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COHABITATION – THE UNITED KINGDOM EXPERIENCE

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There are, of course, three jurisdictions in the United Kingdom and each now has its own law reform body. The duty of the Law Commissions of Scotland and England and Wales is 'to take and keep under review all the law with which they are respectively concerned with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies . . . and generally the simplification and modernisation of the law . . .' (Law Commissions Act 1965, s 3(1)). But in the area of cohabitation outside marriage our progress has been very far from systematic, anomalies abound and no-one could describe the resulting confusion as either simple or modern.

The Law Commissions were founded in a very different world. Almost everyone got married. There were at last enough young men to go round. The age at marriage had been falling. Very few people got divorced. Fertility rates were healthy. Women were having enough children to replace the population. The great majority of these children were born (if not always conceived) within marriage. Condemnation of pre-marital or extra-marital sex was widespread. Most people believed that people who wanted children ought to get married. Living together outside marriage was known to happen but did not appear in the vital statistics because there was nothing to bring it to the attention of the bureaucrats. Generally it was thought to be a transient arrangement and still carried some social stigma.

Things have changed dramatically since then. Fewer people are marrying and those who do are marrying later in life. More people are divorcing. Many more people are living together outside marriage. By 2004 a quarter of non-married men and women aged 16 to 59 in Great Britain were cohabiting. 'Cohabitation has clearly overtaken marriage as the preferred form of first partnership' (Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown – A Consultation Paper*, LCCP No 179, 2006, para 2.18). Many of these relationships may be short lived and childless. But increasing numbers of children are born to cohabiting couples. In 2004, 42% of births were outside marriage, but three quarters of those were registered by both parents and three quarters of those were living at the same address. The British Household Survey suggests that eventually 60% of cohabitations convert into marriage but as marriage rates are declining it is thought that fewer will do so in future. Cohabitations that do not turn into marriage seem to be getting longer. Some of these long term cohabitants may have consciously rejected marriage. Many think themselves 'as good as married' (A Barlow, S Duncan, G James and A Park, *Cohabitation, Marriage and the Law,* Hart, 2005). They may eventually get round to marrying but only when they can afford to do it properly. The wedding rather than the marriage is the thing. US research (A Cherlin, 'The deinstitutionalization of American marriage' (2004) 66 Journal of Marriage and the Family 848, 857) suggests that people tend to defer marriage until they feel financially secure: that 'people marry now less for the social benefits that marriage provides than for the personal achievements it represents.'

The present law: civil partnership

This infinite variety of cohabitation is one reason why the task of law reform is so difficult. Another reason, of course, is the existence of a preferred, convenient and privileged status known as marriage which many fear might be compromised if greater rights were given to cohabiting couples. So far, therefore, with one big exception, in England and Wales we have proceeded bit by bit and almost by stealth. The exception, of course, is same sex relationships. The Civil Partnership Act 2004 came into force on 5 December 2005 throughout the United Kingdom. My husband and I were privileged to be present at one of the very first registrations that day.

Civil partnership is marriage in almost all but name. It is an exclusive, life long union, which gives the parties a status good against the world, irrespective of whether they actually live together. The rules governing capacity and nullity are the same as those for marriage, except that marriage is reserved for couples who are respectively male and female. The pre-registration formalities are the same as for any civil ceremony of marriage and in practice the actual registration takes much the same form. The partnership can only be dissolved by a court, on the ground that it has irretrievably broken down. Breakdown must be evidenced by one of four prescribed facts. These are the same as in divorce, except that adultery is not included. The consequences on dissolution and death are the same as in marriage, including the much prized exemption from inheritance tax.

The consequences during the partnership are also almost identical to those of marriage. The main difference relates to the children. The civil partner of a parent is

treated as the child's step-parent. That will often be appropriate. If he or she wishes to formalise the relationship, this may be done by a joint residence order or agreement giving the step-parent shared parental responsibility or by an adoption. But many lesbian couples are now having children together by artificial insemination. If a heterosexual couple do this using donor sperm, the mother's husband automatically becomes the child's father for virtually all legal purposes. The same applies to her unmarried partner if they are being 'treated together' at a clinic licensed under the Human Fertilisation and Embryology Act 1990. These rules do not apply to the mother's same sex partner, registered or not. Similarly, if a couple of gay men commission a child from a surrogate mother using the sperm of one of them, they cannot make use of the accelerated procedure provided for heterosexual commissioning couples under the 1990 Act and will have to go through the full adoption process. Last year, the Department of Health consulted on changing these provisions to include same sex couples, but no firm proposals have yet emerged (*Review of the Human Fertilisation and Embryology Act, A Public Consultation,* Department of Health 2005, paras 8.19 – 8.24; *Report on the Consultation on the review of the Human Fertilisation and Embryology Act 1990,* prepared for the Department f Health, March 2006).

