Written evidence from Mishcon de Reya [HAB0297]

1. SUMMARY

1.1 Many of those in cohabiting relationships operate under the misconception that they fall within a special legal category of 'common law spouse' which entitles them to legal protection akin to that of a spouse. As a result, they can make decisions through their life in relation to how their finances are managed, or whether one gives up a career to raise children on the assumption that they will have protection in the event that the relationship ends. It is frequently only after the relationship has ended, whether by way of separation or death, that they discover this position to be incorrect.

1.2 In our experience, women tend to be disproportionately adversely affected when cohabiting relationships end.

1.3 We consider that there should be a statutory definition of cohabitation, and make some suggestions as to that definition below.

1.4 We further suggest that there should be a change in the law, providing greater protection to cohabiting couples in the event that the relationship should break down, whether through separation or death. We suggest that such protection should be automatic, provided certain qualifying criteria are met, namely that there be a domicile requirement and a minimum length of cohabitation, but that it should be on an "opt-out" basis, respecting the principles of consent and autonomy.

1.5 In the event that a cohabiting partner qualifies, any remedy upon separation would be discretionary (as opposed to the position in certain other jurisdictions, where assets subsequently acquired are deemed joint). It would be based on a "needs" claim, ensuring that the financially weaker party is, where possible, appropriately provided for, rather than any notion of "sharing" of assets acquired during the relationship.

1.6 This would also serve to align the approach to cohabitants on separation to that currently in place on death (i.e. under the Inheritance (Provision for Family and Dependants) Act 1975). As regards provision on death, we suggest that the requirement that provision for a surviving cohabitant be limited to that required for their "maintenance" be removed, but that instead, the court would have regard to such provision as might be made on separation, as is currently the position where a claim is made by a surviving spouse. We also suggest that consideration be given to giving surviving cohabitants an automatic entitlement to a share of the estate of a party who dies intestate.

1.7 We have analysed the approach taken in a number of other jurisdictions, and note that Ireland and Finland both have approaches which might guide reform in this jurisdiction. We append an analysis of provision made in a number of other jurisdictions as Appendix I to our response.

2. ABOUT US

2.1 Founded in 1937, Mishcon de Reya LLP is a law firm with offices in London and Singapore offering corporate, dispute resolution, employment, private client and real estate legal services to companies and individuals.

2.2 We have extensive international links and established practices based in multiple overseas jurisdictions including Asia, the Middle East, Africa, Israel, India, Eurasia and the US.

2.3 Our team at Mishcon Private comprises art, reputation, property, immigration, tax and wealth planning specialists, alongside experienced litigators in family and business disputes and complex multi-jurisdictional cases. Our family team specialises in assisting UK and international high net worth and high profile individuals in relation to divorce and dissolution, financial orders, pre and post nuptial agreements, cohabitation, domestic abuse, Children Act matters, surrogacy and assisted reproduction, abduction and enforcement (national and international).

2.4 We routinely advise on trust, property, corporate and tax issues arising from relationship formation and breakdown.

3. SHOULD THERE BE A LEGAL DEFINITION OF COHABITATION AND, IF SO, WHAT SHOULD IT BE?

3.1 At present, there are a number of statutory definitions of cohabitation in the law of England & Wales. These include:

3.2 **Family Law Act 1996**: s.62 *"cohabitants" are two persons who are neither married to each other nor civil partners of each other but are living together as if they were a married couple or civil partners.*

3.3 **Inheritance Act 1975** (word "cohabitant" not used): *This subsection applies to a person if the deceased died on or after 1st January 1996 and, during the whole of the period of two years ending immediately before the date when the deceased died, the person was living—*

(a) in the same household as the deceased, and

(b) as if that person and the deceased were a married couple or civil partners

3.4 **Fatal Accidents Act 1976** (Remedial) Order 2020: *(2A) In subsection (2) "cohabiting partner" means any person who—*

(a) was living with the deceased in the same household immediately before the date of the death;

(b) had been living with the deceased in the same household for at least two years before that date;

(c) was living during the whole of that period as the wife or husband or civil partner of the deceased.'

3.5 Each of the above examples specifically refer to the couple living together "as if they were a married couple" or "as the wife or husband" – however, the act of marriage or entering into a civil partnership leads to a change in status, which remains the case until dissolved, regardless of the level of interaction between the parties to it, e.g. a couple can be married despite living separately and maintaining wholly separate lives. Where consideration is being given to giving rights to those in a particular type of relationship (i.e. cohabitants), we consider that the criteria for that relationship to be a qualifying relationship should be as

clear as possible. Defining that relationship by comparing it to marriage can lead to a wide range of relationships being held to be within or without that definition, depending on how traditional the decision-maker's view is of what a marriage looks like.

