a)) would also presumably be triggered in cases of opposite sex cohabitation. Adultery involves sexual intercourse between a man and a woman: Shatter, *Family Law*, 4th edn (Dublin: Butterworths, 1997), p.345.

[30] See Family Law Act 1975 (Commonwealth), s.8. Note that Woods "Rights for Cohabitees – Who Should Qualify?", 18 refers to the example of the Property (Relationships) Act 1984, s.22(1) (New South Wales). Judicial separation survives in England and Wales but has limited independent significance: see Masson, Bailey-Harris and Probert, *Cretney: Principles of Family Law*, 8th edn (London: Sweet and Maxwell, 2008), pp.317–320.

divorce.[31] In light of this, the focus in the proposed s.170(6) on eligibility to seek a divorce seems misguided.

It may also be pointed out that the fact that a cohabitant has lived apart from his or her spouse for four of the previous five years does not, of itself, entitle the spouse of that cohabitant to obtain a divorce; there must also be "no reasonable prospect of a reconciliation between the spouses" and the court must be satisfied that proper provision exists or will be made for the spouses and any dependent members of the family.[32] Therefore, a "married" cohabitant could still satisfy the Bill's definition of a qualifying cohabitant but his or her spouse might be unable to obtain a divorce and so would not have the protection which the exclusion in the Bill seems intended to guarantee. Another point relates to the fact that the Bill allows two years (or more in exceptional circumstances) for a cohabitant to bring a claim.[33] If a married cohabitant has been living apart from his or her spouse for (say) three years, it seems to represent overkill to deny any right to make a claim under the cohabitation legislation when it could instead be stipulated that the claimant would have to wait a year to bring his or her claim (still within the normal time limit), at which time the defendant's estranged spouse would be eligible to seek a divorce and ancillary relief, assuming for the purpose of argument that this eligibility is crucial.[34]

It should be noted that the Bill elsewhere provides that an order cannot be made "in favour of a qualified cohabitant that would affect any right of any person to whom the other cohabitant is or was married"[35] and also specifies "the rights and entitlements of any spouse or former spouse" as a factor to be taken into account in determining whether it would be "just and equitable" to make an order in favour of an applicant cohabitant.[36] This protection is in addition to the possibility of adjourning an application by a cohabitant so that the other cohabitant's estranged spouse can seek ancillary relief, or a variation of existing ancillary orders, on judicial separation or (where this is available) divorce. It seems that these measures represent an appropriate way to protect the financial position of a spouse of one of the cohabitants. Section 170(6) of the Bill should simply be dropped.

"Redress" for Cohabitants

Section 171 sets out the circumstances in which a "qualified cohabitant" may apply for a property adjustment order under s.172 of the Bill, a compensatory maintenance order

[31] It is possible to apply for an order for ancillary relief at any time subsequent to the grant of judicial separation and, subject to very limited exceptions which also apply in the divorce context, it is also possible to apply at any time to vary an order already made. For discussion, see Shatter, *Family Law*, Ch.17.
[32] Family Law (Divorce) Act 1996, s.5(1); Art.41.3.2 of Bunreacht na hÉireann.
[33] Section 193 of the 2009 Bill.
[34] A separate minor point is that the drafting in the Bill overlooks the possibility that the estranged spouse of one of the cohabitants might die during the course of the cohabitation. In such circumstances, it would not make sense to require that the relevant cohabitant have lived apart from the (now deceased) spouse for at least four of the last five years.
[35] Section 171(5) of the 2009 Bill.
[36] Section 171(3)(b). See also s.206.

under s.173 or a pension adjustment order under s.185.[37] Section 171(2) states a basic pre-condition for obtaining one of these orders against the other qualified cohabitant:

> "If the qualified cohabitant satisfies the court that he or she is financially dependent on the other cohabitant and that the financial dependence arises from the relationship or the ending of the relationship, the court may, if satisfied that it is just and equitable to do so in all the circumstances, make the order concerned."

Section 171(3) goes on to set out a list of matters to which the court should have regard "[i]n determining whether or not it is just and equitable to make an order in all the circumstances". The list is extensive and includes inter alia the financial circumstances, needs and obligations of each cohabitant; the duration of the parties' relationship, its basis and the degree of commitment it involves; the contributions of the parties, including the effect of the relationship on the earning capacity of each spouse; any physical or mental disability of the applicant cohabitant[38]; and the conduct of the parties if that conduct is such that it would be unjust to disregard it.