The present law: unmarried or unregistered

Civil partnership has therefore reformed the law for one class of cohabitants - those who were previously not allowed to marry. Those who choose to register their partnership are given a privileged status virtually identical to marriage. Those who do not register but are living together as if they were civil partners are treated in the same

way as those who are living together as if they were married. This means that the patchwork quilt of rights and remedies which are available to cohabiting heterosexual couples now covers them too – as do the disadvantages which the benefits system attaches to marriage and cohabitation alike.

Briefly, the patchwork consists of remedies on death, protection against domestic violence and summary eviction from the family home, and the right to seek a transfer of a social housing tenancy. Unmarried parents also have much the same relationship with their children as do married parents, whether or not they are cohabiting. A major exception used to be unmarried fathers, who could only gain parental responsibility for their children by court order or agreement with the mother. But unmarried fathers registered as such on or after 1 December 2003 now also acquire parental responsibility automatically, so this problem is reducing year by year. They have long had the responsibility of supporting their children and since the Family Law Reform Act 1987 this has been the same as any other parent's. Under what is now schedule 1 to the Children Act 1989, courts can make capital and property adjustment orders for the benefit of the children of married or unmarried parents, as can the divorce courts when married parents divorce.

There are no succession rights on intestacy, but a survivor who has lived in the same household as the deceased as his or her husband, wife or civil partner throughout the two years before the death may make a claim under the Inheritance (Provision for Family and Dependants) Act 1975. This is on the basis that the will or intestacy does not make reasonable financial provision for the survivor's maintenance. The 1975 Act was amended to include cohabitants as such – rather than dependants – by the Law

Reform (Succession) Act 1995, as recommended by the Law Commission in 1989. This was modelled on the already existing right of such cohabitants to claim against a wrongdoer who had caused the death under the Fatal Accidents Act 1976. The third way in which surviving cohabitants are given similar rights to surviving spouses is in succeeding to some residential tenancies, mostly in the social housing sector, if they were living with the deceased tenant as his or her wife, husband or civil partner when he died. But this is the only automatic claim they have. Otherwise they must go to court unless they can reach agreement with the estate.

Unmarried cohabitants and former cohabitants, whether in opposite or same sex relationships, also have the right to seek non-molestation and occupation orders under Part IV of the Family Law Act 1996. These resulted from the Law Commission's 1992 Report on Domestic Violence and Occupation of the Family Home. Those recommendations led to the Law Commissioners being described in the press as 'legal commissars subverting family values'. The original Bill was lost and its provisions had to be reintroduced the following year. Curiously, what had so aroused the ire of press and Parliamentarians was a harmless little clause allowing unmarried cohabitants to use the same summary procedure under the Married Women's Property Act 1882 to resolve their property disputes as married couples can do (but no longer have to because of changes to the divorce courts' powers). It would not have given them the same claims as married couples have on divorce, but no-one noticed that. Nor did they notice the much more radical provisions, now contained in the 1996 Act, allowing the court to transfer secure tenancies of social housing from one to the other or from joint names into the sole name of one of them.

But this last is the only power which courts in England and Wales have to redistribute property, capital or income between the adults when cohabiting couples part. There is no equivalent to the comprehensive powers enjoyed by the divorce court when married couples divorce or are judicially separated. Any claim they may have against property held by the other must be founded on the ordinary principles of contract, trusts or estoppel. It used to be thought that cohabitation contracts might be considered contrary to public policy. But a Chancery Division judge has recently stated that 'there is nothing contrary to public policy in a cohabitation agreement governing the property relationship between adults who intend to cohabit or who are cohabiting for the purposes of enjoying a sexual relationship' (*Sutton v Mishcon de Reya and Gawor & Co* [2003] EWHC 3166 (Ch); [2004] 1 FLR 837, para 22). The problem is that most people do not think or want to make such contracts.

