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Cohabitation, Civil Partnership and the Constitution

By Professor John Mee*

Introduction

This chapter considers the impact of the Constitution on the possible introduction of a civil partnership scheme for unmarried couples in Ireland. The starting point for this reflection is an assessment of the contribution to the debate of two law reform documents published in 2006: the Report on the Family by the Oireachtas All-Party Committee on the Constitution[1] ("the Oireachtas Report") and the Options Paper produced by the Working Group on Domestic Partnership, chaired by Anne Colley[2] ("the Options Paper"). These two documents are, of course, not the only important documents which have been generated by the current law reform process in Ireland. In 2004, the Law Reform Commission (LRC) produced a Consultation Paper on the *Rights and Duties of Cohabitees*.[3] This dealt with the possibility of introducing a "presumptive" scheme which would apply by default to cohabiting couples who satisfied certain qualifying criteria. The LRC, however, did not consider the introduction of a civil partnership scheme which unmarried couples could choose to enter. The LRC's *Report on the Rights and Duties of Cohabitants*[4] was published in December 2006, a few days after the publication of the Options Paper. The LRC Report again concentrated on the idea of a default scheme, on this occasion preferring the term "redress model" rather than "presumptive scheme" to describe the relevant proposal.[5] Since neither of the LRC publications dealt directly with

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* Law Faculty, University College Cork. [Note (December 2011): This chapter was published in W Binchy and O Doyle (eds) *Committed Relationships and the Law* (Dublin: Four Courts Press, 2007). Since its publication, Ireland has enacted the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010. For commentary on the cohabitation aspects of this Act, see J Mee 'Cohabitation Law Reform in Ireland' (2011) 23 Child and Family Law Quarterly 323-343. See also J Mee 'A Critique of the Cohabitation Provisions of the Civil Partnership Bill 2009' (2009) 12 Irish Journal of Family Law 83.]

[1] Tenth Progress Report (Dublin: Stationery Office), published on January 24 2006; full text available at www.constitution.ie/reports/10th-Report-Family.pdf.

[2] Presented to the Minister for Justice, Equality and Law Reform, November 2006; full text available at www.justice.ie/80256E01003A21A5/vWeb/flJUSQ6VYKDA-en/$File/OptionsPaper.pdf.

[3] LRC CP 32-2004 (April 2004). For detailed comment, see Mee "A Critique of the Law Reform Commission's Proposals on the Rights and Duties of Cohabitees" (2004) 29 Irish Jurist (ns) 74. Note also the Consultation Paper subsequently published by the Law Commission of England and Wales *Cohabitation: The Financial Consequences of Relationship Breakdown* (Consultation Paper No 179, May 2006).

[4] LRC 82-2006 (December 2006); full text available at www.lawreform.ie/Cohabitants%20Report%20Dec%201st%202006.pdf. In relation to the difference in terminology in the titles of the Consultation Paper and the Report (i.e. the switch from "Cohabitees" to "Cohabitants"), note the *obiter* comment of Minister Michael McDowell shortly after the publication of the Consultation Paper: "'Cohabitees' does not mean anything to me. … Maybe I am old-fashioned but I just do not like it." See 176 Seanad Debates 777 (5 May 2004).

[5] The phrase "presumptive scheme" is not a felicitous one. The LRC in its Consultation Paper note 30 above, p 3 explained that "[t]he term 'presumptive' is used because once the necessary facts are established the parties are presumed to be cohabiting." This explanation risks circularity, since a central aspect of the "necessary facts" regarded by the LRC as triggering the presumption is that the parties *are* cohabiting, i.e. living together in a marriage-like relationship. The Options Paper note 2 above, which was published just

civil partnership, this chapter does not consider them in depth. However, the work of the LRC is clearly part of the broader picture in relation to possible law reform in this jurisdiction and will be referred to where appropriate throughout the discussion in this chapter.[6]

Part I of the Chapter will consider the contribution made by the Oireachtas Report. A key decision of the Oireachtas Committee was to reject the possibility of a referendum to change the current constitutional provisions in relation to the family (on the grounds that such a referendum would be divisive). Instead, the Committee favoured legislative reform.[7] Unfortunately, the Report failed to engage to any extent with the specifics of possible legislative reform. While the Committee's remit clearly related to the Constitution, rather than to the shape of legislative reform, it was unreal to conduct an analysis of the possible need for constitutional change without considering how the provisions of the Constitution might impact upon possible legislative reform. Having considered the Report, the chapter goes on in Part II to consider the proposals made in the Options Paper in relation to civil partnership.[8] Taking these proposals as useful illustrations of the possibilities, Part III of the Chapter will argue that, as the Constitution currently stands, there are serious constitutional constraints on the available options in terms of a legislative civil partnership scheme. The difficulties are most serious in relation to the creation of civil partnership schemes for heterosexual couples but there are also issues to be considered in relation to same sex couples. In its Conclusion, the Chapter offers some observations on the best way forward in light of the issues considered in the chapter. It will be suggested that the focus should be on the immediate introduction of full civil partnership for same sex couples, with a more measured approach to the possibility of introducing other major reforms in the short term.

Part I: The Report of the Oireachtas Committee

An Overview of the Report

The Oireachtas Report begins with a detailed consideration of "Changes in the demographic and social context of the family".[9] This interesting survey, contained in Chapter 1, takes up more than a quarter of the body of the report.[10] Chapter 2 then

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before the LRC Report, continues to refer to the option of a "presumptive scheme" and, notwithstanding the author's reservations about the term, it will be simplest to follow this usage in this chapter. See also text following footnote note 33 below.

[6] Note also two other relevant reports published in 2006: Walsh and Ryan *The Rights of De Facto Couples* (Irish Human Rights Commission, March 2006), available at www.ihrc.ie/_fileupload/banners/DeFactocouples.pdf; Irish Council for Civil Liberties *Equality for All Families* (April 2006), available at http://iccl.ie/DB_Data/publications/EqualityForAllFamilies1.pdf.

[7] The Report did recommend constitutional changes not directly relevant to the subject matter of this article. See note 1 above, p 124 (the rights of children should be enshrined in Article 41) and *ibid*, p 127 (Article 41.2 in relation to the role of woman in the home should be modified to provide gender-neutral recognition of the role of parents).

[8] Given its topicality, some consideration is also given to other aspects of the Options Paper, notwithstanding this chapter's primary focus on the civil partnership issue.

[9] Note 1 above, pp 19-53.

[10] Excluding the extensive appendices (consisting primarily of the text of submissions to the Committee).

considers the definition of the family in the Constitution.[11] As is well known, the courts have interpreted the provisions of Article 41 of the Constitution as providing protection only for the family founded on marriage.[12] The pre-eminence of marriage in the constitutional scheme is underscored by Article 41.3.1 which states that "[t]he State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack." The Committee's general consideration of the definition of the family is followed by individual chapters on six major areas of concern which were seen to arise from the submissions made to the Committee: cohabiting heterosexual couples; same sex couples; children; the natural or birth father; lone parents; and the status of the "woman in the home".[13] All of these chapters (including Chapter 2 on the definition of the family) consist to a large extent of the presentation in sequence of extracts from the conflicting submissions made to the Committee, with no real analysis being provided by the Committee.

In Chapter 3, which deals with cohabiting heterosexual couples, the Committee concludes that, while an extension of constitutional protection to cohabiting heterosexual couples would be welcomed by "both the families themselves and the agencies that deal with them", it is "clear that legislation could extend to such families the broad range of marriage-like privileges without any need to amend the Constitution."[14] Chapter 4 concludes in similar terms in respect of same sex couples.[15] Unfortunately, however, the relevant chapters of the Report offer no reasoning to justify these conclusions. In its concluding chapter, the Report states that the Committee was faced with a "strategic decision" as to "whether or not to seek a change in the definition of family life so as to extend constitutional protection to all forms of family life".[16] The Committee acknowledges that, while the "installation of the traditional family based on marriage in the Constitution suited the demography and ethos of the day",[17] there has been considerable change in demography and ethos since then. Nonetheless, the Committee saw no consensus in favour of constitutional change in respect of the definition of the family. Instead, there was a sharp division of opinion in the submissions received. The Constitution Review Group in 1996 had proposed a "comprehensive reworking of Article 41 which would provide constitutional protection for all forms of family life while preserving the special character of the family based on marriage."[18] However, this kind of proposal "encounters the strong belief of many people that it is not practicable to provide constitutional recognition for all family types while at the same time maintaining the uniqueness of one."[19]

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[11] See generally Hogan and Whyte *JM Kelly: The Irish Constitution* (4th ed) (Dublin: Butterworths, 2003), p 1825ff.
[12] *The State (Nicholau) v An Bord Uchtala* [1966] IR 567.
[13] It is beyond the scope of this chapter (which is concerned with cohabiting heterosexual and same sex couples) to comment on the Report's treatment of the last four of these topics.
[14] Note 1 above, p 76.
[15] *Ibid*, p 87.
[16] *Ibid*, p 121.
[17] *Ibid.*
[18] *Ibid*.
[19] *Ibid*, pp 121-122. A minority of the Committee concluded that constitutional change was necessary in relation to the definition of the family and proposed (pp 128-129) an addendum to Article 41, expressing the state's recognition of and respect for family life not based on marriage. The proposed amendment

The committee pointed out that "Irish experience of constitutional amendments shows that they may be extremely divisive and that however well-intentioned they may be they can have unexpected outcomes."[20] This led to the conclusion that:

> [A]n amendment to extend the definition of the family would cause deep and long-lasting division in our society and would not necessarily be passed by a majority. Instead of inviting such anguish and uncertainty, the committee proposes to seek through a number of other constitutional changes and legislative proposals to deal in an optimal way with the problems presented to it in the submissions.[21]

The committee recognised that the result of its approach would be that cohabiting heterosexual couples would not be given any constitutional protection for their family life. Instead, the problems faced by such couples would have to be addressed at a legislative level. The committee recommended "legislation to provide for cohabiting heterosexual couples by either a civil partnership scheme or a presumptive scheme such as the Law Reform Commission suggests".[22] Under the LRC's proposed scheme, a range of rights and duties would automatically apply to "persons who, although they are not married to one another, live together in a 'marriage like' relationship for a continuous period of three years or where there is a child of the relationship for two years."[23]

In relation to same sex couples, the Committee also took the view that reform should proceed at legislative level. The Report states that "[s]ince a presumptive scheme would not be appropriate, this provision might be made by way of civil partnership legislation".[24] The following conclusion is then stated:

> "The committee recommends that civil partnership legislation should be provided for same sex couples.
>
> The committee would recommend similar legislation to meet the needs of other long term cohabiting couples."[25]

Assessing the Specific Recommendations in the Report

(i) In Relation to Heterosexual Couples

Although this is remarkable in a Report of such importance, it is difficult at the most basic level to make sense of the Committee's recommendations in relation to

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would also have stated that the Oireachtas was entitled to legislate for the benefit of such families and their individual members.