The Requirement of Financial Dependency

The concept of "financial dependency" is central to this part of the Bill. It will now be argued that this requirement is incoherent at the level of principle and would lead to unacceptable results in practice, so that it represents a crucial flaw in the Bill's proposed regime for qualified cohabitants and, in fact, calls the viability of the scheme into serious question.

The Provenance of the Requirement

The "financial dependency" requirement was not mentioned in the LRC's Consultation Paper. Instead, the LRC provisionally recommended a scheme which would involve the application of specified criteria, centered on the respective "contributions" of the parties, along the lines of the New South Wales Property (Relationships) Act 1984, but which would be subject to a stipulation that an order should only be made "in exceptional circumstances".[39] This qualification was, as the present author argued at the time, "hopelessly vague" and seemed to represent "an extremely crude and unsatisfactory expedient" employed to limit the impact of the proposed reform scheme.[40] The "exceptional circumstances" qualification did not resurface in the LRC's 2006 Report but was replaced by an "economic dependency" requirement.[41] Essentially the same requirement appears in the Bill, albeit the word "economic" has now been replaced with "financial" (although, curiously, "economically dependent" survives in the marginal note

[37] Orders for provision from the estate of a deceased cohabitant are dealt with separately in s.192 (and are discussed in another article by this author: see fn.3 above).

[38] It seems wrong that this factor (see s.171(3)(i)) makes no reference to any physical or mental disability of the defendant cohabitant.

[39] See LRC Consultation Paper, *The Rights and Duties of Cohabitees* (LRC CP 32 – 2004), pp.64–65; 92–93.

[40] Mee, "A Critique of the Law Reform Commission's Proposals on the Rights and Duties of Cohabitees", 95.

[41] *Report on the Rights and Duties of Cohabitants* (LRC 82 – 2006), pp.3; 15-16; 69; 80.

to s.171). There is remarkably little analysis in the LRC Report of the relevant requirement. The metaphor favoured by the LRC was that "the redress model would operate as a safety net to address the needs of vulnerable qualified cohabitants on breakdown of the relationship."[42]

What Does "Financial Dependency" Mean?

Despite the superficial plausibility of the term, it is not easy to pin down its intended meaning. The LRC in its recommendations had required the claimant to establish simply that "arising from the ending of the relationship … he or she is economically dependent".[43] However, in linguistic terms, dependency is a relational thing; one can only be dependent on someone or something else but not dependent in the abstract.[44] The Bill uses a different phrasing, requiring that the claimant be "financially dependent on the other cohabitant and that the financial dependence arises from the relationship or the ending of the relationship".[45] This gets over the linguistic difficulty but raises different problems. Financial dependence on someone else can most simply be understood as a matter of fact: X is financially dependent on Y if, as a matter of fact, X is being maintained by Y. If one took this interpretation of dependence, it would result in an implausibly powerful restriction on relief under the statutory scheme. A claimant could only seek an order under the Bill if he or she could show that, as a matter of fact, he or she "is" at the time of the claim (under the terms of the legislation, necessarily after the termination of the relationship) being maintained by his or her partner. This would arbitrarily exclude a claim in any case where the defendant declined to keep maintaining, or to start maintaining, his or her partner upon the termination of the relationship. Furthermore, even if one were to do violence to the wording of the provision to include cases where the claimant *was*, in the past, maintained by his or her partner, this would still provide an escape clause for a cohabitant who had refused to maintain his or her partner during the relationship, even though he or she was in need of such maintenance because of the economic consequences of the relationship.

What actually appears to be intended in the Bill is that the claimant must be *in need of* financial support for his or her maintenance, in principle from any source, as a result of the relationship or its termination. The reference to the "other cohabitant" indicates the target of the claimant's application but does not actually add anything to the description of the claimant's position. Although linguistically unsatisfactory, the LRC's original formulation, therefore, appears more accurate than the wording of the Bill—the category of person whom the legislation seeks to cover is someone who is "not financially independent" (to reconfigure the LRC's phrasing) because of the relationship or its termination. The notion of not being financially independent, of course, is itself rather

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[42] *Report on the Rights and Duties of Cohabitants* (LRC 82 – 2006), p.69.

[43] See s.12(3) of the LRC's Draft Bill, appended to the *Report on the Rights and Duties of Cohabitants* (LRC 82 – 2006).

