Written evidence submitted by Brian Tobin, National University of Ireland [HAB0373]

Submission on Ireland's Statutory Cohabitation Regime

Ireland's cohabitation regime has 'appropriate regard to the value of autonomy of private relations while providing a safety net to address the needs of particularly vulnerable persons'.[1] Unlike marriage or civil partnership where parties formally 'opt-in' at the outset, 'qualified' cohabitation in Ireland is recognised retrospectively, *and only if certain criteria are fulfilled*. These criteria comprise the statutory time period(s) applicable before one cohabitant 'qualifies' to seek redress from the other following termination of their relationship and the requirement that the applicant must be *financially dependent* on the respondent. In addition, cohabitants can choose to 'opt-out' of the statutory redress scheme by agreement.

Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010

Who is a cohabitant under the 2010 Act?

A cohabitant is one of two adults (whether of the same or opposite sex) who live together as a couple in an intimate and committed relationship and who are not related to each other within the prohibited degrees of relationship or married to each other or civil partners of each other. Section 172 (2) of the 2010 Act provides that when determining whether or not two adults are cohabitants, a court must take into account all the circumstances of the relationship and, in particular, shall have regard to the following:

(a) the duration of the relationship;

(b) the basis on which the couple live together;

(c) the degree of financial dependence of either adult on the other and any agreements in respect of their finances;

(d) the degree and nature of any financial arrangements between the adults including any joint purchase of property;

(e) whether there are one or more dependent children;

(f) whether one of the adults cares for and supports the children of the other, and;

(g) the degree to which the adults present themselves to others as a couple.[2]

---

[1] Law Reform Commission, *Report on the Rights and Duties of Cohabitants*, (Dublin: LRC 82- 2006) p. 19.

Qualified Cohabitants

The Irish 'redress model' for cohabitants provides that once cohabitants who satisfy the definition in section 172 have been living together for five years, or two years where there is a dependent child of the relationship, they become 'qualified cohabitants', after which a 'financially dependent' cohabitant can apply to the court for certain reliefs within a specified time period (two years) after termination of the relationship.[3]

Such reliefs can include a compensatory maintenance order,[4] a pension adjustment order[5] or property adjustment order,[6] but a court should only have recourse to the latter two orders where proper provision cannot be made for the applicant through a compensatory maintenance order.[7]

Section 195 provides that an application for relief must *'save in exceptional circumstances, be instituted within two years of the time that the relationship between the cohabitants ends, whether through death or otherwise'.*

A qualified cohabitant can also seek an order that provision be made out of the net estate of a deceased cohabitant where inadequate or no provision has been made for him/her/them in the deceased's will or via the rules of intestacy.[8] If the qualified cohabitants were in a

---

[2] All cohabitants who satisfy this definition have the right to make cohabitation agreements, to succeed to a residential tenancy and to sue for wrongful death (subject to a requirement of three years' cohabitation). The 2010 Act did not address cohabitants and domestic violence, but Section 60 of the Civil Law (Miscellaneous Provisions) Act 2011 extended barring and safety orders to cohabitants.

[3] Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, sections 172 (5), 173 (2) & 195.

[4] Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, section 175.

[5] Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, section 187. In Ireland, pension adjustment orders are very rarely sought by applicants. Indeed, there is to date no reported case law/evidence on them being sought in/made by the Irish courts in a cohabitation context. Evidence from the context of divorce proceedings indicates that the parties have a very low interest in seeking pension adjustment orders. See Carol Coulter, *Family Law in Practice, a Study of Cases in the Circuit Court* (Dublin: Clarus Press, 2009). Further, Ryan observes that the need to involve the trustees of the pension fund in proceedings makes pension adjustment orders expensive to obtain, and the contingent nature of the potential benefits may lead some applicants to favour more immediately available types of relief – see Fergus Ryan, *Annotated Legislation: Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010* (Dublin: Thomson Round Hall, 2011) pp.297-298.

[6] Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, section 174.

[7] Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, sections 187 (6) & 174 (2).