The principles of the law of property and trusts are complex and obscure and their application in any given case at least as unpredictable as the discretion of the divorce courts. The Court of Appeal has recently held that putting the property into joint names is not enough to raise even a presumption that they intended it to be jointly owned in equity. The court has to do its best to deduce their intentions from their course of conduct in relation to the acquisition of the property. As Lord Justice Carnwath, a former chairman of the Law Commission, lamented, 'To the detached observer, the result [of the case law] may seen like a witch's brew, into which various esoteric ingredients have been stirred over the years, and in which different ideas bubble to the surface at different times. They include implied trust, constructive trust, resulting trust, presumption of advancement, proprietary estoppel, unjust enrichment and so on, These ideas are likely to mean nothing to laymen, and often little more to

the lawyers who use them.' (*Stack v Dowden* [2005] EWCA Civ 857; [2006] 1 FLR 254, para 75; currently under appeal to the House of Lords)

Criticisms of the present law

Why should we mind, if these are people who could get married but chose not to do so? The Law Commission has three main criticisms of the current law. First, its criteria for determining ownership – intention and financial contributions – 'appear arbitrary in the context of everyday domestic life, particularly in relation to domestic financial management'. It is still unclear what value, if any, will be attached to indirect financial contributions to the household.

Second, and to my mind most important, it fails to respond adequately to the parties' interdependence, in particular by refusing to recognise the value and impact of non-financial contributions and associated sacrifices. The effect is particularly acute when there are children. A Cabinet Office study in 2000 calculated the gender gap in life time earnings for women of different levels of educational attainment (K Rake, ed, *Women's Incomes over the Lifetime,* 2000) . Not surprisingly it was least amongst the highly educated people. Then they calculated the mother gap, the additional losses caused by child care and other caring responsibilities – fewer years in employment, shorter working hours, lost opportunities and skills, the pay and other penalties associated with part time work. The effect is least severe for the highly qualified women, but only because they can afford the costs of child care which enables them to remain in or return to work. The financial impact of motherhood and caring responsibilities is life long – it cannot be made up once the children have left home.

The present law attempts to cater for the children's needs while they are growing up – through the child support scheme and the little used property adjustment powers in the Children Act 1989. But this makes no provision for their carer and leaves her in a substantial poverty trap when the children grow up.

The third criticism is that the present law focuses on individual assets. It cannot look at the couple's situation as a whole and assess what adjustments might be fair in their particular circumstances. Added to this is the considerable expense of litigating over property rights, the need to launch separate proceedings if property orders are sought for the children, and the possible illogicality of providing remedies where the couple are separated by death but not if they separate while both are alive.

Again, none of this might matter if it were indeed the conscious choice of both parties. But this is most unlikely, for a number of reasons. The first is that very few people seem to know the law. The British Social Attitudes Survey in 2000 found that 59% of cohabiting people believed in the myth of the common law marriage – that is, that after a period of living together, people acquired the same property and inheritance rights as married people. A small survey of engaged couples, who might perhaps have been thinking about what difference their marriage would make, found that 40% thought that it would make no difference to their legal positions. Another reason for scepticism is that it takes two to marry and two to make a cohabitation contract or property agreement. One party may be much keener than the other for all sorts of reasons. Marriage brings advantages to the economically weaker party but corresponding disadvantages to the economically stronger. This could be seen as a disincentive to the stronger, assuming that he knows the law and calculates the pros

and cons in this detached way, either to marry or to make a contract. It should, of course, bring a corresponding incentive to the weaker party to insist on marriage, but that presupposes an equality of bargaining power which may not exist.

This brings us to another reason for scepticism. Most people do not order their personal lives in such a coldly calculating way. It would be amazing if they did. They decide to marry or to live together for all sorts of personal and emotional reasons and the choice between the two may be motivated by social, moral, religious and cultural factors far more than by economics and the law. Indeed, there is even a category of people who do intend to be married but go through religious ceremonies without realising that they have also to comply with the legal formalities.