[44] Note the Oxford English Dictionary definition: "That depends or has to rely *on* something else for support, supply, or what is needed." *OED Online*, 2nd edn (Oxford University Press, 1989) available online at *http://dictionary.oed.com/cgi/entry/50061141?single=1&query_type=word&queryword=dependent&first=1&max_to_show=10* 'dependent *a*' [Accessed July 30, 2009].

[45] Section 171(2) of the 2009 Bill.

uncertain—it depends on the life-style which the claimant is entitled to expect, which may depend, for example, on whether the claimant is entitled to expect a continuation of the life-style which the relationship allowed (it appearing to be relevant that, unlike in the context of a marriage (or presumably, a civil partnership), a cohabitant is under no duty to maintain the other cohabitant during the cohabitation).[46]

Thus, financial dependence in the terms of the Bill involves an assessment of the claimant's current financial resources against his or her needs, in whatever way the latter should be calculated. Therefore, in this respect, the scheme in the Bill differs crucially from the scheme recently proposed by the English Law Commission[47] or that recently enacted in the Family Law (Scotland) Act 2006. The financial dependency aspect of the Bill's scheme does not involve looking at how much the claimant has lost, or how much the defendant has gained, as a result of the relationship or its termination; it focuses rather on where the claimant has ended up, attempting to create a safety net to prevent a claimant from falling below a certain level in financial terms.

Problems with the Financial Dependency Requirement

The reassuring image of the "safety net" distracts from the fundamental difficulty with a property regime subject to a filter based on financial dependency. Thinking in terms of a "safety net" makes sense in the context of state-provided social welfare assistance but not in the context of a regime for adjusting property entitlements between two private individuals at the end of their relationship. It is instructive to consider one brief attempt in the LRC's Report at justifying the approach under discussion:

> "The Commission believes not all cohabiting relationships warrant redress on breakdown of the relationship. Casual or short-term relationships without interdependency do not require ancillary relief. The court should therefore have regard to the vulnerable position of the applicant. On making an application, a test of 'economic dependency' must be proven."[48]

The reasoning in this passage does not stand up to scrutiny. The fact that not all cohabiting relationships should trigger a right to relief does not prove that such relief should only be available where the applicant has been rendered economically or financially dependent by the relationship. As well as "[c]asual or short-term relationships without interdependency" and relationships which result in the economic dependency of one of the parties, there are also non-casual, longer-term relationships which involve interdependency and which lead to very significant loss for one party, or gain for the other, but which do not result in the weaker party becoming financially dependent. The inconsistency in Bill's approach is that it precludes any remedy in cases in this broad category.

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[46] Note that the list of criteria in s.171(3), although it resembles in some ways the list applicable to ancillary relief in the marital context, omits any reference to "the standard of living enjoyed by the family" prior to the termination of the relationship (contrast Family Law Act 1995, s.16(2)(c) and Family Law (Divorce) Act 1996, s.20(2)(c)).

[47] See *Cohabitation: The Financial Consequences of Relationship Breakdown* (LC 307, 2007).

[48] *Report on the Rights and Duties of Cohabitants* (LRC 82 – 2006), p.69.

In discussing the point, it may help to refer to an imaginary scale of wealth, running upwards from zero. Consider a case where, as a result of contributions and sacrifices made in the course of the relationship, one cohabitant has gone from a strong financial position (say Level 6 on the scale of wealth) to one where they are only barely economically independent (say Level 3) and where their partner has benefited greatly, moving from a position of comparative poverty at the beginning of the relationship to a much more secure position at the end (say from Level 3 to Level 7). Assume that, in this hypothetical situation, by reference to the ten criteria listed in s.171(3) of the Bill, a court would hold that it would be "just and equitable … in all the circumstances" to make a substantial order in favour of the claimant. In this example, despite the extent of the claimant's financial fall, he or she has not fallen into the safety net (which is set at, say, Level 2) and the financial dependency limitation means that he or she can expect no remedy at all because the court never gets to consider the criteria in s.171(3).