[8] Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, section 194.

relationship immediately prior to the death then the applicant need not establish financial dependence, *otherwise this requirement is applicable.*

Marriage and Cohabitation

In Ireland, a person cannot simultaneously be 'living with' his or her spouse *and* be 'living with' another adult as a cohabitant under the 2010 Act. Thus, if a person wishes to claim 'qualified cohabitant' status in respect of a cohabiting partner who is married to someone else they need to demonstrate that this person was 'living with' *them* as a couple in an intimate and committed relationship for at least 2 years where they have a dependent child, or 5 years in all other cases. If successful, the applicant's 'married' cohabiting partner may simultaneously hold the status of spouse *and* qualified cohabitant.

However, it must be noted that section 173(5) of the 2010 Act prevents a court from making an order for redress in favour of a qualified cohabitant that would affect any right of any person to whom the other cohabitant is or was married. Given that the 2010 Act has generated very little case law, it remains to be seen how the courts will reconcile the position of qualified cohabitants with that of spouses, divorced or otherwise.

The protection for spouses in s. 173 (5) is most likely so that the Act complies with the Irish Constitution and respects the primacy of the marital family as guaranteed under Article 41. Indeed, it is well-established, as Walsh and Ryan point out, that 'any legislative arrangement which serves to give preferential treatment to de facto couples over their married counterparts is generally inconsistent with the Constitution'.[9]

In Ireland, a person must be 'living apart' from their spouse for 2 out of the previous 3 years before initiating divorce proceedings – *section 5, Family Law (Divorce) Act 1996, as amended*. This means that in some cases a spouse may be able to seek a divorce and ancillary orders and a 'qualified cohabitant' may be able to seek redress at around the same time (i.e. 2 years 'living with' their 'married' cohabiting partner (where there is a child of the relationship). However, the spouse remains in the stronger position because of the stipulation in s. 173 (5) above and because the 'qualified cohabitant' must also prove that they are 'financially dependent on the other cohabitant' under s. 173 (2).

[9] See Judy Walsh and Fergus Ryan, The Rights of de facto Couples (Dublin: IHRC, 2006) p. 81. See also *Murphy v Attorney General* [1982] IR 241.

Financial dependence

As mentioned, a qualified cohabitant will only be entitled to relief under Part 15 of the Act if they were financially dependent on the other cohabitant. Mee is critical of this requirement because 'it provides no remedy for claimants who have suffered major financial loss during the relationship but have not become "financially dependent" as a result'.[10] Mee considers how a qualified cohabitant who has sacrificed a career to work in the home caring for the family would likely be 'financially dependent' and entitled to a remedy under the 2010 Act. However, such a person would be disallowed a remedy if they suffered the same economic loss but inherited from a parent and thus were not rendered financially dependent upon the termination of the cohabitation. Mee believes that in the latter situation a cohabitant could be 'equally deserving' of a remedy. He argues that the financial dependency criterion:

> Attempts to restrict the scope of the scheme so that it will not go too far in creating rights for cohabitants against each other, resulting in a half-hearted approach that leads to indefensibly arbitrary results.[11]

This author fails to see how it is 'indefensibly arbitrary' to deny the claimant in the latter scenario outlined by Mee the best of both worlds (i.e. an inheritance and a statutory remedy). In a cohabitation situation this type of claimant should be disentitled to any statutory remedy, *because in enacting cohabitation legislation a State's legislature must be respectful of the fact that cohabitants have not made a life-long commitment to one another as with a marriage or a civil partnership and that citizens largely choose to cohabit to avoid any financial obligations extending beyond the cessation of their union.*[12] Indeed, when proposing the redress model, the Law Reform Commission stressed that 'not all cohabitants warrant legal redress' and that:

> The objective of reform in the particular context of ancillary relief on breakdown of the relationship is to provide a default scheme of redress that would ensure

[10] John Mee, 'Cohabitation Law Reform in Ireland' (2011) 23 (3) *Child and Family Law Quarterly* 323 – 343.
[11] John Mee, A Critique of the Cohabitation Provisions of the Civil Partnership Bill 2009 (2009) 12 (4) *Irish Journal of Family Law*, 12 (4), 83–92.
[12] Brian Tobin, 'The Regulation of Cohabitation in Ireland: Achieving Equilibrium between Protection and Paternalism' (2013) 35 (3) *Journal of Social Welfare and Family Law* 279, at 283-4.