3.6 We have considered how cohabitation is defined in a number of the other jurisdictions that provide rights to cohabiting couples. Although some jurisdictions also use the comparator of a married relationship, many do not. Factors that repeatedly crop up include:

(a) A requirement that the parties not be married to each other or in a civil partnership with each other;

(b) A requirement that the parties not be related;

(c) The nature of their relationship, including;

(i) Whether the parties were living in the same household;

(ii) Whether there was an intimate relationship between them;

(iii) Whether that was an enduring relationship

(iv) The degree of integration of their finances and/or household arrangements

(v) How they held themselves out to the rest of the world.

3.7 We would suggest that a definition of cohabitation should be clear enough that any couple would be able to tell with reasonable ease whether their relationship amounts to cohabitation or not. We suggest that, in order for a relationship to be one of cohabitation (as opposed to relationships between family members, carer and cared-for, or friends within the same home):

(a) The relationship must be between two people who are living together in the same household;

(b) Who are not related or married to/in a civil partnership with each other;

(c) The relationship must be, or have been, an intimate one (we do not consider it appropriate that it be confined to those where the parties have had a sexual relationship. Nor do we consider it essential that the relationship remain "intimate" throughout, given the different evolution of many relationships).

(d) The relationship should be one which a reasonable independent observer would recognise as a relationship between a couple.

3.8 Given our proposals that relief would not be available to a cohabiting couple who had been living together for less than a specified number of years, we do not consider that the question of permanence of the relationship should also define cohabitation itself.

4. **WHAT LEGISLATIVE CHANGES, IF ANY, ARE NEEDED TO BETTER PROTECT THE RIGHTS OF COHABITING PARTNERS IN THE EVENT OF DEATH OR SEPARATION?**

A) DEATH

4.1 We propose a legal requirement for solicitors, real estate agents, and local government representatives who interact with co-habiting partners (i.e. in the course purchasing or selling a house, such as issuing a TR1 form or JO form, or council tax payee changes) to direct them to a government information website or a hard copy brochure which sets out:

(a) Their current rights at present on death;

(b) The risks of not making their wishes clear in a will;

(c) The risks to a cohabiting partner under the rules of intestacy; and

(d) The benefits of entering into a cohabitation agreement.

4.2 This may catch some of the target cohabiting partners in advance to encourage them to seek legal advice as a cohabiting couple to prevent the below tools being necessary as "after the event" reactive instruments.

4.3 We further propose a legislative amendment to the Inheritance (Provision for Family and Dependants) Act 1975 s1 (1) which would provide that, where there is a qualifying cohabiting relationship, the surviving partner may make a claim against their deceased's cohabiting partner's estate (as at present), but the reasonable financial provision under s1(2) of the Act should be amended, such that, after subsection (aa) a new provision should be included along the lines of the following:

s1

(2) In this Act "reasonable financial provision"—

(aaa) in the case of an application made by virtue of a qualifying cohabiting partner of the deceased, means such financial provision as it would be reasonable in all the circumstances of the case for a qualifying cohabiting partner to receive, whether or not that provision is required for his or her maintenance;"

4.4 This would mean that a court considering such an application would determine the remedy based on what is reasonable for the surviving cohabiting partner to receive (as it is with spouses) as opposed to the current lower standard of reasonable financial provision based on their maintenance needs.

4.5 The existing lower (maintenance) standard could continue to operate as it stands for cohabiting partners who do not fall within the new regime.

4.6 This would provide a lower and higher financial standard of consideration for a court depending on whether a cohabiting couple fall within the existing lower regime under IA 1975 s1(1A) or under the new regime for cohabiting partners as we suggest below.

4.7 We also suggest that consideration might be given to a legislative amendment to the Administration of Estates Act 1925 ("AEA 1925") creating an automatic right to inherit (without having to make a claim against the estate) in favour of a surviving qualifying

cohabitant. Any such amendment might include a survivorship clause of 28 days to prevent assets passing in simultaneous fatal death incidents with both cohabiting partners passing to the younger of the two deceased partner's line of intestacy or will.

Section 46 (1)

(iii) if the intestate leaves no spouse or civil partner and no issue but a qualifying surviving cohabiting partner who survives them by 28 days, then, in accordance with the following table:

If the intestate leaves no parents the residuary estate of the intestate shall be held in trust for the qualifying surviving cohabiting partner absolutely.