The problem which has just been outlined is not a theoretical one. The proposals in the Bill would leave a wide range of claimants without a remedy, in circumstances where they are not really any less deserving than those claimants who would get a remedy. The paradigm case envisaged by the Bill may be similar to an example posited in the LRC's Consultation paper of "a woman in her 50's who has lived in a 'marriage like' relationship for most of her life; and who has missed out on her career opportunities as a result of her contributions to the family."[49] However, while a claimant in this category may (depending on all the facts) be clearly deserving of a remedy against her partner, she could also be equally deserving if the result of her sacrifices was that she had suffered the same economic loss but, because e.g. of an inheritance from a parent, she was not rendered financially dependent by the termination of the cohabitation. There is no difficulty in identifying other examples of claimant who would be defeated by the financial dependency hurdle. One example would be a claimant who paid for an expensive extension to a family home belonging to his or her partner and who was left with no claim in equity, because the purchase money resulting trust doctrine does not apply to contributions to improvements to property (unless the money is borrowed on a mortgage and the claimant contributes to the repayment of that mortgage).[50] Another is the case of a claimant who transferred a valuable family home into joint names and included an express declaration of the beneficial interests to ensure that his or her partner would acquire the intended joint beneficial interest (or simply intended this result when making the transfer, so that the presumption of resulting trust would be rebutted). Or consider the case of a claimant who gave his or her partner substantial financial gifts to bail out a failing business or who worked without pay for long hours, at a time when no mortgage was being repaid by the other cohabitant, and facilitated the development of a successful business. In none of these cases would the claimant obtain a remedy under the equitable rules currently applicable in our law, yet each claimant would also be denied a remedy under the redress scheme unless it could be

[49] *The Rights and Duties of Cohabitees* (LRC CP 32 – 2004), p.92.
[50] On the rules of equity which currently apply in Ireland to cohabitants' claims, see Mee, *The Property Rights of Cohabitees*, (Hart Publishing, 1999) Chs 2–4. See also *The Rights and Duties of Cohabitees* (LRC CP 32 – 2004), pp.31–47.

shown that the effect of the relationship was to make them "financially dependent on the other cohabitant".

Thus, the essential problem with the financial dependency requirement is that it constitutes an arbitrary limitation, excluding a remedy in many cases where the claimant has suffered a very significant financial loss as a result of the relationship and/or the defendant has made a very significant financial gain. It is true that a person who has been rendered "financially dependent" at the end of a relationship can fairly be described as "vulnerable" but it is hard to deny that description to someone who has lost his or her life savings but is just about able to support himself or herself in the future. The arbitrariness in the legislation is compounded by the fact that, once the financial dependence hurdle is surmounted, the court must consider a broad list of factors in determining whether it would be "just and equitable" to make an order in favour of the claimant. Here one encounters an important issue which is not directly addressed by the wording of the relevant provisions of the Bill. What is the task of the court in devising an order or orders in favour of a successful claimant? Is it (a) to address the financial dependency of the claimant, so that the order(s) can go no further than restoring the claimant to the level of bare financial independence or (b) simply to make whatever order is "just and equitable in all the circumstances", regarding the "financial dependence" criterion as a trigger for the availability of, but not a limitation on the extent of, the claimant's remedy?

In favour of the second of the two possibilities, there is no explicit requirement in the Bill that the court should address the financial dependency issue and go no further—in fact, the court is expressly instructed to make whatever order is "just and equitable" in light of a list of wide-ranging factors.[51] Therefore, the most plausible interpretation of the wording of the Bill seems to be that orders need not be confined to rectifying financial dependency. Unfortunately, the implications of this interpretation are not attractive. Consider a hypothetical scenario where the claimant satisfies the financial dependency test, say because he or she has fallen, as a result of the relationship, from Level 6 to Level 1 (on the graduated scale of wealth mentioned earlier). On the interpretation of the Bill under discussion, the claimant could, depending on the application of the listed criteria, obtain orders which would bring him or her back up to (say) Level 6. It will be remembered that the claimant in a previously discussed hypothetical example, who fell from Level 6 to Level 3, got no remedy at all. Thus, that claimant would have been much better off if he or she had suffered more of a loss and was able to bounce up off the safety net. This means that, bizarrely, in some circumstances it would be beneficial for a defendant to make the argument that the claimant had established a resulting trust over certain property belonging to the defendant, thus showing that the claimant remained above the threshold of financial dependence and so should be entitled to no order under

[51] Section 172(2) stipulates that, before granting a property adjustment order, the court should consider whether "it would be practicable for the financial needs of the qualified cohabitant to be met" by an order for maintenance or a pension adjustment order. This seems to suggest that the purpose of the exercise is simply to meet the claimant's financial needs. However, a parallel provision in s.185(6) requires a court to consider, prior to making a pension adjustment order, "whether proper provision, having regard to the circumstances, exists or can be made" by means of an order for maintenance. Since these two provisions are (unsatisfactorily) worded in an inconsistent way, they seem to cancel each other out in terms of the point under discussion.

the redress scheme. The problem identified in this paragraph demonstrates the extent of the anomaly created by a dissonance between the trigger for the remedy (financial dependence) and the criteria for granting a remedy (what is just and equitable by reference to a general list of criteria, with no reference to eliminating financial dependence).