Finally, given the prevalence of cohabitation as a prelude to marriage, there is no clear-cut point in time at which to judge what the parties intended. They may have started to live together as a trial before marriage, but simply not got round to getting married yet, seeing themselves as good as married in their own and others' eyes. Hence, though there certainly are cohabiting couples who have consciously rejected marriage in the full knowledge of the difference between the two, all the indications are that they are very much in the minority. For the rest, as the Law Commission puts it, 'the harshness of the result in some cases could be regarded as a wholly disproportionate sanction for that inactivity.' (para 5.29).

The Law Commission's proposals

This all adds up to a powerful case for reform but not, as the Law Commission emphasises, for putting cohabitants in the same legal position as spouses. The deliberate decision to opt in to life long legal commitment, even if dissoluble, should count for something. But the Commission does not believe that improving the lot of cohabitants on separation will discourage people from marrying. It would not operate as a direct incentive to both parties in the same way that tax incentives or social security benefits can do. As with marriage the incentives would operate differently between the parties, depending upon whether they saw themselves as weaker or stronger. But in any case, a change in the law is unlikely to play any greater part n couples' decision making than does the present law. One could add that marriage has not lost its pull in the rest of the common law world (in particular in Australia) where the law has given greater protection to cohabitants for many years.

The Law Commission has therefore made provisional proposals for reform. The consultation period closed at the end of September. There are three components in their scheme:

(1) The courts should have power to redistribute the assets of cohabiting couples when they separate.
(2) Only certain cohabiting couples should qualify for these powers.
(3) Couples should be able to opt out of the scheme.

The remedial scheme

On divorce (or judicial separation) the court has power to make a wide range of orders: periodical payments, secured periodical payments, pension earmarking, lump sums, transfer or settlement of property, and pension sharing. All of these should be available to the courts when cohabitants separate. But the principles governing their use would be different from those in divorce.

In divorce, the court has to consider all the circumstances of the individual case, including the couple's financial resources and requirements, their ages, the duration of the marriage, their contributions to the welfare of the family, any disability, and their conduct if it would be inequitable to disregard it. First consideration has to be given to the welfare of minor children but apart from that the statute gives no guidance as to the objective to be attained. In *White v White* [2001] 1 AC 596 the House of Lords emphasised that the yardstick against which awards should be judged was equality. They also pointed out that domestic and financial contributions were incommensurable – they simply could not be valued in the same sort of way. They should therefore be assumed to be of equal value. We followed this up in *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24; [2006] 2 WLR 1283 by identifying three rationales for the redistribution of wealth on divorce: provision for needs generated during the marriage; compensation for disadvantages arising from the marriage; and sharing the fruits of the marital partnership.

The Law Commission's consultation paper was prepared before the decision in *Miller*. But we did not pluck these ideas from the air – they have been around for a

long time. The Commission rejects the idea that remedies should be available on the basis of need alone. Cohabiting couples do not undertake to care for one another in sickness and in health, for better or for worse. They also reject the idea that remedies should be available on the basis of equal sharing of partnership assets. Some cohabitations may be equal partnerships but many others may not. The wide variety of relationships involved should not be forced into the marital partnership mould. Nevertheless, the Commission does acknowledge that there might be a case for treating all cohabitants with children in accordance with partnership principles.

The rationale which the Commission sees for redistribution is the contribution made by each party to the welfare of the household, the other party and other members of the family, in particular their children, and the contributions they will make to the welfare of their children after separation. One way of doing this would be to identify and value the contributions made by each party over the whole course of the relationship – what the Commission refers to as 'global accounting'. This has huge difficulties. How is one to deal with expenditure on food and other ephemeral items, or with extravagant life style choices costing a lot but leaving little tangible return, or with the valuation of non-financial contributions? Not surprisingly, the Commission is unattracted by the idea of using the rates payable to professional child carers, cleaners, gardeners and the like – somehow this fails to capture the full worth of household contributions made for love not money. An even greater objection, it seems to me, is the necessity to rake over the whole history of the relationship in minute detail in order to work out who did what and who paid for what. We have emphatically rejected this approach to assessing contributions within marriage and for much the same reason as we have rejected a similar approach to assessing conduct.

Raking over the coals at the end of the affair is demeaning, undignified, exacerbating hostility, likely to produce inaccurate or misleading results, and certain to cost huge sums in lawyers' fees.