If the intestate leaves parents

The surviving qualifying surviving cohabiting partner shall take the personal chattels absolutely;

the residuary estate of the intestate (other than the personal chattels) shall stand charged with the payment of a fixed net sum, free of death duties and costs, to the surviving qualifying cohabiting partner, together with simple interest on it from the date of the death at the rate provided for by subsection (1A) until paid or appropriated; and

subject to providing for the sum and interest referred to in paragraph (B), the residuary estate (other than the personal chattels) shall be held—(a) as to one half, in trust for the surviving qualifying cohabiting partner absolutely, and (b) as to the other half, on the statutory trusts for both parents of the intestate in equal shares absolutely.

subject to providing for the sum and interest referred to in paragraph (B), the residuary estate (other than the personal chattels) shall be held—(a) as to one half, in trust for the surviving qualifying cohabiting partner absolutely, and (b) as to the other half, on the statutory trusts for one parent of the intestate absolutely.

(iv) If the intestate leaves no spouse or civil partner and no issue and no qualifying cohabiting partner but both parents, then, the residuary estate of the intestate shall be held in trust for the father and mother in equal shares absolutely…..

4.8 We further note that, from an inheritance tax perspective, couples that are legally married obtain inheritance tax benefits for transfers between one another during life and on death – even if they are separated (and even if they have been separated for many years). We suggest that consideration should be given to affording qualifying cohabiting couples similar rights.

B) SEPARATION

4.9 It is considered that legislative change is required to protect cohabitating partners against the risks of separation, which can often leave cohabitants profoundly vulnerable and financially exposed, particularly so after longer-standing relationships where no recognition is currently afforded to the wider contributions which a cohabitation may have made to the welfare of the family.

4.10 Whilst consideration has been given to an opt-in system, it is considered that many cohabitants do not hold a full appreciation of their rights, with some holding the incorrect belief that they are protected by the concept of a "common law spouse". The lack of a wider understanding of cohabitation rights, and the limited education historically provided around

this, may mean many cohabitant partners fail to opt in, meaning they remain vulnerable and financially exposed. Further, it is considered that an opt-in system may leave the victims of coercive or abusive relationships at risk of being unable to opt-in owing to the stance adopted by their partners and many cohabitants may be unable to afford to obtain sufficient or adequate advice to enable them to assess the pros and cons of opting in.

4.11 It is therefore considered that there should be a mandatory regime, provided qualifying criteria is met.

4.12 In terms of the qualifying criteria, it is considered that it should include:

4.12.1 *One or both cohabitants being domiciled in the jurisdiction of England and Wales at the time of their separation* – this would align rights on separation with rights on death, given a claim under the Inheritance (Provision for Family and Dependents) Act 1975 is only permissible in circumstances where the deceased party was domiciled in the jurisdiction of England and Wales at the time of their death.

4.12.2 *There should be a qualifying length of relationship* – it is recognised that a qualifying period may trigger a situation where a cohabitant elects to separate prior to expiry of the qualifying period so as to avoid financial claims. Conversely, cohabitants who remain in a stable relationship beyond the qualifying period, knowing that doing so may result in additional rights and obligations towards one another may result in a promotion of positive cohabitant family dynamics.

4.12.3 Whilst we do not propose a specific qualifying period, it is recognised that there is an important balance in determining what this should be. The law should not be too onerous on couples in short relationships where they may be early in their lives/careers and less likely to experience any financial disadvantage during the course of the short relationship that cannot be rectified in the following years. Similarly, the qualifying period should not be too long so as to increase the financial disadvantage which may be caused by a separation shortly the qualifying period being met.

4.13 It is acknowledged that married couples or civil partners have the right to enter into marital or partnership agreements to "opt out" of certain rights and obligations in the event of separation. Such agreements are not binding in a contractual sense, and the Court retains the ultimate discretion to determine claims on separation. Further, such agreements are only likely to only be given significant consideration by the Court if certain safeguarding requirements have been met, such as there being financial disclosure, the provision of independent legal advice, there being no undue influence or pressure on the parties prior to the agreement being signed and the agreement being fair in all circumstances.

4.14 It is considered that a similar opt-out system for cohabitants would be appropriate, provided that there are safeguarding mechanisms in place to minimise the risk of those in coercive or abusive relationship being forced to enter into disadvantageous or prejudicial opt-out agreements. The existence of an opt-out system recognises individual's right to autonomy. An opt-out system could primarily be addressed by cohabitation agreements having the same legal standing as marital or civil partnership agreements.

4.15 In terms of the claims which a qualifying cohabitant should be entitled to bring, it is considered that they should primarily be "needs" based, with a view to mitigating against the risks posed by relationship-generated disadvantage and possible financial hardship on separation. It is not considered that cohabitants should have an automatic right to "share" in wealth generated during the period of cohabitation. This recognises that married couples or

civil partners have made a conscious and willing decision to enter into a marriage or civil partnership and, in doing so, have decided to take on the rights and obligations arising from such a relationship status. It is considered that if equal rights were to be imposed on cohabiting partners, this would undermine the autonomy which currently exists for couples to decide the extent to which they are willing to take on additional rights and obligations.