It might be thought that, although the legislation has the arbitrary features which have just been described, it at least represents a step forward in protecting vulnerable cohabitants. This argument ignores the fundamental principle that, in order to be just, a law must treat like cases alike and must only treat similar cases differently to the extent that there are relevant differences. It would be possible to make the redress scheme more logically consistent by rewording the relevant provisions to make it clear that the elimination of financial dependence is intended to represent an upper limit on the extent of the remedy. Such a change would, however, further restrict the extent to which the scheme could be said to address the adverse consequences arising upon the termination of an intimate cohabitation. There is also an important issue related to the wider impact of statutory reform in this area. It must be remembered that the law in relation to cohabitants is often misunderstood by the public, a point illustrated for example by the fact that researchers in the United Kingdom have noted the prevalence of a myth that cohabitants enjoy the same legal rights as married couples after a certain period of cohabitation.[52] As has been pointed out, the danger of this myth is that 'if people think that the law will look after them, then they will not do anything to look after themselves.'[53] If legislation is passed giving property rights to cohabitants against their partners, legislation which is likely to attract considerable media coverage, it would be understandable if members of the public believed that they would be protected if they relied on the relationship rather than seeking to protect their individual property rights. Thus, it may well do more harm than good to pass legislation which purports to offer protection to cohabitants upon the termination of their relationship, but which is actually subject to a limitation which excludes from protection many cohabitants who have suffered very serious loss as a result of the cohabitation or its termination.

It must also be observed that the legislation does not deal adequately with an obvious lacuna in the current legislative regime: the absence of any provision for ancillary relief upon nullity of marriage. It was intended to introduce a regime of protection upon nullity in the Family Law Act 1995 but, due to (misconceived) constitutional concerns, this proposal was dropped—with the promise, never fulfilled, that it would be dealt with in separate legislation. A regime of protection applicable on nullity is clearly necessary to avoid injustice to a person who has acted in the reasonable belief that he or she was married.[54] The scheme in the Bill could potentially provide a substitute source of relief for persons who were in a marriage which has been annulled. However, the Bill does not

[52] See e.g. Barlow, Duncan, James and Park "Just a Piece of Paper? Marriage and Cohabitation" in *British Social Attitudes, 18th Report* (London: Sage, 2001), Ch.2; *The Rights and Duties of Cohabitees* (LRC CP 32 – 2004), p.27.
[53] See Bridge "Myth of the Common Law Marriage", *The Times*, July 30, 2002, quoted in *The Rights and Duties of Cohabitees* (LRC CP 32 – 2004), p.27.
[54] See Shatter, *Family Law*, pp.251–253.

provide a satisfactory legal regime to cover such persons. It is not rational to limit the protection upon nullity to claimants who have been rendered "financially dependent". Nor is it rational to include only those persons who, as well as having been involved in a marriage which has been annulled, also happen to satisfy the definition of "qualified cohabitant". A claimant upon nullity who has not lived with his or her partner for the specified period may still need access to remedies against the other putative spouse. Thus, it cannot be claimed that the proposed regime deals justly with the most deserving cases not currently covered by the matrimonial legislation. It provides an unduly restrictive, and inappropriately focused, regime of protection upon nullity and, if enacted, is unfortunately likely to preclude the enactment, in the foreseeable future, of a more appropriate ancillary relief regime in this category of case.

So, in conclusion, it has been argued that the financial dependency requirement is highly unsatisfactory. However, as the Bill stands it acts a precondition to allowing the claimant to obtain a remedy by reference to a wide set of factors, which are not all that far away from those which apply in the marriage context. Thus, it would not seem workable simply to discard the economic dependency filter and to allow those factors to be determinative on their own. The implication is that it would be necessary to go back to the drawing board, bearing in mind that it would certainly not be desirable to replace the flawed scheme of the Bill with a hastily patched together alternative option. Notwithstanding the conclusion of the current author that the cohabitation scheme in the Bill is not defensible and should be abandoned, it is obviously necessary in the context of the present critique to consider the other aspects of the scheme on their own merits and this is the approach taken in the article.