[20] *Ibid*, p 122.

[21] *Ibid*.

[22] *Ibid*.

[23] LRC Consultation Paper note 3 above, p 1. The LRC subsequently favoured a more flexible approach in its Report note 4 above, pp 34-35, whereby cohabitants who did not meet the specified thresholds would be permitted to apply "where serious injustice would result if no right of application were granted".

[24] Note 1 above, p 123.

[25] *Ibid*.

heterosexual couples. As has been mentioned, the recommendation in respect of heterosexual couples was for *either* civil partnership legislation *or* a presumptive scheme.[26] On the next page of the report, in relation to same sex couples, the recommendation is for civil partnership.[27] However, it is then stated that "[t]he committee would recommend similar legislation to meet the needs of other long term cohabiting couples".[28] This seems to amount to a definitive recommendation of civil partnership legislation for heterosexual couples, since such couples appear to be the only "other long term cohabiting couples" besides same sex couples. However, this interpretation would involve the Committee having changed its mind decisively between page 122 and page 123 of its Report and having overruled the earlier recommendation in its section on heterosexual couples in a subsequent section dealing with same sex couples. One could seek to explain away the inconvenient recommendation of civil partnership for those in "other long-term cohabiting couples" as referring to those in non-sexual relationships and therefore as having no bearing on heterosexual couples, although this seems rather implausible in light of the use of the word "couples". Whether one adopts this approach, or simply regards the inclusion of the relevant recommendation as some form of oversight, the most persuasive interpretation appears to be that the Committee wished to recommend legislative intervention in relation to heterosexual couples, with no indication as to whether this should take the form of a civil partnership scheme or a presumptive scheme and with no guidance as to which of the many possible variations on these two themes would be the best option.

(ii) In Relation to Same Sex Couples

As has been mentioned, the recommendation in relation to same sex couples was in favour of the introduction of a civil partnership scheme. This recommendation differs from that in relation to heterosexual couples in that the alternative of a presumptive scheme is not contemplated. The Report simply states, with no justification or explanation, that "a presumptive scheme would not appropriate" for same sex couples.[29] By way of contrast, the LRC in its Consultation Paper on *Rights and Duties of Cohabitees*[30] had no reservations about recommending the inclusion of same sex couples within its proposed presumptive scheme[31] (and this approach was maintained in the subsequent LRC Report on *Rights and Duties of Cohabitants*[32] and also in the Colley Options Paper[33]). Judging from media coverage in the wake of the publication of the Report, the Oireachtas Committee's conclusion may have been based on the view that it would be inappropriate to presume from the fact that two men or two women had been living together for a certain period that they were involved in a sexual relationship. If this

[26] *Ibid*, p 122.
[27] *Ibid*, p 123.
[28] *Ibid*.
[29] *Ibid*.
[30] LRC CP 32-2004 (April 2004).
[31] See the discussion *ibid*, pp 11-14 and the conclusion at p 18 (inclusion of same sex couples within the scheme "does not violate the Constitution and complies with the EHCR [European Convention on Human Rights]").
[32] LRC 82-2006 (December 2006).
[33] Note 2 above.

was the reasoning, then the Committee was labouring under a fundamental misunderstanding. In the context of a "presumptive" scheme, there is no question of presuming a sexual relationship from the mere fact of sharing a home; the LRC's presumptive scheme would only be triggered if the parties were living together in a 'marriage-like' relationship,[34] so that the existence of a sexual relationship, generally being a feature of a marriage, would be one of the facts triggering the presumption rather than being something presumed from other facts.[35]

Conclusion on the Report

On the basis of the preceding discussion, it can be concluded that little of real substance is to be found in the Report in relation to possible legislative reform. The concern of the majority of the Oireachtas Committee was to avoid "the anguish and uncertainty" associated with a referendum to change the constitutional definition of the family. The idea of legislative reform appears to have been seized upon as a justification for avoiding a referendum on this point. One might be forgiven for suspecting that some of the "anguish and uncertainty" mentioned by the Committee might be suffered by politicians who could find it hard to predict the possible electoral damage caused by a particular stance on the difficult issues involved. It is arguable that the "uncertainty" associated with a referendum would, assuming that the amending provision was carefully drafted, largely be removed once the result was known. If, however, one were to proceed to introduce legislative reform without modifying the current constitutional provisions, a constitutional challenge could, in principle, arise at any time in the future. If a piece of legislation conferring rights on cohabiting couples were to be introduced and subsequently was struck down as unconstitutional, thus triggering the need for a referendum, it seems likely that passions on both sides would be more inflamed than if the issues were tested in a referendum which had been deliberately planned and did not stem from an intervention of the courts. Thus, if the Constitution actually does present a potential obstacle to legislative reform, it would promote certainty to tackle that obstacle before enacting legislation.

A central question is therefore whether the Constitution is likely to present difficulties for any of the main legislative options. The Report itself is not exactly coherent on this question. At the end of Chapter 3, the Committee concluded that "it is clear that legislation could extend to [cohabiting heterosexual couples] the broad range of marriage-like privileges without any need to amend the Constitution."[36] A similarly definitive conclusion is reached at the end of Chapter 4 in relation to same sex couples.[37] However, by the concluding chapter of the Report, the Committee was taking a more cautious tack:

> The preponderance of the Article 41 case law would seem to suggest (although this is admittedly far from certain) that the Oireachtas may legislate to provide

[34] Note that the LRC in its Report note 32 above, pp 26-27 replaced "marriage-like relationship" with "intimate relationship" in its definition of cohabitants.
[35] See also note 5 above, noting the difficulties with the term "presumptive scheme".
[36] Note 1 above, p 76.
[37] *Ibid*, p 87.

> 'marriage-like' privileges to cohabiting heterosexual couples provided they do not exceed in any respect those of the family based on marriage.[38]

Thus, what was previously "clear" has now become "far from certain". One is surely entitled to ask which it is. If the constitutional position is indeed "far from certain", then why does the Committee feel entitled to suggest legislation which might come unstuck at some unpredictable point in the future?

It must be concluded that the Report adopted an approach which was intellectually untenable, even if perhaps politically expedient. It rejected the option of a referendum to change the definition of the family without undertaking any proper inquiry into whether or not the relevant constitutional provisions would cause difficulties for plausible reform options.

The next Part of this chapter will turn to a consideration of the Options Paper which, amongst other things, discussed a number of variants of civil partnership. This will prepare the ground for a subsequent analysis of how the current provisions of the Constitution might impact on possible civil partnership legislation.[39]

Part II: The Options Paper

General Observations

In December 2005, the Minister for Justice, Equality and Law Reform, Micheal McDowell, announced his plan to establish a Working Group on Domestic Partnership, although its composition was not announced until April 2006. The Working Group was chaired by Anne Colley, a solicitor, outgoing Chairperson of the Legal Aid Board and former Progressive Democrats TD. The Working Group describes its composition as "diverse"[40] but this appears to mean primarily that its members were drawn from a variety of different government departments and agencies. Besides the Chair, eight of the

[38] *Ibid*, p 122. See also *ibid*, p 123 in relation to same sex couples.

[39] Important constitutional issues also arise in relation to the LRC's proposal for what was termed in its Consultation Paper a "presumptive scheme" and is now referred to in its Report as the "redress model". Notably, the LRC took the view in its Consultation Paper note 3 above, pp 9-11 that the Constitution would require the exclusion from its proposed presumptive scheme of couples where one or both parties was legally married to a third party. The current author argued in "A Critique of the Law Reform Commission's Proposals on the Rights and Duties of Cohabitees" (2004) 29 Irish Jurist (ns) 74, 83-89 that such a restriction would fatally weaken the proposed scheme and is not, in fact, demanded by the Constitution. This point was taken on board by the LRC in its final Report note 4 above, pp 32-34, which drops the restriction in question (although the Options Paper note 2 above, pp 12-13, apparently written without the benefit of the LRC's new analysis, supported the position taken in the LRC Consultation Paper). It is not proposed to revisit this issue in detail in this chapter. It should be mentioned though that, from a constitutional point of view, an important feature of the "redress model" is that it does not attempt to create a new status in the law for qualified cohabitants (as stressed in the LRC Report note 4 above, p 33) nor does it provide the parties with an alternative means, beside marriage, of making a public commitment to each other. Therefore, any constitutional objections to the 'redress model' on the basis that it competes with marriage are likely to be considerably weaker than those against the creation of (heterosexual) civil partnership, which objections are set out later in this chapter.