4.16 It is proposed that the approach towards the determination of needs awards for cohabitant couples should be discretionary, and similar to that adopted under the Inheritance (Provision for Family and Dependents) Act 1975, or for children under Schedule 1 of the Children Act 1973. It is also proposed that needs awards should be determined by the Court, as opposed to determined on a formulaic basis. This ensures that the Court can be appraised of all the circumstances of the relationship when determining the provision.

4.17 Whilst this may place an additional burden on the Court, it is considered that a legislative framework which promotes the use of alternative dispute resolution may mitigate against this issue.

4.18 The multicultural and international nature of the population of England and Wales is such that it is considered important that cohabitants who relocate permanently to this jurisdiction from countries where cohabitation rights are protected by government legislation should have the right to register their relationship, thereby effectively "opting in" to the scheme where their relationship would not automatically meet the gateway criteria.

4.19 From a capital gains tax perspective, married couples who are living together receive capital gains tax benefits for transfers between one another. HMRC has emphasised the need for the couple to be living together to benefit from these. We suggest that cohabiting partners should be afforded similar rights.

5. WHAT EQUALITIES ISSUES ARE RAISED BY THE LACK OF LEGAL PROTECTION FOR THOSE IN COHABITING RELATIONSHIPS?

5.1 In our experience, the individuals most affected by the lack of legal protection upon breakdown of a cohabiting relationship are those in long standing cohabitating relationships who:

(a) are reaching the end of their career / working age;

(b) give up their career to look after children and/or the home and may struggle to return to employment at a similar level;

(c) have children who will be leaving home soon; or

(d) do not have any children.

5.2 In the majority of cases we have come across, where the relationship is a heterosexual one, it is the woman who tends to give up her career or reduce her working hours. The misconception about being a 'common law spouse' is therefore likely to disproportionately affect women. As women also live longer on average, the impact of a lack of suitable financial provision can be experienced acutely during retirement, where a number of recent studies have confirmed that, on average, women's pension savings are significantly lower than men's[1].

[1] See e.g. Prospect: *Gender Pension Gap increases to 40.3% new Prospect research shows:* https://prospect.org.uk/news/gender-pension-gap-increases-to-40-3-new-prospect-research-shows/

5.3 The position is, in our experience, compounded where the woman in the relationship is less well-educated. They may not have been able to afford legal advice so as to better understand their position (or did not consider it necessary), and are instead operating under the misconception that they are a 'common law spouse' and their financial needs will be met. These women would already be at a disadvantage compared to their partner as a result of their education / career potential, and are left at a significant disadvantage should their relationship break down, despite having committed a significant proportion of their lives to the family.

5.4 At present, existing inequalities are exacerbated given that, upon the ending of a cohabiting relationship:

(a) There is no consideration of relationship-generated disadvantage. A cohabitant is not required to make any income provision to reflect the fact that the family made joint decisions e.g. one would be the homemaker and the other the breadwinner.

(b) A cohabitant will not be entitled to income provision in their own right. Any income claims are limited to those cohabitants who have children and who can seek a carer's allowance under Schedule 1 of the Children Act 1989 ("Schedule 1"). This would in any event end upon the children finishing secondary / tertiary education.

(c) There is no recourse to sharing pensions, leaving cohabitants without any financial security for retirement. For cohabitants reaching the end of their career, their partner will not be required to supplement their income (save for under Schedule 1 with the limitations noted above), and they will have no ability to generate any further income or build up a pension pot.

(d) A cohabitant's housing needs will only be met if they are able to succeed in a claim under the law relating to trusts, or for the duration of their children's secondary / tertiary education under Schedule 1. This could leave cohabitants in a very precarious position, which they were totally unprepared for if they do not save sufficient funds for a deposit and/or are unable to generate a sufficient mortgage raising capacity to enable themselves to rehouse independently.

5.5 Some examples of cases we have been involved in which evidence the above include:

(a) Ms X was living with her partner for c.25 years. They did not have any children and she was in her 50s. She considered the relationship to have broken down, but was aware of her precarious financial position. She therefore married her partner and they divorced one year later, with her seamless cohabitation being taken into consideration and her receiving significant financial provision. Had she not married, her claims would have been limited to a trust claim under TLATA for a home, with no income claims or pension provision. However, for many in the same position as Ms X, their partner is not willing to get married.

(b) Ms Y was living with her partner for c. 20 years. They had children aged 17 and 18. She considered the relationship to have broken down. Her housing provision would be limited to a trust claim under TLATA (and/or Schedule 1 for a very limited period), with income provision also for a very limited period under Schedule 1. She decided to remain in the

relationship for the time being given the financial implications of the relationship breaking down, and potentially look to marry. In some instances, there is a risk that the need to retain financial stability will result in parties remaining in relationships that are abusive.