Maintenance and the Clean Break Principle

The Bill envisages four different types of remedies for qualified cohabitants: property adjustment orders, maintenance orders and pension adjustment orders, as well as orders for provision from the estate of a deceased cohabitant which are not considered in this article. The Bill stipulates that, prior to making a property adjustment order, the court must consider whether it would be possible instead to utilise a maintenance order or a pension adjustment order[55] and, prior to making a pension adjustment order, the court must consider whether it would be possible instead to utilise a maintenance order.[56] The hierarchy of preference which is thus created puts maintenance orders first, then pension adjustment orders, with property adjustment orders coming last. This represents precisely the opposite order which would be dictated by the goal of creating a clean break between the parties.

The idea of a clean break is particularly appropriate in the context of cohabitation because the parties have never made any sort of "life-long" commitment to each other in the shape of marriage or civil partnership. This is reflected in the approach of the New South Wales cohabitation legislation (and that of the separate legislation applicable in each of the other seven Australian states and territories), which creates an explicit "duty to end financial relationships" on the court, requiring it to "make such orders as will

[55] Section 172(2) of the 2009 Bill.
[56] Section 185(6).

finally determine the financial relationships between the parties to a domestic relationship and avoid further proceedings between them".[57] The English Law Commission made the achievement of a clean break "a substantive objective" of its proposed legislative scheme for cohabitants, envisaging only a restricted role for periodical payments (limited to the context of future child care costs).[58] The Irish LRC also showed an awareness of the issue, initially recommending in its Consultation Paper that maintenance orders be limited to five years in duration. Although this limitation was dropped in its Report, the LRC was still thinking in terms of making the defendant take "some responsibility … for the cost of restoring financial independence to the applicant by contributing to the cost of any re-training necessary to enable that person to re-enter the workforce".[59] While the LRC's term "compensatory maintenance" survives in a marginal note, the wording of the Bill itself makes no reference to the idea of compensation.

It is submitted that the logic of ensuring a clean break where possible dictates that, at least, the Bill should drop the hierarchy of preference which was mentioned earlier. It would also seem desirable to impose an explicit requirement on the court to attempt to end financial ties between the parties and to minimise the possibility of future proceedings between them. More radically, it could be argued that the Bill should adopt a limited approach to periodical maintenance, focusing its availability on the possibility of increasing the claimant's earning capacity through retraining or on cases where the claimant has the care of young children.[60] It is also questionable whether a maintenance regime for cohabitants should reflect the marriage/civil partnership model in terms of provision for variation at any time[61] and in terms of the rule that an award of "compensatory maintenance" should cease if the claimant has remarried or entered into a new civil partnership.[62]

Cohabitation Agreements

Section 199(1) provides that:

> "Notwithstanding any enactment or rule of law, cohabitants may enter into a cohabitants' agreement to provide for financial matters during the relationship or when the relationship ends, whether through death or otherwise."

This provision is intended to remove the uncertainty surrounding the enforceability of cohabitation contracts, particularly in light of *Ennis v Butterly*[63] where Kelly J. refused to

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[57] See New South Wales Property Relationships Act 1984, s.19. Note also the very similar terms of the Domestic Relationships Act 1994, s.14 (Australian Capital Territory); Relationships Act 2008, s.44 (Victoria); Domestic Partners Act 1996, s.12 (South Australia); Family Court Act 1997, s.205ZJ (Western Australia); Property Law Act 1974, s.337; (Queensland); Relationships Act 2003, s.39 (Tasmania); De Facto Relationships Act 1991, s.36 (Northern Territories).

[58] *Cohabitation: The Financial Consequences of Relationship Breakdown* (LC 307, 2007), pp.89–92.

[59] *Report on the Rights and Duties of Cohabitants* (LRC 82 – 2006), p.77.

[60] Compare the maintenance provisions in the NSW Property Relationships Act 1984, ss.27–37; s.41.

[61] Section 171(6) of the 2009 Bill.

[62] Section 173(5) and (6).

