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

The Committee agree that the current law governing the resolution of disputes upon separation of couples with children is uncertain and is in need of reform.

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

Likewise, reform is warranted for couples without children.

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

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

Whilst the majority of the Committee support an ‘opt out’ scheme for the reasons set out by the Commission, there is a strong minority view that an ‘opt in’ scheme is preferable for the following reasons:
The opt out scheme produces a number of problems later addressed in the Paper which could all be avoided if there were an opt in pre-requisite to the enjoyment of cohabitants’ financial rights on separation.

By conferring the rights as the default mode unless couples opt out, the justification for conferring rights at all is undermined. The default mode as a means of acquiring rights creates a distinction between those who have entered into a commitment to a partnership and those who have not. The former group will have married or entered a civil partnership. The latter group may include some who have entered into a similar commitment between themselves, but not formally announced it, and those who have not.

The formal commitment to a partnership should be the principal justification for conferring rights, but those rights should be the same as for married couples and registered partnerships.

A formal commitment to a partnership should be expressed by:-
   i) opting in;
   ii) having children (which for simplicity could be treated the same as opting in).

Partners should be entitled to opt out of a relationship which produces children by formal agreement registered with a court.

As a consequence of conferring rights as the default mode, a number of problems arise:-
   a) Issues over who should be eligible – these will revolve around the factual issues of the cohabitation and its quality.
   b) The issue of the extent of the rights – the rights proposed are less extensive – and offer a lower level of benefits than available to married people and registered partners – a “second class” relationship which many in unmarried cohabitation would find offensive.
   c) The approach proposed – using economic advantage/disadvantage generated by the cohabitation as the basis for an award will produce anomalous results- eg the partner who has worked will be less well off than the partner who has preferred to live off his/her partner.
   d) As a matter of principle the adoption of a default mode for conferring rights is paternalistic and undermines the principle of autonomy which should be upheld in a liberal democratic society.
e) The justification offered by the paper is questionable - the need to protect vulnerable people – this argument is unsupported by any research data – it could be argued with at least as much force that the majority of unmarried couples would appreciate the value of opting in and could make a free and informed choice. Why should they be denied this right (which could confer equal rights with married and registered partners) for the sake of an assumed and unquantified minority of supposed vulnerable people? This is stark paternalism which may not be necessary.

The advantages of an opt in approach are:-

a) Equal treatment with married people and registered partners is more readily justifiable where the latter have made the formal commitment to their partnership by opting in.

b) Heterosexual couples could be included in the scheme currently available for registered partners, avoiding the need for a new set of rules to apply to unmarried heterosexual couples.

c) Judges and lawyers are accustomed to the rules as they are - an extension of those rules to unmarried couples who have opted in would be simple to apply in practice.

d) The opt in approach would obviate the need for definition - the group would be self-defining.

e) Opting in recognises the autonomy that should be the norm in a democratic society.

f) Couples that did not opt in could be offered a basic level of protection against exploitation along the lines of the Law Commission’s proposals.

Furthermore, some members of the Committee are concerned that the requirement to opt out may increase the volume of litigation by leading to arguments as to whether or not couples have been cohabiting.

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3.24 We invite the views of consultees on whether any legislative definition of those eligible to apply as cohabitants for financial relief on separation should be expressed by analogy to marriage and civil partnership, or in other terms.
The Committee have several comments on possible definitions of eligibility. One view is that the definition should be by reference to the concept of living together as husband and wife because this approach is commonly used and widely understood.

Another suggestion is: “Cohabitants are persons who, not being married to each other or not being in civil partnership with each other, are living together as a couple and sharing a joint household.”

During discussions, members of the Committee questioned whether remedies should be limited to those living together as a couple or whether they should be extended, for example, to brothers and sisters who live together. They may find themselves as much in need of legal remedy as a couple in a sexual relationship. However, the Committee agree that this should not extend to mere flat sharers.