> relationships, in respect of which economic dependency existed and have resulted in some form of vulnerability on termination of the relationship, are protected.[13]

Further, when the 2010 Act was being debated, the then Minister for Justice, Equality and Law Reform, Dermot Ahern stated that the purpose of the redress scheme provided for in Part 15 is to 'protect a financially dependent person who may be left high and dry if a couple split up'.[14] Hence a cohabitant who has sufficient means should not be entitled to seek relief from the other cohabitant at the end of a relationship. Mee gives another example of a cohabitant who would fall foul of the financial dependency requirement because s/he has transferred a valuable family home into joint names and included an express declaration of the beneficial interests to ensure that his/her partner would acquire the intended joint beneficial interest.[15] Again, in this type of scenario the cohabitant transferor has a joint share in a 'valuable' family home to rely on once the cohabitation ends. Why should such a claimant also be entitled to statutory relief against the other cohabitant? Yes, the other cohabitant has gained a property interest because of a generous yet arguably unwise choice that was made by his/her partner, but that was the latter party's choice, and it has not left them financially dependent. In 2002, in the case of *Nova Scotia (Attorney General) v Walsh*, Justice Bastarache, speaking for the majority of the Canadian Supreme Court, stressed the importance of the concept of 'freedom of choice' in intimate relationships because 'all cohabitants are deemed to have the liberty to make fundamental choices in their lives'.[16] Thus, it is opined that the requirement of financial dependency in the 2010 Act arguably achieves as equitable a balance as possible between the competing aims of protecting a *truly vulnerable party* once cohabitation ends and avoiding undue interference with what is perhaps a fundamental attribute of cohabitation, 'the freedom of living according to one's own criteria'.[17] Cohabitation is, after all, synonymous with 'an individualistic outlook on intimate relations'[18] and it also 'comes with the ethic that a relationship should be ended if either partner is dissatisfied'.[19]

Nonetheless, once a cohabitant satisfies the financial dependency requirement the court may grant them relief if it is 'just and equitable' to do so. *Section 173(3) enables the court to*

[13] Law Reform Commission, n1 above, p. 3. Emphasis added.
[14] Dáil Deb, 1 July 2010, vol. 714, col. 353. Emphasis added.
[15] Mee, n 11 above, p. 86.
[16] *Nova Scotia (Attorney General) v Walsh* [2002] S.C.J. No. 84 (QL), 32 R.F.L. (5th) 81.
[17] Horster, H.E., 'Does Portugal need to legislate on de facto unions?' (1999) 13 (3) *International Journal of Law, Policy and the Family* 274.
[18] Lewis, J., 'Debates and issues regarding marriage and cohabitation in the British and American literature' (2001) 15 (1) *International Journal of Law, Policy and the Family* 159.
[19] Cherlin, A., *Marriage, Divorce and Remarriage* (Cambridge, MA: Harvard University Press, 1981) 15-16.

consider numerous factors in this regard. These include 'the financial circumstances, needs and obligations' of each qualified cohabitant, and 'the duration of the parties' relationship, the basis on which the parties entered into the relationship and the degree of commitment of the parties to one another', 'any physical or mental disability' of the applicant cohabitant, and 'the conduct of each of the cohabitants, if the conduct is such that, in the opinion of the court, it would be unjust to disregard it'. Consequently, Mee observes that the court can make 'whatever order is 'just and equitable' in light of a wide-ranging list of factors' and such order can go far beyond rectifying an applicant's financial dependency as no limitation on the court's power is stipulated in the legislation. Mee concludes that the 2010 Act thus contains:

> A dissonance between the trigger for the remedy (financial dependence) and the criteria for granting a remedy (what is just and equitable by reference to a general list of criteria, with no reference to eliminating financial dependence).[20]

Constitutional Concerns

Although Mee is (arguably unfairly) critical of the financial dependency criterion, he nonetheless concludes that it would be unworkable to simply discard it as a filter and allow the numerous factors listed in section 173 (3) to be solely determinative of a claimant's case. This is because these factors mirror those applicable in the context of ancillary relief upon divorce and if a qualified cohabitant could seek relief solely by reference to them, then qualified cohabitation would be more akin to the institution of marriage and the legislation could possibly be declared unconstitutional as a result. If a cohabitant could seek ancillary relief upon termination of a cohabitation after as little as two years where there is a child of the relationship, without any strict filter and by reference to virtually the same criteria applicable on divorce, then this would place such a person in a position equivalent to that of a spouse, who must be living apart from the other spouse for two out of the previous three years before they can seek a divorce and ancillary reliefs attendant upon divorce. Such a legislative dispensation in favour of cohabitants might very well constitute an 'attack' on the institution of marriage which the State 'pledges itself to guard with special care' under Article 41.3.1 of the Irish Constitution. Thus, the financial dependency requirement ensures that the redress model 'does not attempt to create ancillary relief as it applies to spouses'.[21] Instead, it acts as a necessary springboard for only the most vulnerable