[63] [1996] 1 I.R. 426. See Mee "Public Policy for the New Millenium?" (1997) 19 DULJ 149. See also *AF v SF* [2007] IEHC 196; *Sutton v Mishcon de Reya* [2004] 1 F.L.R. 837 (English HC).

enforce a cohabitation contract on the basis of public policy. Unfortunately, there was a constitutional element to Kelly J.'s reasoning, so that not all doubt can be removed by a legislative provision such as s.199(1). The provision does remove any non-constitutional objection to enforcement of the relevant form of contract, although (unsatisfactorily) it does so only in respect of agreements between cohabitants who satisfy the specific definition in s.170.

A striking feature of s.199 is the extent of the formalities required for a valid contract. Under s.199(2) a cohabitants' agreement will only be valid if:

> "(a) the cohabitants—
> (i) have each received independent legal advice before entering into it, or
> (ii) have received legal advice together and have waived in writing the right to independent legal advice,
> (b) the agreement is in writing and signed by both cohabitants,
> and
> (c) the general law of contract is complied with."

These formalities are onerous and expensive, with the result that the impact of s.199 could well be that *fewer* cohabitation contracts will be enforceable than before the enactment of the new legislation. As was argued by the LRC,[64] even without any legislative intervention, *Ennis* would probably not prevent the enforcement of a cohabitation agreement which focused on financial matters. Under s.199(2), however, any such agreement that did not meet all the required formalities would be completely ineffective. This will be the case even if the contract is between cohabitants who are not "qualified" cohabitants,[65] i.e. in circumstances where neither party can apply for an order against the other under the Bill.[66] The potential for injustice is obvious in such circumstances. Consider a case where the parties have made an agreement in writing, otherwise contractually enforceable, and have received legal advice together from a neutral lawyer but have neglected to waive in writing their "right" to insist on separate legal advice[67]—this carefully considered, formal agreement will be rendered unenforceable by s.199(2), even though, if the relevant relationship ends before the parties have become qualified cohabitants, the financially weaker party will not be able to obtain any remedy under the Bill either. A central function of formalities in the context of cohabitation legislation is to ensure that cohabitants cannot lightly give up the rights

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[64] *Report on the Rights and Duties of Cohabitants* (LRC 82 – 2006), pp.20 and 39.
[65] See also s.199(5) (agreement can qualify as a "cohabitants' agreement" although made before the start of the cohabitation).
[66] Note also the possibility of a scenario where one qualified cohabitant becomes bankrupt and the other cohabitant wishes to enforce a debt under a cohabitation agreement alongside the other creditors.
[67] Note that, unfortunately, s.199(2)(a) seems to equate "independent" with "separate" in respect of legal advice. Where the cohabitants "have received legal advice together and have waived in writing the right to independent legal advice", it would not appear open to a claimant to object that the "legal advice" was biased towards the other cohabitant, or indeed was not informed or competent. There is no explicit requirement that the advisor on the law should be a lawyer, unlike under New Zealand's Property (Relationships) Act 1976, s.21F and NSW Property (Relationships) Act 1984, s.47, which also include a requirement of certification by the lawyer.

which the legislation gives them against their partner. This concern is not relevant where the legislation does not apply and, in such circumstances, it appears that the normal rules of the law of contract should simply be applied. This is the approach in New South Wales[68] and, along similar lines, the English Law Commission felt that formalities (incidentally, far less strict than those envisaged in the Irish Bill) should apply only to agreements insofar as they amount to an "opt-out" of its proposed legislative scheme.[69]

Even where the parties are qualified cohabitants, there are very many situations where the Bill would provide no remedy, most obviously because neither party has become financially dependent on the other as a result of the relationship. In such circumstances, it does not seem right to refuse to enforce an otherwise contractually binding agreement between the parties (e.g. in respect of the repayment of money expended on improving the property of the other cohabitant) unless extensive formalities are complied with. The formality rules in s.199 of the Bill would make sense in the context of a very comprehensive scheme such as that applicable in New Zealand[70] (which gives qualifying cohabitants equivalent rights to spouses) but are clearly out of place in the context of the relatively modest scheme of the Bill. In the Bill, the aim should be to ensure that the formality requirements only apply to agreements to the extent that they involve opting out of the protection provided by the statutory regime but would not defeat agreements which give a greater level of protection to the weaker party. The solution may be to treat cohabitation contracts as contractually binding in general but as ousting the jurisdiction of the court under the Bill only if they comply with the stipulated formalities (and there are no exceptional circumstances which would mean that this opt-out would cause serious injustice).[71] This would mean that, if an otherwise enforceable contract did not comply with the relevant formality rules, in the context of an application for an order under the Bill, the court would treat the rights created by the contract as part of the existing legal entitlements of the parties. The financial entitlements created by the contract (as with the parties' other property rights) could be adjusted if the normal criteria under the Bill were satisfied but would be left undisturbed to the extent that an order was not warranted upon the application of the relevant criteria.[72]