[40] Options Paper, p 2.

eleven other members of the Working Group[41] were civil servants, with two drawn from the Department of Justice, Equality and Law Reform and one from each of the Department of Finance, the Department of Health and Children, the Department of Social Welfare, the Attorney General's Office, the Equality Authority and the General Register Office. In addition, there was one representative from the Gay and Lesbian Equality Network and one from the Family Lawyers Association, as well as an economist. The terms of reference of the Working Group were as follows:[42]

> "The Group is charged with preparing an Options Paper on Domestic Partnership for presentation to the Minister for Justice, Equality and Law Reform by 20 October 2006, within the following terms of reference:
>
> 1. to consider the categories of partnerships and relationships outside of marriage to which legal effect and recognition might be accorded, consistent with Constitutional provisions, and
>
> 2. to identify options as to how and to what extent legal recognition could be given to those alternative forms of partnership, including partnerships entered into outside the State.
>
> The Group is to take into account models in place in other countries."

The creation of the Working Group meant that, somewhat confusingly, two different official bodies were considering the question of law reform in relation to cohabitants. The LRC had published its Consultation Paper in April 2004[43] and, at the time of the establishment of the Working Group, was still working on its final report. However, the LRC had declined to consider the question of civil partnership in its Consultation Paper, concentrating instead on the possibility of a presumptive scheme which would afford rights across a wide range of legal areas. The LRC felt that "the question of registration [of civil partnerships] involves major policy considerations, a detailed discussion of which would require a Paper of its own."[44] The current author has previously been critical of this stance on the part of the LRC, since (particularly from the perspective of same sex couples) it is not possible to assess the merits of a proposal for a presumptive scheme/redress model unless one knows if this scheme is to operate instead of, or alongside, a registration scheme.[45] The most practical approach probably would have been to begin with a consultation paper dealing with constitutional and policy issues surrounding both types of scheme and then, following consideration of the responses to the initial consultation, move on in later papers to address more specific issues. Even

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[41] See Options Paper, p 61 for a list of the members.
[42] Options Paper note 2 above, p 2.
[43] Note 3 above.
[44] *Ibid*, p 4. This view limited the extent to which the LRC found it necessary to consider the impact of the Constitution on possible reform in this area. See the discussion *ibid*, pp 7-12. The LRC, *ibid*, p. 7, also saw no need to consider the proposals by the Constitution Review Group in 1996 for changes to the relevant constitutional provisions (see *Report of the Constitution Review Group* (Dublin: Government Publications, 1996)).
[45] See Mee note 39 above, 78-79.

though this approach was not taken initially, it would still have been possible to charge the LRC with a consideration of the civil partnership issue. However, the new Working Group was given this task instead. Moreover, the Working Group also addressed, in the "limited time available to complete its task",[46] the presumptive scheme option. One consequence of this overlap in subject matter was that, within a week of each other, the LRC and the Working Group published documents containing divergent recommendations on the latter option. Unfortunately, since both documents were published at essentially the same time, one had the worst of both worlds from the point of view of clarity, with neither body having the opportunity to address and comment on the final proposals of the other.

Another interesting question concerning the Options Paper relates to the extent to which it is actually an "options" paper. At the outset of the Options Paper, it is confirmed that the Working Group "was not mandated to make recommendations".[47] However, the difficulty for the Working Group was that the task of simply identifying possible law reform options would not have been a particularly difficult one. Anyone who has studied the area reasonably closely could immediately have produced a list of the main options: same sex marriage; civil partnership resembling marriage; more limited civil partnership; a presumptive scheme. Of course, this list would only be a starting point, since there could be an infinite number of versions of "limited" civil partnership and of a presumptive scheme.[48] Thus, the task of identifying options is not an easy one – depending on how you look at it, it is arguably either too trivial to be worthwhile or too open-ended to achieve.

One possible solution for the Working Group might have been to focus on the aspect of the terms of reference which referred to identifying options "consistent with Constitutional provisions". Attention could have been given to looking at the range of possible reform options and eliminating those which were not available because they clashed with the current constitutional framework. However, insofar as an outside observer can judge, it does not appear that any of the members of the Working Group was chosen on the basis of specialist knowledge of constitutional law. Certainly, the Options Paper does not set itself up as offering definitive guidance on the impact of the Constitution. It is stated at the outset that "the Options Paper should not be assumed to indicate any definitive legal or constitutional position, nor did the Group seek specific legal advice on this aspect of its work."[49] The Options Paper does offer a brief general discussion of the impact of Article 41 of the Constitution, running to a page and a half,[50] and does briefly discuss constitutional issues surrounding aspects of the proposals it advances. However, it can by no means be said that the main focus of the Options Paper is to offer a constitutional analysis of the major reform options.

In the end, the Working Group appears to have dealt with the problematic nature of being asked to identify options rather than to make recommendations by effectively ignoring this limitation. The Options Paper, in fact, sets out very specific

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[46] Options Paper note 2 above, p 2.
[47] *Ibid*, p 3.
[48] And it would be necessary to consider non-conjugal relationships also.
[49] Options Paper, p 2.
[50] *Ibid*, pp 23-24. Note that the Working Group stated it was confining its consideration to Art 41 on the family. Compare text to notes 137-139 below, discussing the right to marry under Art 40.3.1 and its possible impact on a civil partnership scheme.

recommendations for reform – the primary sense in which "options" are identified is that the one recommended approach involves combining a number of different types of reform (as many competing reform strategies also would).[51] Despite the inherent difficulty in its task, it does seem that it would have been possible for the Working Group to have identified a number of plausible reform strategies for consideration and to discuss the strong and weak points of each alternative package, even though, in the nature of things, not of all of these reform packages would have represented the preferred option of the Working Group itself. This approach would seem to come closest to fulfilling the mission of the Working Group, which the Group itself described as being "to produce feasible options for the Minister to assist him in developing proposals for legislative reform."[52] Instead, the Options Paper puts together one possible reform approach and presents it for consideration – an option rather than options. This is not to say that its discussion does not cast light on the constituent parts of possible alternative reform strategies or that the Working Group advances final positions on every issue; the fact remains, however, that the Options Paper does not attempt to assemble the various pieces of the reform jigsaw in more than one way.

This chapter does not purport to offer an in-depth consideration of all the recommendations put forward in the Options Paper. It will be useful, however, to sketch out the preferred approach of the Working Group and to comment briefly on it, before turning in the next Part to the main focus of the chapter: a consideration of the impact of the Constitution on possible civil partnership schemes.

The Proposals in the Options Paper

(i) A Presumptive Scheme for Both Same Sex and Opposite Sex Couples

The Working Group favoured the introduction of a "presumptive" scheme which "followed generally, but not entirely"[53] the model advanced by the LRC in its Consultation Paper.[54] According to the Working Group, "[t]he presumptive scheme is designed to protect the vulnerable dependant partner in a relationship in the absence of any formal recognition of that relationship."[55] It would apply upon the termination of the relationship, including upon the death of either of the partners. The Working Group felt that the presumptive scheme should be triggered after three years of cohabitation. Where there is a child of a cohabiting relationship, the presumptive scheme would take effect immediately on the birth of a child.[56] The Working Group proposed that there should be a widespread information campaign to inform couples of the new law and the need to opt out of the scheme if they wished to avoid being governed by it. Couples would also be

[51] See *ibid*, p 34, where it is stated that the Working Group believes that "a combination of a number of options is required to address the range of issues of concern".
[52] *Ibid*, p 3.
[53] *Ibid*, p 37.
[54] Note 3 above.
[55] Options Paper, pp 37-38.
[56] The Working Group stated (*ibid*, p 38) that it was departing from the LRC's approach in its Consultation Paper of requiring two years of cohabitation where there is a child of the relationship.

free to regulate their property and financial affairs by means of a contractual agreement.[57] In keeping with the overall tenor of the Options Paper, it would appear that the presumptive scheme was intended to apply to same sex couples as much as to opposite sex couples. This, however, is stated rather obliquely in the Options Paper. The Working Group describes itself as "proposing" the scheme in the chapter on opposite sex partnerships.[58] By way of contrast, in the chapter on same sex couples it is simply stated that "the arguments for and against … [the option of] the presumptive scheme as outlined in chapter 6, for opposite sex couples, are equally valid for same sex couples."[59] From this, one must presumably take it that the Working Group is proposing the scheme as much for same sex couples as for opposite sex couples.

The Options Paper sets out specific rights and duties which would attach to the proposed presumptive scheme. The following are the main points:

(a) Property Rights: Significantly, unlike the LRC's proposals, the Working Group's scheme would not allow claimants to seek a property adjustment order. The Working Group recommended, however, that "[q]ualified cohabitants should be entitled to apply to court for the right to reside in the couple's home, to the exclusion of the other partner, in exceptional circumstances".[60] Unfortunately, the Options Paper provides no further explanation or discussion of this suggestion, which does not feature in the LRC's proposals. There may in fact be a valid case for conferring certain occupancy rights on non-owning cohabitants[61] along the lines of the jurisdiction in section 36 of the English Family Law Act 1996.[62] The English legislation limits the duration of occupation orders in favour of non-owning cohabitants to a maximum of six months, with a possible renewal for one further period of up to six months.[63] Given that the Working Group's presumptive scheme does not include any provision for other forms of property adjustment order, it would seem logical to follow this aspect of the English approach (because a long-term order excluding an owner from his or her property would effectively amount to a form of property adjustment). The Working Group makes no comment on this issue nor does it propose any criteria which would guide the court's discretion in making the relevant type of order, other than using the phrase "in exceptional circumstances" (which is vague almost to the point of being meaningless). There is also no discussion of the relationship between the proposed jurisdiction and rights which might be acquired by third parties. Since it is not intended that the Family Home Protection Act 1976 would apply to those covered by the presumptive scheme, it would be possible in some cases for the defendant partner to take action prior to terminating the relationship which would render this intended safeguard nugatory (e.g. by

[57] See the discussion in the Options Paper, pp 36-37.
[58] *Ibid*, p 37.
[59] *Ibid*, p 49.
[60] *Ibid*, p 38.
[61] As mentioned in Mee note 39 above, 93.
[62] Note also the jurisdiction under Schedule 1 to the (English) Children Act 1989. Orders under this legislation can potentially allow a non-owning cohabitant to reside in the family home until the children reach the age of majority. For discussion of the difficulties with this jurisdiction as it currently stands, see Law Commission *Cohabitation: The Financial Consequences of Relationship Breakdown* (Consultation Paper No 179, May 2006) pp 81-84.
[63] Family Law Act 1996, s 36(10).