Instead, the Commission wishes to focus on the effects of the relationship upon the parties' respective positions at the time when the relationship ends. There would be two questions. First, have one party's contributions given rise to an identifiable economic advantage retained by the other party at the end of the relationship? Here, as with the present law, the focus would be on contributions to specific items of property or other resources, but it would not be necessary to meet the claim out of that particular property. The Commission also envisages taking non-financial contributions into account for this purpose, although they recognise that this would be difficult. They have in mind unpaid work in building up a business or improving property. But it would be difficult to prove the required causal link for purely domestic contributions. They would be catered for under the other principle.

Second, have one party's contributions led to continuing economic disadvantage at and after the end of the relationship? Specifically, has that person lost earnings and earning capacity as a result of caring responsibilities within the relationship? More importantly, given the focus on the end of the relationship, will she continue to do so in the future? As I understand it, this still would not amount to a wife's claim to the same standard of living as she had enjoyed during the marriage. More, it is a claim to the standard of living she would have had had she not made financial sacrifices for the sake of the relationship and the family. Not surprisingly, the Commission acknowledges that this will raise some difficult questions. But they envisage a

common sense or rough and ready exercise in fair accounting rather than a strictly precise and mathematical exercise. Quite how that concept might be encapsulated in legislation is a puzzle.

The Scottish law of financial provision on divorce has contained a similar principle for many years but such claims are said to be particularly difficult to quantify. Nevertheless the Scottish Law Commission recommended its use in their proposed new scheme for cohabitants and this has now been enacted in the Family Law (Scotland) Act 2006. Section 28 requires the court to have regard to

> '(a) whether (and if so to what extent) the defender has derived economic advantage from contributions made by the applicant; and
>
> (b) whether (and of so to what extent) the applicant has suffered economic disadvantage in the interests of (i) the defender, or (ii) any relevant child.'

The court is only to empowered to order either a capital sum or payments in respect of the economic burden of caring for a child of whom the cohabitants are parents. In considering whether to order a capital sum, the court will have to consider whether any economic advantage gained by either party is offset by economic disadvantage suffered by that party and vice versa. 'Contributions' includes indirect and non-financial contributions (including looking after children or the house – but not it appears the other party). Economic advantage includes gains in capital, income and earning capacity and economic disadvantage shall be construed accordingly.

The English Law Commission has also raised the possibility of an additional principle to cater for the costs of child care which might then enable the separated parent to go out to work, thus reducing or eliminating the continuing economic disadvantage arising from the relationship. I am not entirely clear why this needs to be a separate principle in England, where it is proposed to make the full range of orders available. Scotland has to have it because this is the only circumstance in which non-capital orders are available. But perhaps it is because otherwise there would be doubt about whether it was provision for the child – supposedly covered by the child support scheme – or provision for the parent.

Eligibility criteria

This leads on to eligibility criteria. The first question is who qualify as cohabitants at all? The present definitions of cohabitation tend to refer to living together as husband and wife, but this may not be apt for those who do not want either to marry or to hold themselves out as married. The Adoption and Children Act 2002 refers to a couple, which is defined as 'two people (whether of different sexes or the same sex) living as partners in an enduring family relationship' (s 144(4)). This raises the question whether by definition cohabitants should share a common household. There are known to be couples who 'live together apart' retaining two households but spending varying amounts of time in each other's homes (eg *Kotke v Saffarini* [2005] EWCA Civ 221; [2005] 2 FLR 317). The Law Commission is clearly worried about these people, who may well be in committed long term relationships, but provisionally proposes a joint household. Of course in some of these cases they might be said to

have two joint households. The Commission also proposes a non-exhaustive checklist of factors to help determine who is cohabiting.

But apart from being a cohabiting couple what additional criteria should there be? Having (or having had) children might be both a necessary and a sufficient criterion. The Commission is well aware of the continuing financial detriment caused by child care responsibilities long after the children have grown up. This criterion is easy where they are both the parents of the child, whether born before, during or after their cohabitation. But should it also extend to couples where one is in law the parent and the other is not? Or should there be a minimum duration for relationships where there are only step-children?