(c) Ms Z was living with her partner for c.19 years and they had two children aged 5 and 8. She claimed under Schedule 1. She wanted to remain living in the family home, but the father wanted to sell it in due course. She was able to remain living in the family home until the youngest child completed secondary education and she would then receive one third of the proceeds upon its sale. Child maintenance was paid at the CMS rate. She therefore received no maintenance payments in her own right or pension provision.

5.6 Whilst the above are examples of those in longer relationships, there are many in shorter relationships who are also significantly disadvantaged by the current state of the law. Where there are children, there may be some protection available during the children's majority through the operation of Schedule 1. However, these partners (again, more often than not, women) will potentially have to put their careers on hold for many years to come, missing core career building years in order to care for the children and will still not have any claim in their own right, or any protection in relation to pension provision.

5.7 Seamless cohabitation with marriage can extend the length of the marriage, and the commitment during the cohabiting relationship can therefore be highly relevant on divorce in court proceedings. However, the weight attributed to a cohabiting relationship is currently non-existent if the parties do not marry.

5.8 If cohabitants, and women in particular, were aware of the lack of legal protection that they currently faced, they may arrange their finances differently and/or encourage their partner to get married / enter into a civil partnership. However, the fact that an individual may feel that they have no option but to: a) try and "hoodwink" their partner into getting married after many years of cohabiting, when they consider the relationship to have already broken down; or b) remain in an unhappy relationship as they are worried about their financial future otherwise, is concerning.

6. SHOULD LEGAL CHANGES BE MADE TO BETTER PROVIDE FOR THE CHILDREN OF COHABITING PARTNERS?

6.1 The Children Act 1989 permits applications to be made in relation to children, regardless of the marital status of their parents. Although, historically, unmarried fathers did not automatically have parental responsibility for their children, in practice the effect of this has been reduced by the provisions of the Adoption and Children Act 2002, providing that where a father's name is placed on the birth certificate, he will have parental responsibility from that date. The legislation does not distinguish between married and unmarried parents when considering with whom it is in a child's interests to live, or any other matters relating to a child's upbringing. We consider this to be appropriate.

6.2 As regards financial claims on behalf of children, there is existing legislation which serves to protect the rights of children of cohabiting partners. In particular, attention is drawn to:

(a) Schedule 1 of the Children Act 1989, which entitles unmarried cohabitants to make financial claims for the benefit of a child against the another cohabitant where that cohabitant is the biological parent of the child.

(b) The Inheritance (Provision for Family and Dependents) Act 1975, which gives rise to the possibility of claims being made on behalf of a child against a deceased cohabitant's estate for reasonable financial provision.

(c) The Family Law Act 1996, which places a statutory obligation on the Court to consider a child's rights to occupy a property in the event of a dispute about occupancy rights between cohabiting parents.

6.3 It is recognised that the changing dynamic of modern families means that a non-biological cohabitant parent may become the social or psychological parent of a child, without taking on the financial responsibilities which arise to a biological cohabitant parent under Schedule 1 of the Children Act 1989. It is, however, notable that the existing legal framework anticipates financial responsibilities arising to step-parents of a child, meaning a non-biological cohabitant can elect to take on financial responsibility for a child by entering into a marriage or entering into a civil partnership. As such, it is considered that a variation of the law which places financial responsibilities on non-biological cohabitant parents, who have not entered into a marriage or civil partnership, intrudes upon a party's autonomy to decide what financial responsibilities they take on. It is further noted that such a legislative framework does not alienate a child's rights, as their rights to financial provision from their biological parents are preserved.

6.4 We do not advocate forced heirship in England and Wales. Individuals should retain autonomy when dealing with their wealth and assets to decide how and in what manner it is passed on to their family and children, and it is noted that the Inheritance (Provision for Family and Dependents) Act 1975 provides protection for children where reasonable financial provision is not made by a child's deceased parent.

6.5 In light of these provisions, it is considered that children of cohabitating partners already receive substantial legal protection under the existing legal framework, whilst also respecting the autonomy of their parents.

6.6 Accordingly, it is our belief that no change is required to the existing legal framework to better provide for children of cohabiting partners.

6.7 This does not change our view that the existing legal framework requires change to address the inadequacies of the financial provision made to the cohabitant themselves (rather than their children) under Schedule 1, given such provision fails to meet even the basic needs of the claiming parent after a child reaches their majority (at which stage the parent can often be left without a home and, in circumstances where Schedule 1 provision should not include an allowance to enable savings for the future, the parent has not had the ability to build savings or make pension provision during the child's minority). This in itself is a reason for a change in the law relating to cohabitation, as has been explained above.