selling or leasing the property to a third party). Overall, the fact that the relevant recommendation from the Working Group is expressed in a single sentence seriously detracts from its credibility.[64]

(b) Succession Rights

Like the LRC, the Working Group favoured the creation of a discretionary jurisdiction, resembling that which currently exists for children under s 117 of the Succession Act 1965, which would allow a qualified cohabitant to apply to court on the basis that proper provision had not been made for him or her in the deceased cohabitant's will or upon intestacy.[65]

(c) Maintenance

The Court would have "a discretionary power to award compensatory maintenance to one of the partners in exceptional circumstances where it considers it just and equitable to do so."[66] In addition, where there is no ongoing maintenance for a custodial parent, the court would have to take account of the child-rearing costs incurred by the custodial parent when making a maintenance order under the Family Law (Maintenance of Spouses and Children) Act 1976.[67] This aspect of the Working Group's proposal follows the approach of the LRC in its Consultation Paper.[68] However, the LRC's position evolved following the consultation process and, in its Final Report, it presents a rather different proposal to the one followed by the Working Group.[69]

(d) Social Welfare

No change in this area was proposed as part of the presumptive scheme.[70]

(e) Pensions

The Working Group stated that it agreed with the LRC that pension adjustment orders should not be available upon the termination of a qualified cohabitation.[71] The Working

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[64] For some discussion of the relevant issues, see LRC Report note 4 above, pp 71-73 (concluding against the creation of this type of jurisdiction). See also Law Commission note 62 above, pp 56-58.

[65] Options Paper, p 38. It was also proposed (*ibid*, p 39) that Order 79 of the Rules of the Superior Courts be amended to place qualified cohabitants above siblings in the list of persons entitled to extract a grant of administration.

[66] *Ibid*, p 39.

[67] *Ibid*.

[68] Note 3 above, Chapter 5.

[69] See LRC Report note 4 above, pp 77-78; 79-81. The LRC's final proposal discards the unsatisfactory concept of "exceptional circumstances" and instead requires a claimant to establish "economic dependence" as a precondition of an application for any of the various forms of ancillary relief, including maintenance. If the claimant has established economic dependence, then the claim for ancillary relief would be considered on the basis of a list of criteria which has some resemblance to those which apply in matrimonial property litigation. The LRC (*ibid*, p 78) adhered to another aspect of its provisional proposals, i.e. the idea of taking account of child-rearing costs incurred by the custodial parent when making an order under the Family Law (Maintenance of Spouses and Children) Act 1976.

[70] Although, presumably, the intention was that the law would be changed so as to apply the so-called "cohabitation rule" (which can defeat claims to certain classes of benefit) to same sex as well as opposite sex cohabitation (as was recommended by the LRC in its Report note 4 above, p 49). See Options Paper, p 49, referring to the need to ensure equal treatment under existing legislation affecting cohabitants.

[71] Options Paper, p 39.

Group was not aware, it would seem, that the LRC was about to change its mind on this point in its final Report.[72] However, in any case, the Working Group had already decided not to permit applications for property adjustment orders and it would make no sense to allow applications for pension splitting orders if other forms of property adjustment order were not available.[73]

(f) Taxation

Unlike the LRC, the Working Group proposed no change to the treatment of qualified cohabitants for the purposes of capital acquisitions tax or stamp duty. Although no specific justification is offered for this stance, it appears that significance may attach to a later comment that "a higher level of evidential proof is considered necessary to properly administer some of the provisions excluded from this proposal, but which are included in the Law Reform Commission scheme."[74] No further elaboration of this argument is provided. This is most unfortunate, since a bald appeal to the exigencies of "proper administration" is necessarily unconvincing. If it really would be administratively impractical to provide to unregistered cohabitants the tax reliefs proposed by the LRC, why was it not possible for the Working Group to offer even a brief explanation of the nature of the relevant difficulties?

(g) Other Matters

The Working Group also addressed some other matters, such as those relating to health, adoption (not favouring making qualified cohabitants eligible to adopt jointly), immigration and the law of evidence.[75]

(ii) Limited Civil Partnership for Both Same Sex and Opposite Sex Couples

The Working Group envisaged also the introduction of a "limited" civil registration scheme "which extends a certain status and a limited selection of the rights and duties of marriage to cohabiting couples who choose to register their partnership."[76] This would contrast with a "full" civil partnership scheme which, as will be seen, would be available to same sex couples and would carry the same consequences as marriage. The parties to a limited civil partnership would have to be 18 years of age or older and not be married or in an existing registered partnership. In terms of dissolution, the Working Group proposed that "an immediate dissolution of the relationship would take place if both

[72] See LRC Report note 4 above, pp 78-79.
[73] The Working Group also suggested "[t]he amendment of public service spouses and children schemes to allow for the payment of a survivor's pension to a financially dependent partner in circumstances where there is no legal spouse and where a person nominates a cohabiting partner as a beneficiary." See Options Paper, p 39. See also, making the same recommendation, LRC Consultation Paper note 3 above, pp 131-132; LRC Report note 4 above, p 84.
[74] Options Paper, p 40.
[75] *Ibid*, pp 39-40.
[76] *Ibid*, p 41.

parties agree".[77] If the parties did not agree, then the dissolution would take effect three months after one party gave notice to the other party and registered such notice.[78]

The limited civil partnership scheme would carry all the rights and duties triggered by the presumptive scheme, as well as a limited number of other consequences. Limited civil partners would be entitled to apply to court (within one year of the dissolution of the partnership) for a property adjustment order, which would only be granted in "exceptional circumstances". The criteria to be applied would resemble those outlined in the LRC's Consultation Paper and would focus on the (broadly defined) contributions of the parties. In fact, after considering the responses to its Consultation Paper, the LRC has since abandoned its original proposal in favour of a rather different set of criteria[79] but, once more, the Working Group does not appear to have been aware of this when publishing its paper. A further incident of limited civil partnership would be that the Family Home Protection Act 1976 would apply to the family home of registered partners. Also, limited civil partners would receive the same treatment as spouses under domestic violence legislation.

A final aspect of the Working Group's limited civil partnership was that it would confer certain taxation benefits. Civil partners would be placed in Group Threshold 1 for capital acquisitions tax and would be given the same relief as "related persons" (i.e. 50%) for stamp duty purposes. These are the same proposals which the LRC made as part of its presumptive scheme (which it later rechristened the "redress model").[80] Since the creation of limited civil partnership would depend on a decision to register, rather than on a history of factual cohabitation, it might be tempting for parties to a transaction to register a limited civil partnership in order to save stamp duty, given that such a civil partnership can be dissolved immediately if the partners agree (and contractual arrangements about financial matters are also permissible). To get over this problem, the Options Paper states without further explanation that the taxation reliefs under the scheme should be "subject to anti-avoidance and appropriate claw-back provisions."[81] In relation to "appropriate claw-back provisions", it could conceivably be provided that, if the parties terminated their relationship within a specified period of taking advantage of one of the tax concessions, then some or all of the benefit would have to be repaid. This could mean, unfortunately, an unforeseen financial loss for one or both parties to a genuine intimate relationship which happens to collapse relatively soon after a relevant transaction.[82] Conversely, two non-intimate friends could save money by registering a limited civil partnership and, if it unexpectedly happened that either of them wished to enter a genuine marriage or civil partnership within the claw-back period, they could immediately dissolve their bogus civil partnership and repay some or all of their gain – essentially a no-lose proposition. This suggests that anti-avoidance provisions would also be necessary but what would such provisions look like in this context? Would it be

[77] *Ibid*, p 44.
[78] *Ibid*.
[79] In its Report note 4 above, pp 80-81, the LRC favoured a requirement that the applicant show "economic dependency". If this threshold was met, then a long (matrimonial property style) list of criteria would be considered by the court, which would make an order where it considers it just and equitable to do so.
[80] LRC Consultation Paper note 3 above, pp 143-151; LRC Report note 4 above, pp 45-46.
[81] Options Paper, p 43.
[82] There could also be difficulties if the parties wished to implement a property settlement upon the dissolution of their civil partnership. See text to notes 95-97 below.

stipulated that one could not register a civil partnership with a person one did not love? The point is a serious one, since it would not be desirable to make it a pre-condition of civil partnership that the parties were actually cohabiting; given that the presumptive scheme proposed by the Working Group so closely resembles the limited civil partnership scheme, one of limited classes of couples who might be tempted to register under the latter scheme would be those in a genuine relationship who, for whatever reason, were not able to live together and would not qualify under the presumptive scheme. It is submitted that any anti-avoidance provisions would be likely to be complex to administer and potentially intrusive in their operation.