One should not be overly optimistic about the extent to which cohabitants will anticipate the possibility of the breakdown of their relationship and undertake the complicated and potentially divisive task of working out an agreement to govern their property rights in hypothetical future circumstances. Nonetheless, in the context of a limited scheme such

[68] The NSW Property (Relationships) Act 1984 provides that domestic agreements are "subject to and enforceable in accordance with the law of contract" (s.46) and goes on to provide (s.47(1)) that, if such an agreement complies with all the relevant formalities, the court cannot make a financial adjustment order under the Act "in so far as the order would be inconsistent with the terms of the agreement". Outside of the context of proceedings under the relevant part of the Act, however, the agreement can be enforced between the parties: s.48. This enforceability is not affected by the fact that the agreement may purport to oust the jurisdiction of the court under the relevant part of the Act.

[69] See *Cohabitation: The Financial Consequences of Relationship Breakdown* (LC 307, 2007), p.105.

[70] See Property (Relationships) Act 1976, s.21F.

[71] As envisaged by s.199(4) of the Bill.

[72] Compare NSW Property (Relationships) Act 1984, ss.46–48.

as that proposed in the Bill, there is no justification for unnecessary restrictions on the enforceability of such contracts when they are, in fact, concluded.

Conclusion

This article has analysed aspects of the scheme for cohabitants proposed in the Civil Partnership Bill 2009. A number of problems have been identified. Many of these, although serious as the Bill now stands, can be rectified in a relatively straightforward manner. However, there is no simple solution to the key problem that the scheme in the Bill is subject to a restriction based on "financial dependency". This author's view is that the scheme in the Bill for cohabitants should be scrapped and any relevant reform should be limited at this point to targeted reforms in areas such as succession and taxation.[73] In relation to cohabitation outside marriage/civil partnership, it is important to guard against the naïve assumption that immediate legislation is the appropriate response to any complex social phenomenon. The reality, which is not obvious on first consideration, is that it is extremely difficult to devise an appropriate legislative scheme to deal with the property rights of cohabitants.[74] There would be little problem if, as in a country like New Zealand, informal cohabitation had become so accepted in society that it was thought appropriate to subject qualified cohabitants to the same legislative regime as that which governs spouses. The difficulty arises where, as in Ireland at present, it is felt by legislators that unmarried cohabitation cannot be equated with marriage, so that some more restrictive regime must be devised. It is not at all easy to develop a relatively restrictive scheme without creating arbitrariness and inconsistency and, unfortunately, the scheme proposed in the Bill does not achieve this difficult goal. In the short term, legislative energy should be devoted to getting the civil partnership aspects of the Bill right. Then, prior to attempting to develop a new scheme for cohabitants, it would be highly desirable to commission empirical research on the social phenomenon of cohabitation,[75] rather than attempting to shape a legislative scheme on the basis of guess-work as to the reality of cohabitants' lives. In practical terms, if any form of general legislative scheme for cohabitants is enacted, it is unlikely that the legislature will revisit the area for a considerable time. It is important, therefore, that the legislature should not act until a degree of assurance can be felt that an appropriate reform option has been chosen.

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[73] See further Mee, "Cohabitation, Civil Partnership and the Constitution" in Doyle and Binchy (eds) *Committed Relationships and the Law*, (Dublin: Four Courts Press, 2007), pp.210–214.

[74] Note the exertions of the Law Commission resulting in *Cohabitation: The Financial Consequences of Relationship Breakdown* (LC CP 179, 2006); *Cohabitation: The Financial Consequences of Relationship Breakdown* (LC 307, 2007). See also *Sharing Homes: A Discussion Paper* (Law Com. No. 278). Although informal cohabitation has been widespread for far longer than in Ireland, and is still much more common, there is no immediate prospect of legislation in England and Wales. See the ministerial statement of March 8, 2008, announcing the government's response to the Law Commission's Report, available online at *www.justice.gov.uk/news/announcement060308a.htm*.

[75] Compare Colley Working Group *Options Paper*, pp.45–46.