7. SHOULD COHABITING PARTNERS HAVE THE SAME RIGHTS AS THOSE WHO ARE MARRIED OR IN A CIVIL PARTNERSHIP?

7.1 It is recognised that the rights currently afforded to married couples or civil partners are enhanced compared to unmarried cohabitant partners. It is also recognised that married couples or civil partners have made a conscious and willing decision to enter into a marriage or civil partnership and, in doing so, have decided to take on the rights and obligations arising from such a relationship status.

7.2 It is considered that if equal rights were to be imposed on cohabiting partners, this would undermine the autonomy which currently exists for couples to decide the extent to which they are willing to take on additional rights and obligations.

7.3 Accordingly, it is our belief that there should be a distinction in the extent of claims that can be brought so as to recognise the conscious decision parties make when deciding to marry or enter into a civil partnership (knowing the rights and responsibilities that flow from this).

8. ARE THERE EXAMPLES OF GOOD PRACTICE IN RELATION TO THE RIGHTS OF COHABITING PARTNERS IN THE UK OR INTERNATIONALLY THAT THE GOVERNMENT SHOULD SEEK EMULATE IN ENGLAND AND WALES?

8.1 We have conducted a high-level review of the rights of cohabitees across 56 different jurisdictions. We have identified that only 12 jurisdictions have specific legislation implemented in relation to cohabiting couples. Of these 12 jurisdictions, we have carried out further research into eight of the jurisdictions which we noted to be of particular interest. A table of our key findings can be found at Appendix 1 to this document.

8.2 Out of these jurisdictions, we have identified that the legislation of Finland and Ireland contain examples of good practice in relation to the rights of cohabiting partners.

8.3 Both Finland and Ireland have legislated that cohabiting parties must live together for a minimum of five years to fall within the definition of 'cohabitees'. This time limit is reduced to two years in Ireland, and is removed entirely in Finland, if the couple have had a child together. As submitted above, the legislation of England and Wales should follow a similar practice with a minimum requirement of a certain number of years for parties residing together before a cohabiting relationship can be established. Whilst we are not proposing a specific period to be included in the legislation, we would suggest that a two or three year cohabitation period, as required by the majority of the jurisdictions examined in Appendix 1, is too short.

8.4 As our proposed definition of cohabitation requires, the couple must live together in the same household and the definition of cohabitees should not be extended to include non-exclusive relationships (as permitted in Australia and New Zealand), or relationships between friends or relatives (as permitted in Alberta, Canada). However, we would also not propose that the legislation be limited only to couples who have had children together (such as in Hungary), as we believe that the provisions of Schedule 1 to the Children Act 1989 already adequately protects the claims of those parties, as explained above.

8.5 Finland and Ireland both require cohabiting parties to be in an exclusive relationship whilst residing in the same household. Ireland also prevents the status of cohabitee being granted to those who are related within the prohibited degrees of relationship, the circumstances of which would fall outside of our proposed definition of cohabitation. Whilst we have not included this in our proposals for the definition of cohabitation, and it does not appear in the legislation of Ireland or Finland, we thought it would be of interest to highlight a specific part of the legislation of Hungary as an example of further good practice. It provides that couples where one party is legally married or in a registered partnership to a separate individual are still considered cohabitees provided that their “community of life” in that pre-existing marriage or registered partnership has already ceased. This ensures an additional safety net is in place for those who do not take steps to sever previous legal ties but have established lasting new relationships that would otherwise be recognised under the law.

8.6 The effect of the legislation of Finland and Ireland is that both parties can claim property rights on the breakdown of a relationship based on their contributions during the relationship.

Such rights are not as extensive as those available to spouses and civil partners on a divorce or dissolution which, as we have proposed above, allows for a clear distinction between marriage and cohabitation. Agreements can also be entered into for the purposes of formally agreeing the separation of assets and property in advance of the relationship ending, in line with the opt-out scheme we have proposed above. In addition to these practices being incorporated into the legislation of England and Wales, we propose that the right to receive 'spousal' maintenance should also be available to cohabitees to ensure the financially weaker party is sufficiently provided for on the termination of their relationship. Currently such maintenance is not available in Finland and is only available in Ireland in circumstances where the party claiming maintenance can satisfy the eligibility criteria for the redress scheme, showing that they are financially dependent on their former partner.

8.7 Whilst we do not consider that Finland and Ireland present perfect examples of legislation that ought to be replicated in their entirety, for the reasons outlined above we believe that they are examples of jurisdictions with legislation closest to that which we think should be implemented in England and Wales.