(iii) Full Civil Partnership for Same Sex Couples

The Working Group favoured the option of "full" civil partnership for same sex couples, regarding the introduction of marriage for such couples as being vulnerable to constitutional challenge.[83] Full civil partnership would extend "the full range of rights and duties of marriage to same sex couples who choose to register their partnership."[84] The Working Group went on to explain that:

> "The parties [to a full civil partnership] must not be married or in an existing registered partnership and must not come within the prohibited degrees of relationship. Full civil partnership must be an exclusive union between two people aged 18 years or more. The notification and other formalities before registration are the same as those for civil marriage. The partnership must be formally registered in the same way as civil marriage. All the legal provisions available on the breakdown of marriage apply to the breakdown of full civil partnership. Full civil partnership can only end on death or dissolution by a court and dissolution is subject to the same requirements as divorce."[85]

Essentially, then, the Working Group envisaged that "[f]ull civil partnership would put same-sex couples on an equal footing with opposite-sex married partners, with the notable exceptions of not ascribing a marital identity and not offering the protection the Constitution affords to marriage and family life."[86]

(iv) A Study of Cohabitation/Relevant Legislation

In the context of its consideration of the position of opposite sex cohabiting couples, the Working Group recommended that a comprehensive study of cohabitation in Ireland be conducted with a view to informing a review of relevant legislation to see what reforms

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[83] Compare *Zappone and Gilligan v Revenue Commissioners*, unreported, High Court, 14 December 2006, where Dunne J refused to uphold a claim for the recognition of a Canadian same sex marriage for taxation purposes in Ireland.
[84] *Ibid*, p 51.
[85] *Ibid*. The Working Group stated *ibid* that "[w]hile there is no constitutional impediment to a less onerous dissolution regime than divorce for full civil partnerships, the Working Group is of the view that the two institutions, i.e. marriage and full civil partnership which are equivalent in terms of the consequent rights and duties, should be subject to the same dissolution requirements."
[86] *Ibid*.

would be desirable.[87] It was argued that this review should be undertaken in tandem with the other reforms suggested in the Options Paper rather than constituting an alternative to them.[88]

(v) Non-Conjugal Couples

Due to the low level of submissions in relation to non-conjugal relationships, and the absence of existing research, the Working Group found it difficult to assess the options for reform in respect of such relationships. The Working Group suggested that the comprehensive study of cohabitation in Ireland which it had previously recommended should "include non-conjugal domestic relationships in all their diverse forms."[89] Such a study would inform a review of legislation with a view to possible reform.[90]

(vi) Comment on the Working Group's Proposed Schemes

Overall, the approach of the Options Paper is considerably more conservative than that of the LRC, as is demonstrated e.g. by the fact that property adjustment orders and taxation benefits would be available under the LRC's presumptive scheme but, under the Working Group's approach, would be available only if the couple had registered a limited civil partnership. The Options Paper favours a more modest version of the presumptive scheme. This was in part because of the previously mentioned (unelaborated) concern as to the administrative workability of certain aspects of the scheme proposed by the LRC. Another reason, however, was that, unlike the LRC, the Working Group wished to link its presumptive scheme with a limited civil partnership scheme. An aim of the limited civil partnership scheme was to allow couples "to make a public commitment, which includes signing up to a limited range of rights and responsibilities that go beyond the provisions of the presumptive scheme."[91] As will be discussed later, the Working Group saw it as essential to the constitutional acceptability of its limited civil partnership scheme that it would be relatively limited in terms of the rights and duties it carried. This in turn meant that, since the presumptive scheme had to trigger an even lower level of rights and duties, it had to be very limited in its scope – so much so that one would strongly question the benefit of presenting it as a "scheme" of protection rather than as a number of individual legislative reforms, since it does not amounts to much more than a change in the succession law area, a specific change in relation to occupation of the home and the introduction of limited provision for maintenance. It is notable that, in England, two of these three reforms have been in place for ten years (in relation to succession[92] and

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[87] *Ibid*, pp 45-46.
[88] *Ibid*, p 46. It was also suggested (*ibid*) that future family law legislation should involve a process of "proofing" for its impact on cohabitants, where appropriate.
[89] *Ibid*, p 58.
[90] In a 28 November 2006 press release upon the publication of the Working Paper, the Tanaiste, Michael McDowell, commented that "while noting the position arrived at by the Working Group in respect of non-conjugal relationships, the Government is of the view that the arrangements made should provide protection for people in these situations on an equal basis with other relationships of mutual dependency." See www.justice.ie/80256E01003A02CF/vWeb/pcJUSQ6VYN2J-en.
[91] Options Paper, p 40.
[92] See Law Reform (Succession) Act 1995.

occupation rights[93]) but this is not presented in that jurisdiction as amounting to anything resembling a "presumptive" scheme for cohabitants.

In Part III of this chapter it will be argued that, as the Constitution now stands, there are serious constitutional objections to the idea of a limited civil partnership scheme. In addition, as will now be discussed, there are objections of a practical nature to the particular proposals favoured by the Working Group. The first point is that the set of proposals made in the Options Paper would lead to an unnecessarily complex position. At present, there are essentially two options – either one is married or one is not. If the political will existed, the position could be kept equally simple, with same sex couples simply being permitted to marry. However, given that there is to be no constitutional referendum to prepare the ground for same sex marriage, it will be necessary to introduce a civil partnership scheme for same sex couples. The Working Group's recommendation of such a scheme was an important one, which should be greatly welcomed. However, alongside such a full civil partnership scheme, the Options Paper wished to introduce a limited civil partnership scheme *and* a presumptive scheme. The result would be that a person could (i) be married; (ii) be a full civil partner; (iii) be a limited civil partner; (iv) be a qualified cohabitant under the presumptive scheme; or (v) be none of the above (although possibly cohabiting as a matter of fact, with consequences in areas such as social welfare law).

What is the pay-off for creating this elaborate set of legal frameworks? Upon closer consideration, the limited civil partnership scheme advanced by the Working Group is rather unappetising. In terms of state benefits accruing to a couple who register, essentially all that is on offer are two concessions in the taxation area. One of these relates to placing registered partners in Group Threshold 1 for capital acquisitions tax purposes. The impact of this is significantly reduced by a previous legislative concession which, subject to certain conditions, gives an exemption for CAT purposes in relation to gifts or inheritances of the donee's principal residence[94] (and, if it was felt that this exemption did not go far enough, it would be simple to relax the conditions by amending the relevant legislation). The other concession involves a reduction on stamp duty in relation to transfers between the civil partners. This will, of course, only be helpful if the partners wish to make a transfer of land between themselves; some couples may have reason to make such a transfer but many others never will. In fact, one obvious time when stamp duty would come into play would be if the parties were co-owners of a property and one party wished to buy out the other upon the break-up of the relationship.[95] However, there is the difficulty that the parties might no longer be civil partners by the time that they come to an agreement on a point such as this and so might not qualify for the tax concession. Furthermore, conveyances which take place shortly before the dissolution of a civil partnership might be liable to the "clawback" provisions which were mentioned in the Options Paper.[96]

In addition to restricted positive benefits in terms of taxation, the limited civil partnership scheme would also give the parties rights against each other, although many of these rights would already accrue if the parties lived together for long enough to

[93] See Family Law Act 1996, s 36.
[94] Finance Act 2000, s 151.
[95] See Options Paper, p 66.
[96] See the discussion in the paragraph of text accompanying notes 80-82 above.

trigger the presumptive scheme. In addition to the consequences triggered under the presumptive scheme, registration would open up the possibility of the parties suing each other for property compensation orders or for maintenance, their rights to make conveyances would be limited by the Family Home Protection Act 1976, and they would be treated as spouses for the purposes of domestic violence legislation. It is submitted that prospect of creating these "hostile" rights against each other is unlikely to lead couples to enter a civil partnership, given the well-established failure of couples to contemplate the ultimate breakdown of their relationship at a time when all is going well, which is the time when they might be considering formalising their relationship in some way.

In addition to relatively anemic tax breaks and rights to sue each other, civil partnership would indeed allow the parties to make a public commitment to each other and obtain "a certain status"[97] for their relationship, without having recourse to marriage. Unfortunately, the very term "limited civil partnership" serves to suggest a second-best, or in fact a third-best, status (and conversely, the fact that parties to such a limited arrangement are termed "civil partners" would tend to cheapen the concept of "full" civil partnership which is being presented to same sex couples, in lieu of marriage, as offering them long-denied public recognition for their relationships). How many men or women would get down on one knee, or perhaps merely look sheepishly in the direction of the floor, and propose limited civil partnership to their loved ones? International experience of civil partnership shows that the rate of take-up is low[98] and the variant proposed by the Working Group is pitched at such a modest level, in an attempt to avoid constitutional invalidity, that it is surely not worth the complexity which it would add to the legal position.

The Working Group was of the view that:

> Setting the presumptive scheme as the base line offering protection for vulnerable dependent partners combined with limited registered civil partnership is a pragmatic and realistic approach to offering cohabiting couples protection while providing a means for public recognition of the relationship for those who want it. Implementing either option on its own would leave a considerable gap in the level of protection offered to cohabiting couples.[99]

However, given that few couples are likely to avail themselves of such a half-hearted opt-in scheme in practice, it is submitted that it would be a mistake to rely on it to fill "a considerable gap in the level of protection for cohabiting couples".

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[97] Options Paper, p 41.
[98] As is pointed out in e.g. LRC Consultation Paper note 3 above, p 22; Law Commission *Cohabitation: The Financial Consequences of Relationship Breakdown* (Consultation Paper 179) p 106.
[99] Options Paper, p 41.

Part III: The Impact of the Constitution on a Possible Civil Partnership Scheme

This Part of the chapter considers whether, in the absence of a referendum to alter the Constitution, there would be constitutional difficulties with the introduction of civil partnership into our law. It will be convenient to consider in turn the issues relating to heterosexual couples and same sex couples respectively.

(i) Civil Partnership for Heterosexual Couples

It is submitted that, as the Constitution stands, there are serious constitutional obstacles in the way of the introduction of heterosexual civil partnership. In analysing the matter, it is obviously necessary to bear in mind that such a scheme might take a variety of forms. Two representative variants are discussed in the Options Paper and a consideration of these will provide a useful focus for the discussion.

(a) Full Civil Partnership for Heterosexual Couples

This type of scheme would confer the same rights and impose the same duties as marriage, much like the civil partnership scheme introduced in the United Kingdom for same sex couples.[100] The most obvious reason why a couple would choose this option ahead of marriage would be on the basis of an objection to the ideology of marriage, perhaps because of its traditional division of roles based on gender.[101] It seems plausible to suggest that this kind of civil partnership scheme would fall foul of Article 41.3.1 of the Constitution, in which, it will be recalled, "[t]he State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack." If the state sets up a new institution to compete with marriage – designed to cater for those who have ideological objections to marriage – surely this is as direct an attack on the institution of marriage as one can imagine? It appears to be conventionally accepted that the preponderance of the constitutional case law suggests that the Oireachtas may legislate to give 'marriage like' rights to cohabiting couples so long as these do not exceed in any respect those given to married couples.[102] However, in the context of the cases, one is considering the acceptability of legislative measures on individual matters (e.g. one aspect of the tax or social welfare codes), rather than the creation of a comprehensive package of rights which would put a comparable social institution in as favourable a position as marriage.