The Commission does not suggest that the scheme might apply to joint parents who have never lived together – but I wonder why it should not. The economic sacrifices involved in bringing up a child are if anything greater if one is doing so alone. The interests of the child may well require the parents to remain in touch and if possible friendly, even if they separated before the child was born. Child support and capital provision for the child do not cater for the sacrifices made by the mother.

If there are no children, the Scottish Law Commission nevertheless saw no need for a minimum duration requirement. The principles of relief were self limiting. If they justified a claim at all, why deny it because the cohabitation had only lasted a short time? One only has to imagine a widow who loses her pension on cohabitation with a man who has a terminal illness whom she nurses devotedly for the last few months of his life. The English Commission sees a lot of force in that argument and in the

problems that any arbitrary cut off point would bring. But if there were no cut off point for remedies on separation should there be a cut off point for remedies on death?

There is, of course, the problem of identifying both the beginning and the end of a cohabitation relationship. The Law Commission is attracted to the divorce case law on separation which takes a broad view of the state of the relationship as a whole even if the parties are still under the same roof or if they are temporarily under separate rooves. But that is linked to the concept of 'living with each other in the same household'.

A further problem is whether it should be possible to make a claim as a cohabitant, either on separation or death, in respect of periods when either party was married to (or the civil partner of) someone else. On the one hand, the law should give priority to the claims of the lawfully wedded spouse. On the other hand, a principle of relief based on economic sacrifice for the sake of the other could and perhaps should operate regardless of their legal status. Claims based on contributions to particular assets might have to be apportioned – but that might be difficult to do because that is not how the divorce court approaches property adjustment. Even so, where there is enough to go round, great injustice might be caused by denying relief, for example where a man had succeeded in maintaining two households for years.

Opting out

The Commission has rejected remedies depending on opting in to a lesser form of union. Many of the reasons why people do not get round to marrying would apply just

as powerfully to civil unions. Such schemes do not have a large take up elsewhere in the world (apart perhaps from pactes civiles in France). Some of the hardest and most meritorious cases would lose out. But the Commission does believe that couples should not have marriage-like consequences forced upon them if they consciously decide to reject them.

Given the very unmarriage-like scale of their proposals, and what many might think the obvious justice of their principles, I have my doubts about whether a binding opt-out should be allowed. One problem is to identify what counts as an opt-out. Is it enough if, for example, people make a cohabitation contract which does not expressly opt out of the scheme; or if they make an express agreement about some of their property but not all; or if they make express declarations of trust?

If an agreement is to be binding, what safeguards should be required? The Commission would like agreements made after specific detailed legal and financial advice to be respected, but there are many gradations in the independence and quality of such advice. Another problem is that things may so easily change over the course of any intimate relationship and the longer it goes on. What seemed fair at the outset may be overtaken by later events and become decidedly unfair. Sacrifices may be made for the sake of the relationship which no-one contemplated when it began. The advent of children and the major life-style changes that this so often brings is the obvious example.

There is no express provision for opt out in the Scottish scheme but this is because of a general principle of Scots law that a person may renounce a right which exists for

his own benefit (Scottish Law Commission, *Report on Family Law*, 1992, Scot Law Com No 135, para 16.47). Apparently they do not see the public policy difficulties which we might see in this particular context. The English Commission is well aware of all these problems but is obviously attracted to making some sort of opt-out available. If so, should it only apply to their proposed remedies on separation or to all the existing remedies, which at present do not have an opt-out, although of course the court would take it into account in exercising its discretion? No doubt the remedies against domestic violence and other forms of abuse would not be included in any opt-out scheme, but what about occupation orders regulating the occupation of the family home in the relatively short term?

Conclusion

The present UK experience is that all three jurisdictions have introduced civil partnerships for same sex couples and equate unregistered same sex relationships with unmarried opposite sex ones. One jurisdiction has legislated, in five deceptively simple sections of the Family Law (Scotland) Act 2006, to cater for cohabitants' property claims on separation or on death. Another jurisdiction has just published a 373 page Consultation Paper and a 77 page overview. Its firmest provisional conclusions appear remarkably similar to the Scottish provisions. As the Commission embarked on this exercise at the request of the Government and has moved with remarkable speed for such a complex exercise, there must be some hope that it will bear legislative fruit. The third jurisdiction has not yet embarked upon any law reform exercise in this area. It is a fair bet that the Irish Republic will be first past the post.