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

As to the statutory checklist for eligibility, the Committee would like to draw the Commission’s attention to the New Zealand example as contained in the Property (Relationships) Act 1976 (New Zealand), section 2D which provides that:

“(2) In determining whether two persons live together as a couple, all the circumstances of the relationship are to be taken into account, including any of the following matters that are relevant in a particular case:

(i) the duration of the relationship;
(ii) the nature and extent of common residence;
(iii) whether or not a sexual relationship exists;
(iv) the degree of financial dependence or independence, and any arrangements for financial support between the parties;
(v) the ownership, use and acquisition of property;
(vi) the degree of mutual commitment to a shared life;
(vii) the care and support of children;
(viii) the performance of household duties;
(ix) the reputation and public aspects of the relationship.

(3) In determining whether two persons live together as a couple, no finding in respect of any of the matters stated in subsection (2), or in respect of any combination of them, is to be regarded as necessary…”
The majority of the Committee consider that Factor (ix) is much to be preferred to factor (6) of the checklist used by the Department for Work and Pensions (see Para 3.29). Factor (6) perpetuates the marriage analogy, to which Paras 3.20-3.23 critically refer: factor (ix) avoids it.

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

The Committee agree that cohabitants who are by law the parents of a child born before, during or following cohabitation (including children as yet unborn and children who have reached adulthood or have left home as specified in Para 3.43) ought to be entitled to claim remedies under the new scheme.

Furthermore, if the child is the child of one of the parties and has been treated as a child of the family by the other (using an adapted version of the definition in section 41 of the Matrimonial Causes Act 1973) the couple should be entitled to inclusion in the scheme.

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

The Committee agree with a minimum two year period of continuous cohabitation, in line with that which entitles cohabitants to claim under the Inheritance (Provision for Family and Dependants) Act 1975.

For the purpose of determining whether persons are or have been living continuously as cohabitants no account shall be taken of any one period (not exceeding six months) or of any two or more periods (not exceeding six months in all) during which those persons lived apart from each other, but no period during which they lived apart shall count as part of the period of living as cohabitants.

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

The majority of the Committee agree that the substantive law governing financial relief between spouses on divorce should not be extended to cohabitants on separation.

The minority view (following the preference for an opt in scheme) is that if couples have the opportunity to opt in and choose to make that formal commitment, they should enjoy the same rights as married and registered partnerships.

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3.66 We provisionally propose that in granting financial relief to cohabitants on separation, the courts should have available to them the following menu of orders:
(1) periodical payments, secured and unsecured;
(2) lump sum payments, including by instalment;
(3) property adjustment;
(4) property settlement;
(5) orders for sale;
(6) pension sharing; and
(7) interim payments ordered on account pending a full trial or final settlement.
Do consultees agree?

The Committee agree with the proposed menu of orders.

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

The Committee agree that the court should have a jurisdiction based on discretion structured by principles.
3.139 We consider that, in determining whether to grant relief and, if so, what the relief should be, the court should have regard to whether, and to what extent, either party’s economic position following separation (in terms of capital, income or earning capacity) was:
(1) improved by the retention of some economic benefit arising from contributions made by the other party during the relationship (“economic advantage”); or
(2) impaired by economic sacrifices made as a result of that party’s contributions to the relationship, or as a result of continuing child care responsibilities following separation (“economic disadvantage”).
Do consultees agree?

Following on from the different views held within the Committee as to whether the scheme should be opt in or opt out, there were two views on the application of economic advantage / disadvantage. The minority view was that the limiting of remedies to those who have gained economic advantage or suffered economic disadvantage is justifiable if the remedies are to be available to all cohabitants unless they opt out. It was proposed that this narrow basis of remedy should be available to cohabitants who do not opt into the scheme. Those who do opt in should be equated with married and registered partnerships. The majority of the Committee supports the Commission’s proposals.

The majority view was that those without relevant children should be under an obligation to demonstrate economic disadvantage caused by the circumstances of the partnership years to qualify for relief. (Example 6 at page 56 of the Consultation Paper would be covered here.)

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

The Committee agree that parties’ conduct should not be taken into account in considering claims for financial relief on separation, save where that conduct relates to
litigation or financial misconduct, or where it would otherwise be inequitable to disregard it.