A key point to remember is that, although the introduction of civil partnership might be presented as a possible "solution" to the problem of cohabitation, civil partnership would inevitably be open to all couples. Thus, as well as being chosen by that

[100] See the Civil Partnership Act 2004.

[101] It is unclear how many couples currently cohabit on the basis of an ideological objection to marriage (and there may be a tendency in academic circles to exaggerate the importance of this reason for cohabitation). There is an unfortunate lack of empirical evidence as to the reasons why people cohabit in Ireland but it seems likely that other reasons are more important, ranging from an unwillingness by one or both partners to enter any form of legal commitment at all to a simple concern with the cost of a wedding. It is, incidentally, difficult to see how ideological objections would disappear in the context of civil partnership, itself a state-sponsored institution which would operate in the context of continuing inequalities between men and women.

[102] See e.g. LRC Consultation Paper note 3 above, pp 6-8.

fraction of the 77,600 cohabiting couples who currently eschew marriage on ideological grounds, it would also be chosen by some of the much larger pool of couples who, in current circumstances, decide to marry. After all, the roughly 700,000 married couples in Ireland enjoy numerous privileges when compared with cohabiting couples and not all couples can afford the luxury of making material and practical sacrifices in order to indulge their ideological preferences. However, if civil partnership were available as an option to heterosexual couples, there would be no need to make any sacrifice. A couple who felt that civil partnership was ideologically preferable to marriage – or was less old-fashioned, or more trendy, or that the label simply had a more appealing ring to it – would be free to secure all the benefits of marriage without actually getting married. Therefore, it seems that there would be constitutional objections to a civil partnership scheme for heterosexual couples which resembles marriage. This is also the position taken in the Options Paper, which concluded that the introduction of this type of scheme would be unnecessary and vulnerable to constitutional challenge.[103]

Support could be found for this position in the High Court decision of *Ennis v Butterly*,[104] where Kelly J concluded that "agreements, the consideration for which is cohabitation, are incapable of being enforced".[105] Kelly J felt that to allow an express cohabitation contract to be enforced would "give it a similar status in law as [*sic*] a marriage contract" and that this would conflict with the State's obligation to guard the institution of marriage with special care.[106] In fact, Kelly J went on to argue that the failure of the legislature "to confer rights akin to those of married persons upon the parties to non-marital unions e.g. a right to maintenance" showed an acceptance that to do so "would be contrary to public policy, as enunciated in the Constitution".[107] The position of Kelly J was, in fact, an extreme one, in that it would seem to imply that it would imply that a full or limited civil partnership scheme would be unconstitutional (a proposition which this author would accept) but so also would be a presumptive scheme which conferred no public status on the cohabiting relationship but triggered a right to apply for maintenance, or even an isolated legislative enactment creating this right (propositions which appear to go too far, especially in relation to the last point). Thus, one of the few Irish authorities to consider the State's obligation to protect the institution of marriage takes a view which, even if moderated considerably, would still rule out the introduction of any form of civil partnership.

(ii) Limited Civil Partnership for Heterosexual Couples

It is next necessary to consider possible civil partnership schemes which differ from marriage in terms of their practical consequences. There are many permutations. The Working Group took the view that "[t]he more comprehensive a scheme of limited civil partnership is, i.e. the closer to marriage in the rights and duties flowing from it, the more

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[103] Options Paper, p 35.
[104] [1996] I IR 426, criticised by Mee "Public Policy for the New Millennium?" (1997) 19 DULJ (ns) 149.
[105] *Ibid*, 438.
[106] *Ibid*, 438-439. The judgment in *Ennis* casts a shadow on the enforceability of contracts between cohabitants in relation to their financial affairs, notwithstanding understandable attempts to wish away the uncertainty caused by the case (see e.g. Options Paper, pp 36-37; LRC Consultation Paper note 3 above, pp 38-42). This is another important area which would benefit if there was a modification of the constitutional definition of the family.
[107] *Ibid*, 439.

open to constitutional challenge it becomes."[108] The Group was content that the version of limited civil partnership which it proposed "was sufficiently different from marriage that its vulnerability to constitutional challenge is reduced."[109]

Thus, there appear to be two lines of defence against the suggestion that a limited civil partnership scheme would infringe the Constitution. The Oireachtas Committee put forward the line that the balance of the case law indicates that it is permissible to create confer rights and privileges on unmarried couples so long as these do not exceed in any respect those associated with marriage, while the Working Group took this a step further by arguing that the more distinct from marriage the proposed scheme, the more likely that it would be constitutionally acceptable. Closer consideration, however, reveals problems with these arguments, suggesting that any limited civil partnership scheme is likely to be constitutionally dubious.

It is clear that some couples who are currently cohabiting might enter limited civil partnership on the basis that they would regard it as preferable to unmarried cohabitation and sufficiently different to the option of marriage which they would not have favoured. This seems to be what was envisaged by the Working Group, which suggests that its proposed limited civil partnership scheme would "provide legal recognition and status for those cohabiting opposite-sex couples unwilling to enter into or opposed to marriage."[110] However, the crucial point is that, in addition, a proportion of couples who would otherwise have married would find the option of limited civil partnership more attractive than marriage. Thus, some couples would choose limited civil partnership over marriage, instead of choosing it over unmarried cohabitation. It cannot be assumed that everyone who gets married craves all the current rights and duties associated with marriage and could only be tempted not to marry by the creation of a competing institution which carries all the same rights and duties but which has a different name. Rather, it is reasonable to believe that people could be diverted from marriage by the creation of a competing institution which would provide "legal recognition and status" but would not carry all of the consequences of marriage. Can it really be believed that no couples exist who would prefer an institution which, upon the breakdown of their personal relationship, would allow them to agree to an immediate termination and move on with their lives (as in the case of the Working Group's version of limited civil partnership), rather than having to live apart for four years of five in order to obtain a divorce (as in the case of marriage)? Or that there would not be couples who, in a world without civil partnership, would marry after (say) five years of life together but, if civil partnership were possible, would enter it after (say) two years and never get around to marriage?

Since it takes two people to marry, the man and the woman in the couple in question may well have divergent views as to the attractions of the extensive legal rights and duties associated with marriage. The possibility that there may be disagreement within a couple as to whether to marry or enter a civil partnership seems to further underline the constitutional difficulty with creating a civil partnership scheme for heterosexual couples, since there is a danger that the weaker party in the relationship might be steamrollered into accepted a lesser degree of legal protection than would be provided by the constitutionally preferred option of marriage.

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[108] Options Paper, p 44.
[109] *Ibid*.
[110] *Ibid*, p 41.

Another way to argue the point is to contend that creating a competing state-sponsored institution, which will prove more attractive to some couples than marriage, amounts to an inducement not to marry. The question of the significance of the creation of inducements not to marry has been considered to some extent in the case law. In *Muckley v Ireland*,[111] the Supreme Court had to deal with an unusual legislative provision arising from the aftermath of *Murphy v Attorney General*.[112] In the latter case, the Supreme Court had declared invalid provisions of the Income Tax Act 1967 which subjected married couples to a higher rate of taxation than a cohabiting couple. The State had responded by enacting s 21 of the Finance Act 1989 which levied a new tax on all married couples corresponding to the amount which would have been payable in the past if the unconstitutional provisions of the Income Tax Act 1967 had not been invalid. Thus, it was in the words of Barrington J in the High Court, "a thinly disguised attempt" to re-impose the unconstitutional taxation burden.[113] The State argued that the new tax created no inducement to avoid marriage, since it was entirely retrospective in nature and could not affect future decisions as to whether or not to marry. However, the Supreme Court (upholding the decision of Barron J) rejected the view that the Supreme Court in *Murphy* "had reached its decision *only* on the basis of the prospective inducements [not to marry]".[114] Finlay CJ explained that "essentially" the basis of the earlier decision had been that "the invalid sections penalised the married state".[115] Since the new tax similarly penalised the married state, it was also unconstitutional.

It is submitted that *Muckley* establishes only that the creation of an inducement not to marry is not a *necessary* aspect of an unconstitutional attack on marriage. The case leaves open the possibility that, given that there is more than one way to skin a constitutionally-protected institution, the creation of an inducement not to marry would be *sufficient* to violate the constitution. The issue was explored further in *Mhic Mhathuna v Ireland*,[116] where the claimants argued *inter alia* that the existence of social welfare and taxation supports for single parents and unmarried mothers amounted to an inducement not to marry and therefore constituted an unconstitutional attack on the institution of marriage. In the High Court, Carroll J held that the impugned provisions did not, in fact, create any inducement or incentive not to marry.[117] Carroll J's decision was upheld by the Supreme Court on appeal and her stated reasons for judgment were regarded as "correct".[118] Thus, the Supreme Court expressed no difficulties with Carroll J's willingness to engage with the "inducement" argument which had been advanced by the claimants. The authors of *Kelly*[119] comment that "Carroll J did not refer to *Muckley* and consequently offered no justification for the resurrection of the inducement test"[120] which had been "rejected by the Supreme Court in *Muckley*"[121]. It is perhaps somewhat harsh to

[111] [1985] IR 472.
[112] [1982] IR 241.
[113] [1985] IR 472, 482.
[114] *Ibid*, 485 *per* Finlay CJ (emphasis supplied).
[115] *Ibid*.
[116] [1989] IR 504 (HC); [1995] 1 IR 484 (SC).
[117] [1989] IR 504, 513.
[118] [1995] 1 IR 484, 494-495.
[119] Hogan and Whyte *JM Kelly: The Irish Constitution* (4th ed) (Dublin: Butterworths, 2003).
[120] *Ibid*, p 1836.
[121] *Ibid*, p 1835.

suggest that Carroll J "resurrected" the inducement question, when clearly she was responding to an argument by the claimant expressly based on inducement and when, as already pointed out above, the Supreme Court in *Muckley* had rejected only the argument that the existence of an inducement was invariably necessary. It is also not surprising that the Supreme Court made no specific comment on the inducement argument in *Mhic Mhathuna*, given Finlay CJ's comment that this argument had been less clearly relied upon by the claimants when the case moved to the Supreme Court.[122] It should further be noted that the authors of *Kelly* are not hostile to "Carroll J's inducement test", stating that there is "much to be said for [it]" in the context of the issues considered in *Mhic Mhathuna*.[123]

To sum up, it is submitted that there is a strong argument that the creation of a civil partnership scheme for heterosexual couples, which attracted a different set of rights and duties to those consequent upon marriage, would be unconstitutional as infringing Article 41.3.1. The legislation creating such a scheme would, of course, enjoy the presumption of constitutionality and, as Kenny J stated in *Murphy v Attorney General*,[124] the onus would be on anyone seeking to challenge its constitutionality to establish "a clear breach by the State of its pledge to guard with special care the institution of marriage and to protect it against attack".[125] In this connection, it may be useful to make a further point relating to the existing case law in this area.