APPENDIX 1

We have conducted a high-level review of the rights of cohabitees across 56 different jurisdictions[2] and have assessed that:

- Only 12 jurisdictions have specific legislation implemented in relation to cohabiting couples, including Australia, Canada (depending on the province), Finland, France, Hungary, Ireland, Israel, Italy, New Zealand, Sweden, Scotland and Ukraine.

- Out of the remaining jurisdictions:
  - 7 require an agreement to be entered into by the cohabitees in order for their rights to be recognised;
  - 25 provide limited rights to cohabitees, either under alternative legislation or case law (this includes England); and
  - 12 jurisdictions do not recognise the rights of cohabiting couples in any way.

Out of the 12 jurisdictions which have specific legislation implemented in relation to cohabiting couples, we have identified the following jurisdictions as being of particular interest and have carried out a deeper analysis in the table below:

Jurisdiction	**Key requirements for cohabitation, including minimum period of relationship?**	**Exclusive relationship?**	**Shared household required?**	**Spousal Maintenance rights?**	**Property rights?**	**Limitation of claims following termination of the relationship?**	**Registration required?**
UNITED KINGDOM							
Scotland	Discretion of the court, no fixed minimum period.	No, it does not matter if one of the cohabitants is also married or in another de facto relationship.	Discretion of the court, to be considered amongst other factors.	No, however a capital sum may be awarded if one cohabitant has suffered some sort of economic	No, however a partner can make a claim for financial contributions towards the property if it is not	Within 1 year or within 6 months of death.	No.

[2] *Please note that any access to foreign law and commentary for the purposes of this research is largely restricted to free resources and the information contained within this Appendix or Mishcon de Reya's response relating to foreign law should not be relied upon. Local advice should always be sought.*

				disadvantage and the other has derived economic advantage.	held in joint names.		
INTERNATIONAL							
Australia	2 years; OR Child of the relationship; OR One party has made substantial contributions.	No. A de facto relationship may also exist where one person in that relationship is also married or in another de facto relationship	No.	Yes.	Yes.	Within 2 years or with leave of the court.	No, however if registered there is no need to meet the key requirements set out in the first column (though registered relationships are not recognised in every territory).
Canada (British Columbia)	2 years; OR Child together.	Whilst the legislation does not specifically state that there must be an exclusive relationship, it does state that a 'marriage-like relationship' must exist.	No.	Yes.	Yes.	Within 2 years.	No.
Canada (Alberta)	3 years; OR Child together; OR The parties	An Adult Interdependent Partnership can be platonic (between friends or relatives) however a person can	No.	Yes.	Yes – limited property rights are conferred upon parties in Adult Interdependent	Within 2 years (for a property claim). Limitation relating to maintenance is more complex.	No, however if the parties are related by blood or adoption, they must enter into an Adult

	have entered into an Adult Interdependent Partnership.	only have one adult interdependent partner at a time.			Partnerships.		Interdependent Partner Agreement to be considered adult interdependent partners. This does not need to be registered.
Finland	5 years; OR Child together	Yes.	Yes.	No.	Yes.	No limitation specified in legislation.	No, however the parties can agree on the separation of property by registering a separation deed.
Hungary	For maintenance and property claims: 1 year; AND Child together	Yes (*see below exceptions*).	Yes.	Yes.	Yes.	Within 1 year (unless there are exceptional circumstances).	No, however can be voluntarily registered.
Ireland	5 years; OR 2 years with a child	Yes.	Yes.	Not automatically - they must satisfy the eligibility criteria for the redress scheme (show they are financially dependent)	Yes.	Within 2 years.	No, cohabitants can enter into a cohabitation agreement.

New Zealand	3 years; OR Child together; OR One party has made significant contributions so failure to make an order would result in serious injustice.	No, although a party cannot be married or in a civil union, the Property (Relationships) Act can apply to persons in contemporaneous multiple-party relationships (however, rarely applied).	Yes.	Yes.	Yes.	Within 3 years. *(Of note: this limit is only 1 year following the dissolution of a marriage or civil union).*	No, de facto partners may make a separation agreement.
Sweden	No minimum period specified.	Yes.	Yes.	No.	Yes. Limited to the joint home and household goods purchased for joint use, not property mainly used for leisure purposes.	Within 1 year.	No, cohabitees may enter an agreement to exclude the Cohabitation Act.

i. Length of relationship

It is clear from the table above that the majority of jurisdictions require a set number of years for parties to reside together before a cohabiting relationship within the legislation can be established. In most circumstances, this requirement is decreased or removed where the couple has a child together. The length of time required for cohabitation varies between one and five years and for some jurisdictions it is left entirely to the court's discretion. On average, the length of time required to establish a cohabitation is three years.