[20] Mee, n 11 above, p.85.

cohabitants to have their case decided by reference to the 'just and equitable' requirement and the criteria outlined in section 173, and this in turn helps to maintain the balance between a 'safety net' approach and making qualified cohabitation another substantive legal institution which might not withstand constitutional scrutiny in Ireland.[22]

The impact of the statutory time frames for qualified cohabitation

In addition to the 'financial dependency' criterion, Ireland's cohabitation regime is limited by the statutory time frames applicable before a cohabitant can 'qualify' to seek redress in court. While a cohabitant can apply for relief after two years where there is a dependant child of the relationship, research shows that the majority of cohabiting couples are childless family units.[23] Although all other cohabitants can apply for redress after five years or more, Kiernan observes that in most European countries 'one in two cohabitations had converted into marriages by the fifth anniversary of the union'.[24] Similarly in Ireland, research indicates that there is likely to be a much smaller pool of cohabitants by this time. Halpin and O'Donoghue estimate that in Ireland 70% of cohabiting relationships last for at least two years, with the average duration of a cohabitation being a little over two years.[25] Further, the authors estimate that only 25% of couples cohabit for six years or more. This low statistic is possibly because for many Irish couples cohabitation 'is functioning increasingly as a standard route into marriage'[26], with over 40% of new marriages being preceded by a period of cohabitation. Hence, the number of couples satisfying both the five-year time frame and the financial dependency requirement is statistically unlikely to be all that significant.

Cohabitants' agreements

---

[21] Law Reform Commission, n 1 above, p. 69.
[22] Brian Tobin, n 12 above, p. 285.
[23]Central Statistics Office, *Census 2011, This is Ireland (Part 1)* (Dublin: Central Statistics Office , 2012) p. 27: https://www.cso.ie/en/media/csoie/census/documents/census2011pdr/Census_2011_Highlights_Part_1_web_72dpi.pdf
[24] Kiernan, K, 'The rise of cohabitation and childbearing outside marriage in Western Europe' (2001) 15 (1) International Journal of Law, Policy and the Family 1, 7.
[25] Halpin, B. and O' Donoghue, C., 'Cohabitation in Ireland: evidence from survey data' (University of Limerick: Working Paper WP2004-01, 2004) Available from: http://www3.ul.ie/sociology/docstore/workingpapers/wp2004-01.pdf
[26] Halpin, B. and O' Donoghue, C., n 25 above.

Section 202 of the 2010 Act allows cohabitants to enter into enforceable agreements 'to provide for financial matters during the relationship or when the relationship ends'. Section 202(3) states that a cohabitants' agreement may exclude either cohabitant from seeking an order for redress under section 173 or an order for provision from the estate of their partner under section 194, although section 202(4) enables a court to set aside a cohabitants' agreement 'in exceptional circumstances, where its enforceability would cause serious injustice'. Therefore, cohabitants can contractually 'opt-out' of the statutory redress scheme and avoid being subjected to the certain rights and obligations that are associated with it. However, in order to be valid, a cohabitants' agreement must comply with certain formalities. In particular, before signing the written agreement each cohabitant must receive legal advice independently of the other or, if the parties have not been so separately advised, they must have been advised together and waived in writing their right to independent legal advice.[27] The Law Reform Commission has stressed that 'agreements must limit opportunities for the exercise of undue influence on the party who stands to lose more as a result of the agreement'.[28] It is arguable that these stringent criteria might ensure that an agreement is less likely to be struck down by the courts where one of the cohabitants has a change of heart and seeks to challenge the arrangement later on because 'the more criteria required, the less opportunity there should be for the courts to overturn it'.[29]