The decided cases generally involve a comparison between the position of married couples and cohabiting couples. Logically, the existence of the state of being married presupposes its opposite, the state of being unmarried. The position which our courts have reached – that there is nothing impermissible in treating both sets of couples on a par in relation to specific matters – was really unavoidable. It could hardly be contended that the law must treat married couples more favourably than cohabiting couples in absolutely every respect. The issues are different if the legislature takes it upon itself to create a new institution, conferring public recognition and status, which gives some of the same privileges as marriage but overall carries a less extensive set of legal consequences. In the nature of people's preferences, the difference between the legal consequences of the two institutions will encourage some couples to choose the rival institution over marriage. Since there was no obligation on the state to set up the rival institution in the first case, it is much harder from a constitutional point of view for the state to defend its actions than in the type of cases which have thus far arisen.

This last point is of relevance in relation the Working Group's argument that, essentially, it has pitched the rights and duties associated with its limited civil partnership scheme at a low enough level to make it sufficiently different from marriage to be constitutionally acceptable. It has been suggested already that the very fact that an institution is meaningfully distinct from marriage, because it carries a lighter range of rights and duties, could make it a more realistic competitor to marriage than a rival institution which amounted to marriage in almost everything but name. Notwithstanding this, it is reasonably plausible for the Working Group to suggest that if one tunes down the level of the rights and duties low enough then the new institution would become less

[122] [1995] 1 IR 484, 494.
[123] Note 119 above, p 1836.
[124] [1982] IR 241.
[125] *Ibid*, 286-287.

attractive to those who would otherwise have married (albeit, unfortunately, also to those who would otherwise have cohabited).[126] What is important, however, is that an aspect of the new institution which would subsist is the element of public recognition it would confer on the parties' relationship. It must be remembered that the institution of marriage has not always been clothed in warm layers of legislative regulation. Many of the incidents of marriage which we take for granted are of fairly recent origin, e.g. pension adjustment powers (1995);[127] property adjustment orders (1989);[128] family home protection (1976);[129] the spouse's legal right share in testate succession (1965); [130] eligibility as a couple to adopt (1952).[131] If one looks back in history to the institution which was entrusted to the special care of the State in the Constitution of 1937, it was more obvious that the central feature of marriage was that it provided a public validation of a relationship between two adults. A civil partnership scheme, however moderate the legislative trappings it carried, would still usurp that key function of marriage.[132] Therefore, there is a strong argument that it would be unconstitutional for the State to take it upon itself to create such an institution without consulting the people in a referendum.

(ii) Civil Partnership for Same Sex Couples

(i) Full Civil Partnership for Same Sex Couples

The Options Paper states that:

> "Full civil partnership for same-sex couples, in contrast with opposite-sex couples, is viewed by the [Working] Group as a distinct institution separate from, and not competing with marriage. The Group believes that full civil partnership for same-sex couples does not suffer the same constitutional vulnerability as full civil partnership for opposite-sex couples."[133]

Thus, it is assumed that same sex civil partnership does not involve a constitutionally forbidden attack on marriage. The argument seems to be that, since same sex couples can never marry as the Constitution stands, there is no danger of their being wooed away from marriage by the creation of an alternative institution. The German Constitutional Court, as the authors of *Kelly* note, essentially accepted this argument in dealing with a broadly similar issue under German law.[134]

The counter-argument could be raised that there are some people whose sexual preferences make it possible for them to have a committed relationship with someone of

[126] See text accompanying notes 94-99 above, which notes also that this is especially so given that the Working Group's version of limited civil partnership would be combined with a presumptive scheme which would confer many of the same limited benefits on couples without any action on their part.
[127] Family Law Act 1995, ss 12-13.
[128] Judicial Separation and Family Law Reform Act 1989, s 15.
[129] Family Home Protection Act 1976.
[130] Succession Act 1965, ss 111-116.
[131] Adoption Act 1952, s 11 (this being the legislation first providing for adoption in Ireland).
[132] Compare *Ennis v Butterly* [1996] I IR 426, discussed in the text following note 103 above.
[133] Options Paper, p 51.
[134] See Hogan and Whyte *JM Kelly: The Irish Constitution* (4th ed) (Dublin: Butterworths, 2003) p 1839.

either sex and that introducing a civil partnership for same sex couples (which would carry the same benefits as marriage) would remove the incentive for such people to choose a marital relationship with someone of the opposite sex. However, it does not seem that the institution of marriage is benefited if the fiscal and other societal benefits associated with marriage induce a person to marry someone other than (and of a different gender to) the person to whom he or she would otherwise have committed himself or herself. Rather, as is evidenced by the experience of Irish society over past decades, the institution of marriage appears to be harmed by the painful breakdown of opposite sex marriages where one of the parties is homosexual and would not have entered into the marriage if society had been willing to recognise same sex civil partnership.[135] Thus, on the whole, it seems reasonable to conclude that a court would probably find the concept of same sex full civil partnership to be acceptable under the Constitution.[136]

In terms of the detail of a legislative scheme, constitutional issues could arise in relation to the rules surrounding the termination of such a civil partnership. The Options Paper suggests that, while this is not required by the Constitution, the new institution should be subject to the same rules concerning dissolution as apply in relation to marriage and that the two institutions should be mutually exclusive, in that a person could not be both married and in a civil partnership at the same time (as is the UK approach).[137] This is a plausible approach, since same sex couples are being offered this form of civil partnership as an alternative to marriage and it would diminish the seriousness of the institution if, for example, as in relation to the Working Group's proposed limited civil partnership scheme, either party were allowed to terminate the relationship after a short notice period.

The possible constitutional problem relates to the position of a person in a civil partnership who wishes to end that partnership and enter a constitutionally protected heterosexual marriage with someone else. This issue, although likely to arise more frequently in the context of considering civil partnership for heterosexuals, could in principle arise in the context of the Working Group's proposed full civil partnership scheme for same sex couples. If the civil partnership legislation stipulated a delay of at least four years before the civil partnership could be terminated, this could amount to an attack on the unenumerated right to marry of the person in the civil partnership.

There was limited authority on the constitutional right to marry under Article 40.3.1[138] until the matter was recently considered by Laffoy J in *O'Shea v Ireland*.[139] The learned judge affirmed the existence of the right and held that it was infringed by the Deceased Wife's Sister's Marriage Act 1907, s 3(2)[140] which purported to prevent a

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[135] I am grateful to my colleague, Dr Conor O'Mahony, for suggesting this last point to me.

[136] In *Norris v A.G*. [1984] IR 36, O'Higgins CJ commented that he "would not think it unreasonable to conclude that an open and general increase in homosexual activity in any society must have serious consequences of a harmful nature so far as marriage is concerned …. Homosexual conduct can be inimical to marriage and is per se harmful to it as an institution." The conclusion in the text assumes that these views would be regarded as outmoded in Irish society today.

[137] See e.g. Civil Partnership Act 2004, s 3(1): prohibition on entering a civil partnership if either of the parties is married.

[138] See Hogan and Whyte *JM Kelly: The Irish Constitution* (4th ed) (Dublin: Butterworths, 2003) pp 1468-1469; see also p 1832 discussing the right to marry as deriving from the protection of the institution of marriage in Art 41.3.1.

[139] *Irish Times*, 6 November 2006 (High Court, 17 October 2006).

[140] As amended by the Deceased Brother's Widow's Marriage Act 1921.

woman from marrying the brother of her former husband, during the lifetime of that former husband. It was held that, where a legislative provision restricted the right to marry, it had to be justified either as being necessary in support of the constitutional protection of the family and the institution of marriage, or having regard to the requirements of the common good. The restriction on a civil partner marrying until at least four years have elapsed could not be defended as being necessary in support of marriage or the constitutionally protected family because the civil partnership scheme would not attract such constitutional protection. Therefore, the only option would be to argue that the restriction was necessary for the common good. Since the civil partnership scheme would have been introduced by the legislature following careful consideration and debate, the scheme itself could be regarded as being necessary for the public good. However, this argument could not plausibly be extended to every detail of the scheme. Therefore, there seems to be a strong argument that a restriction which would prevent a civil partner from marrying her chosen partner for at least four years is an attack on the right to marry which is not necessary in the interests of the common good. It is possible that the problem could be avoided if some lesser period for the dissolution of a civil partnership were specified in the legislation. While this would put same sex civil partners couples in a different (and arguably more rational) position in this respect when compared to married couples, this seems to flow from the decision to impose a separate institution on such couples instead of simply allowing them to marry.