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3.144 We consider that, having determined that some remedy is justified and calculated its quantum in accordance with the principles outlined above, the court should have regard, in particular, to the following factors when deciding what order(s) to make:
(1) the needs of both parties and any children living with them; and
(2) the extent and nature of the financial resources which each party has or is likely to have in the foreseeable future.
Do consultees agree?

The Committee consider it preferable to adopt the matters set out in section 25(2) of the Matrimonial Causes Act 1973 but expressly to include consideration of ‘fairness’ in determining which remedy is justified and in calculating quantum. The Committee recognises however that the weight to be given to the various factors may be different from cases involving divorcing couples. ‘Need’ as a factor should not be disregarded but should not be the only factor to be taken into account.

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

The Committee agree that the aim should be to avoid parties being economically tied together long after they have separated so orders for long term or indefinite periodical payments would be avoided and property transfers or lump sums preferred.

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5.18 We provisionally reject the view that cohabitants should have an automatic entitlement to a share of their deceased cohabitant’s estate on intestacy.
Do consultees agree?
The majority of the Committee agree that there should be no automatic entitlement to a share of the deceased cohabitant’s estate on intestacy.

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5.19 We provisionally propose that, if a new scheme for financial relief for cohabitants on separation were enacted, then in relation to the Inheritance (Provision for Family and Dependants) Act 1975:
(1) the definition of cohabitants for the purposes of the 1975 Act should be amended to match the definition used under the new scheme;
(2) the definition of “reasonable financial provision” applied to cohabitants’ claims under the 1975 Act should be reviewed to ensure consistency with the new scheme applying on separation;
(3) in determining a cohabitant's claim for provision under the 1975 Act, the court should be required to have regard to the provision that the applicant might have reasonably expected to receive in proceedings for financial relief on separation; and
(4) the court should be entitled, on granting a cohabitant financial relief on separation, to direct that neither cohabitant should subsequently be entitled to make an application under the 1975 Act in the event of the other’s death.
Do consultees agree?

The majority of the Committee agree that in accordance with consistency –
(a) Cohabitants who are eligible to apply for remedies under the proposed new scheme on separation because both are parents of a child should be eligible to apply under the 1975 Act;
(b) Cohabitants who do not fall within (a) should only be eligible to apply under that Act if there has been a minimum period of two years’ cohabitation, whether or not there is a child living with them. If there is a child and there has been less than two years’ cohabitation, there may be the alternative open to the surviving cohabitant that she can claim as a dependant.

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5.21 We invite the views of consultees as to whether cohabitants should be entitled to opt out of the right to claim financial provision under the 1975 Act against their partner’s estate (whether as cohabitant or as dependant of their partner) in the event of their partner’s death.
The Committee agree that cohabitants should be entitled to opt out of the right to claim financial provision under the 1975 Act for the reasons stated in para 5.17.

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

The Committee consider it appropriate to apply normal contract principles in determining whether an opt out agreement is binding. In other words, it should not be binding if there is, for example, evidence of duress, undue influence, mistake or lack of disclosure.

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

The Committee consider agree that claims by cohabitants under the proposed scheme should be treated as family proceedings, and the promulgation of rules should be referred to the Family Procedure Rule Committee.

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

The Committee agree that claims should be heard in the county court or High Court.

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7.7 We provisionally propose that claims under a new statutory scheme should be brought within one year of the parties’ separation. Do consultees agree?
7.8 We invite the views of consultees as to whether:
(1) the time period for making a claim should be extended to one year from the birth of a child of the cohabitants where, at the time of separation, the applicant is pregnant by the respondent;
(2) there should be a general discretion vested in the court to extend the time period for making a claim in exceptional circumstances.

The Committee agree that the general rule should be that claims must be made within one year of the parties’ separation, but we also agree to Para 7.8 (a) the extension to one year from the birth of the child of the cohabitants where, at the time of separation, the applicant is pregnant by the respondent and (b) a general discretion to extend a claim in exceptional circumstances.