ii. Exclusivity of relationship

We believe that allowing parties who are not within an exclusive relationship to benefit under the proposed legislation (such as in Australia, Scotland and, in certain situations, New Zealand) would be too broad. Similarly, it is too far-reaching to capture platonic relationships, including those between relatives, as in Canada (Alberta). Hungary offers a good example of establishing a middle ground in terms of exclusivity. It limits the definition of cohabitees to those who are in a "marriage-like" relationship and does not extend the definition to relatives, friends or other platonic relationships. Generally, parties who are in established marriages or registered partnerships are not considered cohabitees for the purpose of the legislation. However, the legislation does provide for cohabitees who are legally married or in a registered partnership to other parties but who are still considered cohabitees provided that their "community of life" in that pre-existing marriage or registered partnership has already ceased. This ensures a safety net is in place for those who do not take steps to sever previous legal ties but have established lasting new relationships that would otherwise be recognised under the law.

iii. Requirement to reside together

As most of the above jurisdictions establish, parties ought to be living together in order for cohabitation to be established. In Australia, a de facto relationship may even be established where the parties maintain "*very individual lives as a couple preferring not to merge their existences*"[3]. We consider this approach too extensive, taking account of relationships not anticipated by the legislation.

iv. Limitation of claims

Most jurisdictions examined above have a time limit within which a claim can be brought following the breakdown of the relationship. These fluctuate between one and three years post separation, with a potentially shorter time limit on death.

v. Right to spousal maintenance

Whether a party has the right to spousal maintenance following the breakdown of their relationship varies considerably between jurisdictions. In some jurisdictions, it is simply not an option (Sweden, Finland). In Scotland, whilst cohabiting parties cannot claim maintenance, the courts have a wide discretion to award a capital sum if one cohabitant has suffered some sort of economic disadvantage and the other has derived economic advantage. In Ireland it is only possible to claim maintenance if they can demonstrate financial dependence on their long-term cohabitee. Similarly, in Hungary a former partner can only claim maintenance if (i) they lack the necessary means to maintain themselves; (ii) the other party would not seriously jeopardise their own maintenance or the maintenance of their child; and (iii) there is no unworthiness on the claimant's side. This ceases if the party gets married or enters into another civil partnership.

Other jurisdictions are more generous. In Australia for example, cohabiting parties may seek and receive maintenance on the same basis as if they were married, being, if the paying party is "reasonably able" to pay and the payee party is unable to "support himself or herself adequately" by reason of having to care for a child of the relationship, or because of their "age or physical or mental incapacity for appropriate gainful employment or for any other adequate

[3] *Smyth v Pappas* [2011] FamCA 434 [7]

reason". In New Zealand, responsibilities and criteria for maintenance are the same as those for a spouse or civil union partner, except the responsibility is to maintain a de facto partner at the end of the relationship only, not during. Maintenance will only be granted for a time period that is reasonable in the circumstances of the particular case.

vi. Right to property settlement

Some jurisdictions prescribe cohabitees the same rights to property settlement as spouses, provided certain criteria are met (New Zealand, Canada (depending on the province)). In other jurisdictions, the status of cohabitee does not automatically grant a right to joint ownership of property. Instead, the property is divided according to who holds legal title and will only be divided between the former cohabitees if jointly owned (Finland, Ireland). Some jurisdictions grant limited rights to former cohabitees without legal title to continue to reside in the common dwelling following the breakdown of their relationship (Hungary, Sweden). Others permit former cohabitees to apply for property rights on the basis of their financial contributions towards the property (Ireland, Scotland) or non-financial contributions to the property or welfare of the family unit, including child support (Hungary, Australia), or on an argument of unjust enrichment (Finland).

In Australia, the approach taken is one of flexibility, being whether it is "just and equitable in all the circumstances" of the case to make an order for property settlement.

Property agreements are a useful mechanism to avoid involving the courts in circumstances where the parties are able to reach an agreement as to the separation of property and wish to record this (Hungary, Finland).

It is clear from the table above that more jurisdictions favour the granting of property rights to cohabiting couples than granting 'spousal' maintenance rights.

vii. Requirement to register the relationship

None of the jurisdictions considered in the above table require a cohabiting relationship to be registered. However, in Australia, if a cohabiting relationship is registered, there is no need for the parties to meet the key requirements to prove there is a cohabiting relationship, including meeting the minimum time limit. In Hungary, parties have the option to voluntarily register their relationship to protect their rights, however this is not a requirement. Registering the relationship ensures certainty, confirming when the relationship was established and terminated (if applicable). This can provide greater protection to former cohabitees who do not then need to contend they fall within the relevant cohabitation criteria and have brought their claim within the prescribed time limit. However, it does require both parties to voluntarily opt to register the relationship and may not necessarily provide protections to those unaware of such requirements – and who may be most in need.

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