Thus, it has been suggested that, in terms of one important detail, the existing constitutional provisions on the family and the absence of constitutional protection for family arrangements other than marriage might have a distorting impact on possible civil partnership legislation for same sex couples. In turn, of course, this again calls into question the assumption in the Oireachtas Report that there is no need to adjust the constitutional definition of the family prior to implementing legislative reform.

(ii) Limited Civil Partnership for Same Sex Couples

On the basis of the same argument made in relation to full civil partnership for same sex couples, it would seem that there would be no constitutional objection to extending limited civil partnership to such couples. From a practical point of view, the fact that making this option available to heterosexual couples would probably be unconstitutional would lessen the attraction of implementing it for same sex couples (alongside full civil partnership).[141]

Concluding Observations

This chapter has considered the contributions of two documents, the Oireachtas Committee Report and the Colley Options Paper. In the final assessment, the first of these two documents has little to offer. Its only lasting impact has been to skew the reform process from the start, by imposing the conclusion (prior to any consideration of the actual issues) that a referendum to adjust the constitutional provisions on the family is

[141] Admittedly, it would be possible to counter any argument based on the need to avoid discrimination against heterosexual couples by pointing out that the reason why civil partnership schemes for same sex couples are constitutionally acceptable is because such couples are discriminated against in being excluded from the constitutionally protected institution of marriage.

unnecessary and that the way forward lies in legislation. The Options Paper, which followed on from the Oireachtas Report, was constrained to consider only options which were possible within the current constitutional framework. The Options Paper is a more useful document than the Oireachtas Committee Report, in that it actually engages with the issues. A disappointing aspect of the Options Paper, however, is that at important times a position is taken but no reasoning whatsoever is provided to back it up. To take one relatively minor example, the LRC had proposed that its presumptive scheme would apply to couples who had cohabited for three years or, if they had a child, for two years. The Working Group suggested, instead, imposing no time requirement where the couple had a child.[142] However, no reason or explanation is given for this, arguably perfectly defensible, departure from the approach of the LRC. What is the value of simply asserting the correcting of a particular approach, particularly when the approach in question is a sufficiently obvious alternative that nothing is contributed by simply identifying its existence?[143] That point having been made, the Options Paper is intelligently presented and makes a genuine contribution to public debate by illuminating the issues.

Having considered the relevant reform documents, the view of the present commentator is that the best way forward would be to proceed with the implementation of civil partnership for same sex couples, with this form of partnership mirroring marriage as far as possible (consistent with the Working Group's recommendation on this issue). Of course, if one is willing to attach all the incidents of marriage to full civil partnership, then the introduction of same sex marriage would seem to be a more honest and less begrudging approach. However, even if the political will existed in principle to take this step, a referendum would still be necessary. This may mean that the prompt introduction of full civil partnership is the most pragmatic way forward, with the ultimate possibility of a subsequent referendum to allow for same sex marriage.

Dealing in this manner with the most obvious injustice of the current law would allow a more clear-headed appraisal of the remainder of the reform landscape. At present, the strong case for opening up marriage or its equivalent to same sex couples tends to lend weight to other logically distinct reform options. It is, for example, interesting that the Working Group conceded in the Options Paper that it had received "very few submissions dealing with specific concerns of cohabiting opposite-sex couples"[144] and went on to observe, again in its chapter on opposite sex cohabitants, that:

> In the absence of conclusive research on the motivation, duration and structure of conjugal cohabitation, it is difficult to identify what institutional innovations would be appropriate to the needs of cohabitants.[145]

Notwithstanding these comments, which surely point towards a cautious approach, the Working Group proceeded to recommend the immediate introduction of two specific and

[142] Options Paper, p 38.
[143] Note that the LRC in its Report note 4 above, p 32 considered dropping the time requirement where the couple had a child but decided against recommending this on the (again not very informative) basis that it would be "far-reaching".
[144] *Ibid*, p 12.
[145] *Ibid*, p 13.

detailed innovations for opposite sex couples – a presumptive scheme and a limited civil partnership scheme.[146]

The Working Group also made the sensible suggestion that "a comprehensive study of cohabitation in Ireland [be commissioned] with a view to informing a review of the relevant legislation to identify where reforms may be required."[147] Unfortunately, it went on to argue that this idea of a study and a review of legislation was "not put forward as an option alternative to the other options outlined in this paper but should be considered in tandem with them."[148] It seems clearly to have been the intention of the Working Group that their recommended major reforms would not wait for the comprehensive study of cohabitation. But why should we leap before we look? An understanding of the social phenomenon one is seeking to regulate must surely be a prerequisite of worthwhile reform.

While frequent reference is made to the increasing level of cohabitation in Ireland as a justification for legislative reform, it is vital to reflect on the nature of this cohabitation. A significant proportion may involve couples where one or both parties is still involved in a moribund marriage to a third party[149] – such couples would gain no benefit from either of the two major proposals of the Working Group and so their existence cannot help to justify such reform. Also, many cohabiting couples may be living together in an (as yet) childless relationship which either leads to marriage or terminates after a relatively small number of years. Such couples would not be covered by the presumptive scheme proposed by the Working Group unless their cohabitation lasted more than three years.[150] Furthermore, the type of injustice which might tend to arise in typical relationships may not be covered by the terms of the proposed presumptive scheme. Take the case of a female cohabitant who has a career and spends €100,000 on improving the family home, which legally belongs to her partner. Or consider a cohabitant who sells his existing house and uses the proceeds to purchase a new house in the joint names of himself and his partner (carefully ensuring that his partner gains a joint equitable as well as legal interest), not realising that the relationship will break down shortly afterwards. It is unlikely that either of these people would have any remedy under the law of equity.[151] Nothing satisfactory seems to be offered to such cohabitants by either the Working Group's presumptive scheme (which affords only the possibility of "compensatory maintenance" or the right to live in the home to the exclusion of the other partner, when some form of property adjustment order would clearly be the sensible remedy, if any, to give) or by the LRC's redress scheme (which requires as a pre-condition of a remedy the establishment of "economic dependency). The

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[146] See also note 90 above (Working Group making no specific recommendations for non-conjugal relationships, due to lack of submissions and non-existence of research, but Tanaiste insistent that such those in such relationships should equally be protected by reform legislation).

[147] Options Paper, p 35. See also *ibid*, pp 45-46.

[148] *Ibid*, p 46.

[149] According to data gathered during the 2002 Census, such couples represent approximately 25% of all cohabiting couples in Ireland. See Mee "A Critique of the Law Reform Commission's Proposals on the Rights and Duties of Cohabitees" (2004) 29 Irish Jurist (ns) 74, 83-84; 110. It remains to be seen how the position will have changed when the data from Census 2006 becomes available.

[150] Note that in its Report note 4 above, pp 34-35, the LRC decided that to allow for exceptions to the specified time periods of cohabitation "where serious injustice would result if no right of application were granted".

[151] See generally Mee *The Property Rights of Cohabitees* (Oxford: Hart Publishing, 1999), Chapters 2-4.

first of the guiding principles accepted by the Working Group at the outset of the Options Paper was "[t]he principle of equality [which] involves treating persons in similar situations similarly, unless differentiation is objectively justified."[152] This principle seems to be offended if a proposed scheme gives a remedy to certain categories of claimant while denying a remedy to other, equally deserving, claimants.

The examples considered in the previous paragraph lead into a wider point. This whole area is a highly complex one, where part of the difficulty has been public misconceptions about the law, with people assuming that being in a "common law marriage" confers some protection for their rights. Into this craggy terrain sweeps the lightly-shod reformer, impressing the inhabitants with high rhetoric and laying down a baffling array of new edicts, before being whisked away to battle the next social phenomenon menacing the kingdom. After this, who could blame the people if they slept soundly in their cohabiting beds? But some of them will eventually learn to their cost that none of the new laws will help them – because they are still in a long-dead marriage or because the serious loss they suffered did not involve "economic dependency" or because the remedy they seek is not on the very limited list of remedies or because their problem was simply not anticipated because the legislation was enacted before proper research was done and subsequently the attention of the legislators was elsewhere. The Working Group did suggest a "widespread information campaign" (albeit only in the specific context of its proposed presumptive scheme)[153] but one cannot have unrealistic expectations as to the amount of complex legal information that ordinary people will have the time or the interest to absorb.

This commentator favours a more measured approach to reform.[154] As has already been mentioned, the first step would be to put the necessary energy into the introduction of a civil partnership scheme for same sex couples, which would carry the same rights as marriage or come as close as politically possible. At the same time, it would be beneficial to initiate the comprehensive study suggested by the Working Group to provide a better understanding of the phenomenon of cohabitation in this country. If both these steps had been accomplished, it would be possible to attempt a careful assessment of the form which any further legislative and/or constitutional reform should take. It should not be assumed that our society, in its current state of development, needs a presumptive scheme or alternative institutions to marriage for heterosexual couples. It may be that in the short-term we would be better served by carefully considered reforms in areas such as succession and taxation. Interestingly, unlike the LRC's more radical proposals, the limited range of measures put forward by the Working Group actually comes close to this model. However, by labeling the proposed limited package of measures "a presumptive model" the Working Group risks creating exaggerated public expectation as to the extent of the change envisaged and also ties itself, perhaps unnecessarily, to setting the same qualifying criteria for each distinct reform. More generally, it would be a mistake to think that there is no cost attached to enacting reforms which, whether because of constitutional problems or because society is still in the process of accepting cohabitation, are too

[152] Options Paper, p 3.
[153] *Ibid*, p 38.
[154] For more extensive observations on the policy issues associated with reform, see Mee "Property Rights and Personal Relationships: Reflections on Reform" (2004) 24 Legal Studies 414. See also Mee note 149 above.

modest to make a real difference. As well as the fact that they could lead some people to imagine that they are legally protected when they are not, there is also the difficulty that politicians will already have received the credit for tackling the difficult issues around cohabitation and it will be more difficult to get meaningful reforms enacted when the time is really ripe for this.

In the end, the reform questions are difficult but important. They require careful and detailed consideration and this chapter has attempted to make a contribution to the necessary debate.