Nonetheless, irrespective of the fact that they allow couples to 'opt-out' of the redress scheme, cohabitants' agreements have not become the norm in Ireland because contracts 'are primarily designed to regulate economically based relations and transactions where each party acts primarily in his or her own economic interest'.[30] Schrama argues that such agreements do not reflect 'the love-based nature of the relationship' which dominates parties' financial behaviour. Consequently, as Bala has pointed out:

> People are generally not psychologically prepared to make contracts about their personal relationships, and the evolving roles and expectations of the partners in

[27] Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, section 202.
[28] Law Reform Commission, n1 above, p. 41.
[29] Law Reform Commission, n 1 above, p. 41.

[30] Schrama, W.M., 'The Dutch approach to informal lifestyles: family function over family form?' (2008) 22 (3) *International journal of Law, Policy and the Family* 311–332.

non-marital relationships in any event tend to make contracts problematic when dealing with familial rights and obligations.[31]

Comments/Observations:

A significant increase in the numbers of couples cohabiting is not necessarily indicative of an equivalent increase in the number of couples who wish to acquire greater rights and responsibilities in relation to one another – in fact, it is most likely quite the opposite. Couples are cohabiting more (and perhaps marrying less) because we live in a society that places increasing emphasis on respecting *individual choice*.

Although I am unfamiliar as to whether empirical research on cohabitation has recently been carried out in England and Wales, I would emphasise the importance of this type of research. The words of Professor Mee seem particularly apt:

"prior to attempting to develop a new scheme for cohabitants, it would be highly desirable to commission ***empirical research on the social phenomenon of cohabitation****, rather than attempting to shape a legislative scheme on the basis of guess-work as to the reality of cohabitants' lives."* (Emphasis added)[32]

Further, with the extension of civil partnership to opposite-sex couples, there is an alternative to marriage for those who do not want to marry for ideological reasons, etc, but want to register their relationship and obtain State-sanctioned rights/responsibilities in relation to each other, so perhaps an even greater argument can be made for avoiding any undue interference with a fundamental attribute of cohabitation, 'the freedom of living according to one's own criteria".[33] Cohabitation is, after all, synonymous with "an individualistic outlook on intimate relations".[34]

Further, although there has been a rather notable increase in cohabiting family units in England and Wales, the incidence of cohabitation does not suggest that the jurisdiction is at a stage where cohabitation and marriage are virtually interchangeable, therefore maintaining separate regimes for financial provision on cessation of cohabitation and divorce (or dissolution of a civil partnership) continues to be appropriate.[35]

I firmly believe that the policy objective in this area should be to achieve an equitable balance between respecting the autonomy associated with unregistered private relationships

---

[31] Bala, N., 'Controversy over couples in Canada: the evolution of marriage and other adult interdependent relationships' (2003) 29 Queen's Law Journal, 41, 54-55

[32] J. Mee, "A Critique of the Cohabitation Provisions of the Civil Partnership Bill 2009", 12 (4) *Irish Journal of Family Law* 83, 90

[33] H.E. Horster, "Does Portugal need to Legislate on *de facto* Unions?" 13 (3) *International Journal of Law, Policy and the Family* 274

[34] J. Lewis, "Debates and Issues regarding Marriage and Cohabitation in the British and American Literature" 15 (1) *International Journal of Law, Policy and the Family* 159

[35] See the four stages of cohabitation discussed in K. Kiernan, "The Rise of Cohabitation and Childbearing outside Marriage in Western Europe" 15 (1) *International Journal of Law, Policy and the Family* 1, 3

while ensuring that cohabiting relationships "in respect of which economic dependency existed and have resulted in some form of vulnerability on termination of the relationship, are protected."[36]

Therefore, I believe that any legislation should require that a qualified cohabitant is financially dependent/economically vulnerable upon termination of the cohabiting relationship before they can seek to initiate a claim under any legislation.[37]

I would be happy to engage further with the Women and Equalities Committee as regards anything discussed in this submission or as regards cohabitation law reform more generally.

August 2021

[36] Law Reform Commission, n 1 above, p.3

[37] See generally B. Tobin, "The Regulation of Cohabitation in Ireland: Achieving Equilbrium between Protection and Paternalism?" 35 (3) Journal of Social Welfare and Family Law 279.